The University of the State of New York

The State Education Department
State Review Officer
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No. 17-004

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

Appearances:
Law Offices of Nancy Rothenberg, PLLC, attorneys for petitioner, Naomi Maxine Abraham, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Brian Davenport, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to direct respondent (the district) to reimburse the parent for her daughter's tuition costs at the Kulanu Torah Academy (Kulanu) for the 2015-16 school year. The appeal must be sustained in part and remanded for further proceedings.

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 in this case has received diagnoses of Williams Syndrome and scoliosis (Dist. Exs. 2 at p. 1; 3 at p. 1).[1] Formal psychoeducational testing conducted in September 2014 revealed that the student's cognitive functioning was in the extremely low range, and in the low to below

[1] According to the parent, Williams Syndrome is the result of the microdeletion of the seventh chromosome, which effects can "run the gamut," including eyesight, maturity, posture, small stature, overly friendly social behaviors, eating disorders, and low IQ (Tr. pp. 103-04).

average range academically (Dist. Ex. 2 at p. 2). Despite overall low scores on a scale of adaptive functioning, the student enjoyed socializing and receiving attention from others (id.). The student also has a history of feeding difficulties, for which she received a feeding tube at 12 months of age (Tr. p. 104). More recently, the parent indicated that the student did not eat many solid foods and that she used the feeding tube primarily at home, noting that the student's diet was "extremely limited" (Tr. pp. 104-05).

The student has attended a nonpublic school throughout her educational career, while also receiving related services through the district (Tr. p. 105). The hearing record shows that the student has been attending Kulanu since the 2014-15 school year (Tr. p. 105; Dist. Ex. 2).[2]

A CSE convened on March 12, 2015 to review the student's eligibility for special education services and to create the student's IEP for the 2015-16 school year (Dist. Ex. 1). Participants included a psychologist who also functioned as the district representative, and a district special education teacher/related services provider; the parent and Kulanu administrators and staff, including the educational director, principal, classroom teacher, school psychologist, physical therapist, and an occupational therapist participated telephonically (Tr. pp. 44-46; Dist. Ex. 1 at p. 21).

The CSE determined that the student remain eligible for special education and related services as a student with an "other health impairment" and recommended 12-month services and placement in a 12:1+1 special class in a specialized school (Dist. Ex. 1 at pp. 12-14, 17; Parent Ex. B at pp. 11-12, 14).[3] In addition, the CSE recommended that the student receive individual related services, consisting of: one 40-minute session of counseling per week; three 40-minute sessions of occupational therapy (OT) per week; three 40-minute sessions per week of physical therapy (PT); and five 40-minute sessions of speech-language therapy per week (Dist. Ex. 1 at p. 13; Parent Ex. B at p. 11). The CSE also recommended that the student receive both counseling and speech-language therapy once per week for 40 minutes in a group of three (id.). The CSE further recommended that the student receive the services of a group health paraprofessional for "[f]eeding" (id.). In addition, the CSE recommended that the student receive adapted physical education and travel training twice per week (Dist. Ex. 1 at pp. 12-13; Parent Ex. B at p. 11). The March 2015 CSE created annual goals with corresponding short-term objectives and recommended supports for the student's management needs, special transportation services, participation in the New York State Alternate Assessment, and exemption from the language other than English requirement (Dist. Ex. 1 at pp. 4-12, 15-16, 19; Parent Ex. B at pp. 3-10, 4-9, 13-15). The March 2015 IEP also included a coordinated set of transition activities "to facilitate the student's movement from school to post-school activities" (Parent Ex. B at pp. 12-13).

The March 2015 IEP indicated that the parent had concerns regarding how the student was treated at "the mainstream site" (Dist. Ex. 1 at p. 3). This appears to reference the student's

[2] Kulanu is a nonpublic school for students with special needs between 11 and 21 years of age that has not been approved by the State Commissioner of Education as a school districts may contract with to instruct students with disabilities (Tr. p. 68; Parent Exs. N at p. 1; O; see 8 NYCRR 201.7).

[3] District Exhibit 1 and Parent Exhibit B appear to represent the same IEP; however, Parent Exhibit B does not contain the filled in sign-in sheet appearing in District 1, and District Exhibit 1 is illegible in certain areas. Therefore, references in this decision are made to the exhibit that most clearly presents the relevant information.

participation in a regular education class as part of her program at Kulanu, as the Kulanu progress report indicated that the student attended a mainstream biology class (Dist. Ex. 5 at p. 3).

In correspondence dated June 12, 2015, the district provided the parent with prior written notice along with a school location letter (Dist. Exs. 7; 8). In the prior written notice, the district summarized the program and services recommended in the March 2015 IEP, identified which assessments, reports, and evaluations were considered by the CSE in making its recommendations, and described other placement options the CSE considered and the reasons why those options were rejected (Dist. Ex. 7 at pp. 1-2). The school location letter advised the parent of the particular school site that the student was assigned to for the 2015-16 school year, as well as contact information to schedule a visit (Dist. Ex. 8).[4]

In a "10-day notice and request for settlement" letter dated June 15, 2015, the parent notified the district of her disagreement with the March 2015 IEP, and further advised the district that the parent intended to unilaterally enroll the student at Kulanu for the 2015-16 school year, and would seek reimbursement for the cost of tuition at Kulanu (Parent Ex. C).

In a second "10-day notice and request for settlement" letter dated August 18, 2015, the parent formally notified the district that the student would be enrolled at Kulanu for the 2015-16 school year, and that the parent had not been able to observe the assigned public school site in a timely manner as the school location letter had not been received by the parent "until recently" (Parent Ex. D).

During the 2015-16 school year the student attended Kulanu in a 10:1+1 self-contained vocational education class with a 1:1 paraprofessional, and participated in community based vocational internships with a 1:1 job coach (Parent Exs. G; H).[5] While accompanied by a teacher assistant, the student also attended a mainstream general education global studies class, physical education, and instructional breakfast and lunch at a nonpublic general education school located across the street from Kulanu (Tr. pp. 77, 85-86, 89; Parent Exs. E; G at pp. 2-3).

A. Due Process Complaint Notice

In a due process complaint notice, transmitted to the district via facsimile on April 26, 2016, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) due to both procedural and substantive inadequacies with the March 2015 CSE meeting process and resultant IEP (see Parent Ex. A). With respect to the March 2015 CSE, the parent asserted that the CSE: "may not have been" properly composed; failed to properly evaluate the student; and, "failed to provide the parent with an opportunity to meaningfully participate in the development of [the student's] IEP" (id. at p. 2).

[4] Although the school location letter was dated June 12, 2015, and was shown as an enclosure to the prior written notice, the parent's August 18, 2015 10-day notice letter indicates she "did not receive the site recommendation until recently and has been unable to observe the specific site and classroom" (Parent Ex. D at p. 2; see Dist. Exs. 7 at p. 3; 8).

[5] Although the Kulanu class 2015-16 Career Development class profile indicated the student to teacher ratio was "12:1:1" the hearing record reflects that only 10 seats were filled (Parent Ex. F; see Tr. p. 60).

With respect to the March 2015 IEP, the parent in general terms that the IEP was inappropriate (Parent Ex. A at p. 2). More particularly the parent contended that the management needs section was incomplete insofar as it was missing information about the student's feeding issues (id.). The parent asserted that the academic goals were inappropriate, not challenging enough, and not uniquely tailored to meet the student's needs (id.). The parent also argued that the IEP lacked feeding goals for the student's assigned health paraprofessional (id.). With regard to educational placement, the parent contended that the IEP failed to state how the recommended 12:1+1 special class placement would meet the student's needs; that the recommended 12:1+1 special class placement was inappropriate because it was too large; and that the IEP failed to state if the recommended 12:1+1 special class placement would be in a community or specialized school (id.). The parent also asserted that she believed that the assigned public school site would not be able to appropriately implement the student's IEP (id.).

As relief, the parent requested that an IHO find that the district failed to offer the student a FAPE; Kulanu was an appropriate unilateral placement; that the parent cooperated with the CSE; and that the parent was entitled to direct payment or reimbursement from the district for the cost of tuition at Kulanu, as well as the costs of the student's related services and health paraprofessional (Parent Ex. A at p. 3). The parent also sought an order directing the district to provide transportation to and from Kulanu (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 2, 2016, and concluded on October 27, 2016 (see Tr. pp. 1-124).[6] In a decision dated December 7, 2016, the IHO dismissed the parent's due process complaint notice, concluding that the district offered the student a FAPE for the 2015-16 school year, that Kulanu was an appropriate unilateral placement, and that equitable considerations favored the district (IHO Decision at pp. 6-9).

With respect to the March 2015 CSE meeting, the IHO found that the district representative testified credibly as to who participated, that the participants all had the opportunity to contribute to the discussion, and that the resultant IEP was based on reports and feedback from the people who worked directly with the student (IHO Decision at p. 7). The IHO further found that the district representative testified credibly that she did not recall any disagreement during the meeting and that the resulting IEP was a collaborative effort (IHO Decision at pp. 7-8). The IHO also found that the parent did not testify or present witnesses or evidence to rebut, contradict, or refute the testimony of the district representative regarding the March 2015 CSE meeting (id.).

With respect to the recommended placement, the IHO found that contrary to the parent's assertion that a 12:1+1 was not appropriate for the student, a 12:1+1 special class in a special school was essentially the class that the student was in at Kulanu (IHO Decision at p. 8). Further,

[6] The impartial hearing transcript covers proceedings conducted over four hearing dates; however, the first three dates were adjourned for several reasons, including witness availability (see Tr. pp. 1-22). The only date testimony was taken or documentary evidence was offered was the last hearing date, October 27, 2016 (see Tr. pp. 23-124). Of some concern is the IHO's decision to grant a request for two 30-day extensions at the same time on September 12, 2016 (Tr. pp. 19-20), a practice expressly prohibited by State regulation (8 NYCRR 200.5[j][5][i]).

the IHO rejected the parent's assertion that the 12:1+1 class was inappropriate because it would have been too large to meet the student's needs, which, according to the IHO, "flies in the face of testimony" by the student's teaching assistant at Kulanu, "who testified that [the student] participated in a general education Global Studies class with 20 students, with support, did well and passed the class" (id.).

Based on the above, the IHO found that the district created a procedurally and substantively sound IEP which recommended an appropriate program, reasonably calculated to provide the student with an educational benefit for the 2015-2016 school year (IHO Decision at p. 8).

Although the IHO rejected the parents claims that the district denied the student a FAPE, the IHO briefly stated her conclusions regarding the unilateral placement and equitable considerations. With little explanation or analysis, the IHO also found that the student was "afforded an individualized program at Kulanu which met her unique special education needs and provided her with the related services on her IEP" (IHO Decision at p. 9). With respect to equitable considerations, the IHO found that they favored the district because the parent's cooperation with the district was "superficial" and the IHO also did not credit the parent's assertion that she never received the district's assigned school placement recommendation (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred first by inappropriately shifted the burden of production and persuasion from the district to the parent. The parent also contends that the IHO failed to make determinations regarding: (a) whether the recommended placement was in the student's LRE; (b) whether the IEP met the student's needs with respect to social skills, transitional skills, and independent living skills; (c) whether the goals met the student's needs; (d) the lack of feeding goals for the health paraprofessional; and (e) whether the district's chosen assigned public school site was appropriate, actually available, and capable of implementing the student's IEP.

With respect to the March 2015 CSE meeting, the parent asserts that the IHO erred in determining that the CSE was duly constituted. Specifically, the parent argues that the district did not present evidence that the student's general education teacher was present even though the student was participating in a general education classroom or that a counselor was in attendance "despite social skills being an important area being addressed."

With respect to the March 2015 IEP, the parent contends that the IHO erred by not requiring the district to demonstrate the appropriateness of the staffing ratio in general, as well as, specifically why a special class was chosen for classes in which the student had already shown an ability to receive an educational benefit in a general education setting. The parent argues that the IHO erred in not requiring the district to demonstrate how the March 2015 IEP met the student's needs with respect to social skills, transitional skills, functional skills, and independent living skills. With respect to the annual goals contained in the March 2015 IEP, the parent asserts that they were immeasurable because they lacked: a "base measure," specificity, and any specific measurement. The parent also claims that there was insufficient information describing the student's skill levels in the present levels of performance section to support the basis for the academic goals contained within the IEP. Additionally, the parent argues that the IEP did not

include a feeding goal for the student's health paraprofessional or an explanation as to why a feeding goal was not created for the health paraprofessional.

With respect to the district's choice of assigned public school site, the parent claims that IHO erred in failing to require the district to demonstrate that the site was appropriate, had an available seat for the student, and could implement the student's IEP.

With respect to equitable factors, the parent argues that the IHO improperly found that her cooperation with the CSE was superficial that the IHO further erred in finding her testimony lacked in credibility based on her testimony that she did not receive the district's placement recommendation, as the district failed to demonstrate that it mailed the notice.

The parent requests that the SRO find that the district failed to meet its burden to demonstrate that the March 2015 IEP procedurally and substantively provided the student a FAPE, and that equities favor the parent's request for reimbursement for the student's tuition at Kulanu for the 2015-2016 school year, along with the costs of the related services and a health paraprofessional.

In its answer, the district generally responds to the parent's allegations with admissions, denials, or various combinations of the same and argues that some of the issues raised by the parent on appeal, including whether the recommended program was in the LRE for the student, were not raised in the due process complaint notice and are outside the scope of review. The district requests that the IHO's determinations that the district offered the student a FAPE for the 2015-16 school year, and that equitable considerations do not weigh in favor of the parents' requested relief be upheld.

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

As discussed below, the parent raises a number of claims that were not addressed by the IHO, and for which an adequate hearing record has not been developed. Accordingly, this matter is being remanded to the IHO to develop a record with respect to the presence of a regular education teacher at the March 2015 CSE meeting; whether the March 2015 IEP offered the student a FAPE in the student's LRE and to what extent, if any, the student could have been educated in a general education setting; whether the goals contained in the March 2015 IEP were measurable or lacked sufficiency; and whether the IEP appropriately addressed the student's deficits in social skills, transitional skills, and independent living skills; and, further, in the event that the IHO determines the district committed procedural violations to make a determination as

to whether any they individually or cumulatively rose to the level of a denial of FAPE for the 2015-16 school year.[7]

A. Issues Not Addressed by the IHO

Initially, the parent asserts that the IHO failed to determine whether the recommended placement was in the student's LRE. More specifically, the parent asserts two issues on appeal related to LRE. First, that the district did not consider the student's ability to participate in a general education class for each academic subject, and, second, that the hearing record indicated that the student was participating in a general education class at the time of the March 2015 CSE meeting, both of which, the parent asserts, supported a finding that the district's recommendation for a special education class in a specialized school was not in the student's LRE. In response, the district contends that the parent did not raise these issues related to the student's LRE in her due process complaint notice and that they are outside the scope of the hearing.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). However, "the waiver rule is not to be mechanically applied. . . . [and t]he key to the due process procedures is fair notice and preventing parents from sandbagging the school district by raising claims after the expiration of the resolution period." (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014]).

In this instance, the parent's due process complaint notice included an allegation that "[t]he IEP fails to explain if the 12:1:1 special class is in a community school or a District 75 program" (Parent Ex. A at p. 2). While this allegation may, understandably, at first glance appear to relate to what is reported on the IEP, it can also be interpreted as a challenge to the CSE's consideration of the student's LRE, as one of the primary differences between a community school and a

[7] The parent asserts that the IHO erred when she inappropriately shifted the burden of production and persuasion to the parent to demonstrate that the March 2015 IEP was appropriate. The parent points to that part of the IHO's decision which reads "'Parent has not rebutted, contradicted, or refuted the testimony' by the [district's] witness, and that the Parent's witnesses did not provide testimony about the IEP meeting" (Petition ¶ 1; see IHO Decision at pp. 7-8). Under State law in New York, the burden of proof has been placed with 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]). The IHO's statement that the parent had not rebutted, contradicted, or refuted the testimony of the district witness is not an indication that the IHO placed the burden of proof in this matter on the parent, but rather the terms "rebut" "refute" and "contradict" indicate that after the IHO determined that the district presented evidence sufficient to meet its burden to show that it offered a FAPE, the parent did not, at that point sufficiently attack or undermine the evidence presented by the district wither through cross-examination or the parents own opposing evidence (see IHO Decision at pp. 6-8). It does not mean, as the parent contends, that the IHO initially required the parent to bear the burden of proving that there was a denial of a FAPE. As this matter is being remanded for consideration of the issues outlined below, the IHO and parties are reminded that the school district continues to have the burden of proving that the district offered the student a FAPE (Educ. Law § 4404[1][c]).

specialized school is access to regular education peers (see A.A. v. New York City Dep't of Educ., 2015 WL 10793404, at *10 [S.D.N.Y. Aug. 24, 2015][the district represented that "'District 75 refers to specialized schools—ones in which there are no nondisabled students. Specialized schools are, in turn, recognized as more restrictive than community schools … because there is no opportunity for disabled students in those schools to 'mainstream' during non-academic activities.'"]). Additionally, the district elicited testimony from its own witness during direct examination to support the CSE's recommendation for placement in a specialized school (Tr. pp. 47-48, 57-58), which is an indication that the district was aware that the recommendation for placement in a specialized school was an issue being contested.[8] Further, much of the parent's case focused on the student's participation in a general education setting (Tr. pp. 69-70, 77, 85-87, 94-95, 97-98, 105-06) and the March 2015 CSE had information indicating that the student participated in a general education class (Dist. Exs. 1 at p. 3; 5 at pp. 1, 3). Lastly, as discussed further below, the parent's allegations related to LRE are also directly related to her allegation regarding the composition of the CSE, as she challenges the absence of a general education teacher. Overall, considering that the parent's due process complaint notice contained an allegation that could be read as a challenge to the CSE's consideration of the student's LRE, and, also considering that the student's participation in a general education setting is central to one of the parent's other claims, whether the recommended program was in the student's LRE was properly raised and should be addressed.

In addition to the parent's allegations related to LRE, the parent also alleges that the IHO failed to address whether the program recommended in the student's March 2015 IEP addressed the student's needs related to social skills, transitional skills, and independent living skills. The parent's due process complaint notice does not articulate these issues and the IHO made no specific findings with respect to these issues; however, the district does not challenge these issues as being outside the scope of the due process complaint notice in its answer, and instead asserts that the March 2015 IEP adequately addressed the student's deficits in these areas; therefore, these issues are within the scope of review (see N.B. v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016][the district waived its waiver argument by not raising it in its answer to the SRO]). However, as this matter is already being remanded to the IHO and as these issues have not yet been addressed by the IHO, the IHO is given the first opportunity to identify the parties' precise arguments, further develop the record if deemed necessary, and render a determination after the parties have been heard.

Upon review of the parent's due process complaint notice, the parent also raised claims which the IHO did not rule on and which the parent has not raised in her request for review—specifically, that the CSE failed to administer necessary evaluations to form the basis of the IEP and that the management needs section of the IEP was incomplete (see Parent Ex. A at p. 2). Pursuant to State regulations, "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review

[8] Even assuming that the matter was not in the due process complaint notice, the district may have "opened the door" to the issue during the hearing (see P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 509–10 (S.D.N.Y.2013) (concluding that the district "opened the door" to an issue which the parents would have otherwise waived, "when it raised the issue in its opening argument and elicited testimony about it from one of its witnesses on direct examination."

Officer" (8 NYCRR 279.8[c][4]).[9] As these issues were not identified in the parent's request for review, they have been abandoned, and on remand, the evaluation claim and management needs claim are no longer disputed matters to be resolved by the IHO in this proceeding (id.).[10]

Additionally, to the extent that the parent's assertion on appeal that there was "so little information describing the Student's skill levels in the present level of performance section to support the basis of [the academic goals]," can be read as a challenge to the sufficiency of the present levels of performance, the parent did not raise this issue in her due process complaint notice, nor did the IHO make a determination on this issue, and as such, it is not within the scope of my review (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).[11] Furthermore, State regulations require that a party requesting review of an IHO's determinations set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). The adequacy of the student's present levels of performance was not outlined in the request for review as an enumerated issue, instead, the present levels of performance were referenced as a statement concerning the academic goals (see Pet. ¶ 8). Therefore, on remand, the issue of the student's then present levels of performance is not a disputed issue to be resolved by the IHO in this proceeding.[12]

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[9] In September 2016, Part 279 of State regulations were amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). As this appeal was served upon the district after January 1, 2017, the amended provisions of Part 279 apply.

[10] As part of the amendments to Part 279, a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings (8 NYCRR 279.10[c]). On remand, an IHO retains the authority to conduct a prehearing conference and take additional testimony if such actions are deemed necessary to create a complete record and render a proper decision (8 NYCRR 200.5[j][3][vii], [xi], [xii]; [4]; see Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]).

[11] I note that while the CSE memorialized which formal objective assessments it reviewed prior to creating the student's respective IEPs, the CSE also relied on teacher progress reports which were not memorialized as being in front of the CSE (see Dist. Ex. 1 at pp. 1-4; Parent Ex. B at pp. 1-2). For example, the student had been receiving OT, PT, and speech-language therapy; however, no documentation of the student's purported progress was memorialized as being provided to the CSE members, including the parent (Dist. Ex. 1 at p. 1; Parent Ex. B at p. 1). Recently, the Second Circuit determined that the failure to memorialize which evaluative information a CSE reviewed constitutes a "serious procedural violation" (L.O. v. New York City Dep't of Educ., 822 F.3d 95 [2d Cir., May 20, 2016]). The Court in L.O. cautioned that, when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often months or years later, are left to speculate as to how the CSE formulated the student's IEP (L.O., 822 F.3d at 110-11). While the memorialization of the evaluative information utilized is not at issue in this appeal, I caution the district to ensure that it provide the parent with prior written notice, including "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action" (see 8 NYCRR 200.5[a][3][iv]).

[12] Although they are not disputed issues, if the IHO requires information on these subjects because of their relationships to the issues that are in dispute, the IHO is free to elicit information from the parties in order to complete the hearing record.

B. Additional Issues

1. CSE Composition

With respect to the March 2015 CSE meeting, the parent asserts that the IHO erred in determining that the CSE was duly constituted. Specifically, the parent asserts that the district did not present evidence that the general education teacher and counselor were in attendance.[13] However, the IHO did not make a specific ruling as to whether the March 2015 CSE was properly composed; the IHO instead determined that the district's witness credibly testified as to who participated, that the participants all had the opportunity to contribute to the discussion, and that the resulting IEP was based on reports and feedback from the people who worked directly with the student (see IHO Decision at p. 7).

The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the regular education environment (20 U.S.C. § 1414[d][1][B][ii]; Educ. Law § 4402[1][b][1][a][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii] see E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). Furthermore, in the event that the absence of a regular education teacher resulted in a procedural violation, that procedural violation only results in a denial of FAPE if the procedural inadequacy (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]).

In this matter, the evidence shows that the student was mainstreamed with nondisabled peers to some extent while attending Kulanu and that the March 2015 CSE had knowledge of this fact (Parent Ex. G at p. 1; see Dist. Ex. 1 at p. 3; Parent Ex. B at p. 2). Additionally, there is no evidence in the hearing record that has been developed up until this point that a regular education teacher participated in the March CSE.

As the IHO did not directly address the presence of a regular education teacher at the March 2015 CSE meeting, this issue is remanded to the IHO for consideration of whether the presence of a regular education teacher was required, whether a regular education teacher in fact attended the meeting and, if there was a procedural violation, whether it rose to the level of a denial of FAPE. In this context, one of the factors to consider is what such a teacher would have added to the

[13] The parent asserts that the CSE failed to have a counselor at the March 2015 meeting, citing to the student's deficits in social skills; this argument is without merit, as the CSE contained a school psychologist from Kulanu (Dist. Ex. 1 at p. 21). In addition, testimony by the March 2015 CSE district representative indicates she was also a psychologist (Tr. p. 44; Dist. Ex. 1 at p. 21). Furthermore, review of the March 2015 IEP reveals that along with a counseling goal and its associated short-term objectives, the IEP also included speech-language goals with associated short-term objectives designed to address the student's language processing, self-advocacy, and pragmatic language needs (compare Parent Ex. B at pp. 6-7 with Parent Ex. B at p. 10).

discussion during the March 2015 CSE meeting (see DiRocco v. Bd. of Educ., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that, even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M., 2012 WL 4571794, at *6-*7).

2. Annual Goals

On appeal, the parent asserts that the goals were not measurable as they are without a "base measure," lack specificity, and fail to provide any specific measurement, and that the information contained in the present levels of performance section of the March 2015 IEP was insufficient to provide such a base measure for the goals. The parent also asserts that the district failed to demonstrate how the goals contained in the March 2015 IEP were appropriate insofar as being related to the student's deficits in reading, math, writing, social skills, activities of daily living, and transition to post-secondary life. The parent argues that the CSE failed to provide an adequate amount or number of goals, noting that only offering one academic goal per subject for a high school student with a second grade reading level and fourth grade math skills is insufficient and inappropriate. Finally, the parent specifically continues her challenge to the lack of feeding goals for the student's health paraprofessional.

With respect to the parent's assertions concerning the adequacy of the annual goals and short-term objectives found in the March 2015 IEP, the issue is not readily determinable. First, the parent only identifies as an issue the amount and sufficiency of the "academic" goals. Without further information, it is difficult to determine which of the 19 goals and 56 short-term objectives are in dispute (Dist. Ex. 1 at pp. 5-12; Parent Ex. B at pp. 4-10). In order to thoroughly address the parent's allegations, the IHO should determine from the parties upon remand precisely which of the 19 goals and 56 short-term objectives are in dispute.

The parties and the IHO should keep several points in mind when addressing the goal disputes upon remand. First, with respect to the parent's assertions that the goals contained within the March IEP were not measurable because they lacked a "base measure," lack specificity, and fail to provide any specific measurement, these claims should be addressed in separate concrete terms with reference to the applicable standards.

With respect to one branch of the parent's argument—that the goals contained in the March 2015 IEP were deficient because they were not measurable due to the lack of "base measures" from which to measure progress, State regulations neither mandate nor preclude a CSE from developing IEP goals that are expressed in terms of a specific "grade level" or "baseline" (see Lathrop R-II School Dist. v. Gray, 611 F.3d 419, 424-25 [8th Cir. 2010][noting that a school district cannot be compelled to put more in an IEP than is required by law]; R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013][explaining that with respect

to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured"]; Hailey M. v. Matayoshi, 2011 WL 3957206, at *23 [D. Hawaii Sept. 7, 2011][rejecting the claim that goals are inadequate because they lack baseline levels or grade levels and are appropriate if they are capable of measurement and directly relate to student's areas of weakness identified in the present levels of educational performance]; D.G. v. Cooperstown Cent. Sch. Dist., 746 F.Supp.2d 435, 446-47 [N.D.N.Y. 2010] [noting that the CSE took into account baseline information located in the student's evaluations when developing the student's IEP]). I also note that in this case, the absence of an identified "base measure" would have no effect on the ability to measure the student's progress toward meeting the goals, as the criteria for mastery of the goals was not dependent on the student's baseline functioning but rather how often the student is able to perform the task (see Parent Ex. B at pp. 4-10).

Next, the issue of goal measurability in accordance with the standards set forth in the IDEA and State regulation should be addressed by the IHO. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, a review of the hearing record shows that at least some inconsistency exists with relation to the measurability of the annual goals. Several points are addressed below with regard to two annual goals as an example of what the IHO and parties must address regarding the parent's challenges to the measurability and evaluation criteria for annual goals. I will leave the ultimate conclusions to be drawn by the IHO after all of the disputed goals are examined.

The first example, an annual goal related to improving the student's ability to listen to information presented orally provided the implementing related service provider with the purpose of the goal—for the student to take time to process information being read or questions asked in two out of four trials—and in the three short-term objectives aligned to the goal, provided the related service provider with both the expectations for the student and the criteria for mastery of the objectives (Dist. Ex. 1 at p. 8; Parent Ex. B at p. 6). More specifically, in the first short-term objective aligned to the above noted goal, the student was expected to listen to orally presented information without interrupting for five minutes (id.). The second short-term objective expected the student to listen to orally presented information without interrupting for ten minutes, and the third short-term objective expected the student to listen to orally presented information without interrupting for 15 minutes (id.).

A second example stands in contrast to the first. An annual mathematics goal provided the implementing teacher with the purpose of the goal—that within one year the student will improve her math computation and problem solving skills with 85 percent accuracy—and in five short-term objectives aligned to the goal, provided the implementing teacher with the expectations for the

student, but did not include the criteria for mastery of the objectives (Dist. Ex. 1 at p. 10; Parent Ex. B at p. 9). More specifically, in the sequence of five short-term objectives aligned to the above noted mathematics goal, the student was expected to multiply with single digits, multiply with double digits, solve problems involving money, divide single and double digit numbers, and compute with fractions and percentages (id.). Notably, here, none of the mathematics short-term objectives provided criteria for the teacher to look for to determine if the student demonstrated mastery of any of the short-term objectives (id.). Review of the student's annual goals designed to improve the student's reading decoding, word recognition, comprehension, and written language skills shows that the short-term objectives also lack evaluative criteria to be used to measure progress toward meeting the annual goal (id. at pp. 9-10).

As discussed above, some of the short-term objectives lack information that may be required to effectively measure the student's progress toward the annual goal. On remand, the IHO should, after determining the parties' specific positions with respect to each of the annual goals and each short-term objective, decide the extent to which the disputed goals contained evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period of service (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Next, with regard to the parent's claim that there was only one goal per academic area, the parties and IHO are reminded that the IDEA does not require that a district create a specific number of goals for each deficit, and the failure to create an annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). The IHO must address the parent's claim that the IEP does not address (or adequately address) the student's deficits in reading, math, writing, social skills, activities of daily living, and transition to post-secondary life, by determine if the goals and short-term objectives were appropriate given the student's deficits.

Last, with respect to the parent's particular assertions that the March 2015 IEP failed to provide annual goals for the student's paraprofessional addressing the student's feeding needs, the March 2015 IEP included an annual goal related to feeding (Dist. Ex. 1 at p. 7; Parent Ex. B at p. 6; see Tr. p. 60). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (see 34 CFR 300.320[d][2]). The hearing record indicates that the March 2015 IEP noted the student's feeding deficits in the physical development section of the IEP, a paraprofessional was recommended for the student, and a feeding goal with two short-term objectives was created (see Parent Ex. B at pp. 2, 6, 11). Further, the health paraprofessional was recommended primarily to encourage the student to eat (addressing the student's weight issue) and to eat different foods, and to ensure that the student was eating smaller pieces of food (addressing the student's eating habits and to avoid choking) (see Tr. pp. 59-60). As such, while the parent's concern that the March 2015 IEP did not contain goals for the student's paraprofessional, based on the hearing record, I find that

the district adequately addressed the student's deficits concerning her eating habits, feeding tube, and potential for choking.[14]

3. Assigned Public School Site

The parent accurately states that the IHO did not render a determination as to whether the district's choice of assigned public school site was appropriate, if the school would have had a seat available for the student, or whether the district would have implemented the student's IEP if she had attended. However, the only allegation regarding the assigned school raised in the parent's due process complaint notice was that "[t]he parent does not believe that [the student's] IEP will be appropriately implemented in the recommended program" (Parent Ex. A at p. 2). This allegation does not sufficiently raise a challenge to the district's ability to implement the student's IEP.

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., 611 Fed. App'x at 731; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [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"], quoting T.Y., 584 F.3d at 419; R.B., 589 Fed. App'x at 576).

However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [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 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]).[15] The Second Circuit has held 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 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges

[14] Further, federal and State regulations do not provide for, nor does the parent point to any requirement, that a goal be developed specifically for district staff working with the student; rather, annual goals are intended to address the CSE's expectations for the student (see "Guide to Quality [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf ["[a]nnual goals are statements that identify what knowledge, skills and/or behaviors a student is expected to be able to demonstrate within the year during which the IEP will be in effect"]).

[15] The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *16 [S.D.N.Y. Nov. 17, 2015], quoting K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Apr. 9, 2015]; see also Z.C., 2016 WL 7410783, at *9; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S., 2016 WL 5107039, at *15; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

In this matter, the parent does not raise any allegation other than her statement in the due process complaint notice that she did not "believe" that district would have appropriately implemented the student's IEP (Parent Ex. A at p. 2). In the parent's 10-day notice, dated August 18, 2015, the parent indicated that she "did not receive the site recommendation until recently and has been unable to observe the specific site and classroom," but also that she "[did] not believe that the recommended program and site [could] implement her child's IEP" (Parent Ex. D at p. 2). During the hearing, the parent testified that she did not receive the district's school location letter, that if she had received it she would have called the district and her advocate, and further that she did not follow up when she did not receive it because she assumed the student could continue at Kulanu (Tr. pp. 109, 116; see Dist. Ex. 8).

The IHO determined that the parent's testimony regarding receipt of the school location letter was in conflict with her 10-day notice, which acknowledged receipt of the letter (IHO Decision at p. 4). The IHO also determined that the parent's due process complaint notice did not include an allegation that the parent did not receive the district's school location letter (IHO Decision at p. 4). Review of the parent's due process complaint notice verifies the IHO's determination (see Parent Ex. A), and, while the parent challenges the IHO's determination that the parent received the letter, the parent does not contest the IHO's specific finding that the parent did not allege in her due process complaint notice that she did not receive the school location letter. Accordingly, the IHO's determination on this issue is final and binding and whether the parent received the school location letter is outside the scope of the hearing to the extent that it relates to the ability of the district to implement the IEP.

Based on the above, the parent has not raised any challenges to the district's ability to implement the student's IEP that are based on something other than the parent's unsubstantiated belief that the school would not implement the IEP. Such challenges are impermissible (see Z.C., 2016 WL 7410783, at *10 [noting that challenges to assigned schools must be evaluated prospectively, "based on facts 'uncovered by a parent prior to' [his or her] rejection of the placement"], quoting M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 120 [S.D.N.Y. 2016]). Additionally, at this point in the proceeding, the parent has had numerous opportunities to further define her general allegation that she did not believe the district could implement the IEP, and to this point, the parent has not provided any further clarification of her assertion.

Accordingly, rather than remand this matter to the IHO along with the other issues herein, the parent's claims related to the ability of the assigned public school to implement the IEP are dismissed.

C. Equitable Considerations

The parent asserts that the IHO improperly found that equities favored the district based on the IHO's conclusion that since the parent did not credibly testify that she had not received the prior written notices, any cooperation she showed with the March 2015 CSE was superficial. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The parent asserts that the IHO either applied an incorrect standard or misapplied the above standard. It is not necessary at this point to decide whether the IHO erred, as much of the question of equitable considerations in this case can only be made after a determination is made regarding

whether the district offered the student a FAPE for the 2015-16 school year. However, the parent may raise her concerns regarding the standard used by the IHO in determining equitable considerations to the IHO on remand, and the IHO may revisit her determination on equitable considerations, if she so chooses.

VII. Conclusion

In summary, based on the discussion above, the parent's claims related to evaluations and the management needs section of the IEP are deemed abandoned. Additionally, parent's claims regarding the student's present levels of performance as found on the March 2015 IEP are not at issue as the parent did not properly raise the issue in either her due process complaint notice or in her request for review. The parent's assertion that the goals are immeasurable for the specific reason that they lack a "base measure" (i.e., a grade level or baseline) from which to measure progress is without merit and is dismissed. The parent's claim that lack of a feeding goal on the IEP for the student's paraprofessional was not a violation, and even if it were, it would not have risen to the level of a denial of FAPE. The parent's general allegation related to the assigned public school site is dismissed as impermissibly speculative.

However, for the reasons set forth above, the remaining matters are remanded to the IHO for a determination on the merits of the unaddressed claims set forth in the parent's due process complaint notice. On remand the IHO is directed to make determinations concerning the following issues: (1) the presence of and need for a regular education teacher at the March 2015 CSE meeting; (2) a determination of which of the 19 goals and 56 short-term objectives were in dispute and whether each of the disputed goals contained in the March 2015 IEP met the standards for measurability; (3) whether the goals in the IEP adequately addressed the student's areas of need in light manner in which the IEP was drafted as a whole including, but not limited to whether the IEP appropriately addressed the student's deficits in social skills, transitional skills, and independent living skills; and (4) whether the March 2015 IEP offered the student a FAPE in the student's LRE and to what extent, if any, the student could have been educated in a general education setting. Depending on the outcome of these issues, the IHO may find it necessary to expand her analysis and explain her conclusions regarding the unilateral placement of the student at Kulanu and explain how the factors relevant to equitable considerations were weighed.[16]

At this time, it is unnecessary to address the parties' remaining contentions in light of the determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 7, 2016 is vacated and the matter is remanded to the same IHO who issued the December 7, 2016 decision to determine the

[16] While I understand the IHO's view regarding the documentary evidence and her credibility determination of the parent's ability to visit the school location, that was one equitable element and it is unclear whether the IHO would have denied all reimbursement due to the parent's statements regarding her ability to visit the site during the impartial hearing. There are other equitable factors that may also be relevant, such as the parent making the student available to observers and evaluators, the parent's participation and cooperativeness in the development of the IEP, the timeliness of her 10-day notice, etc. A thorough balancing of the relevant equitable factors would be needed should the IHO reach this point in the Burlington/Carter analysis.

merits of the unaddressed issues set forth in the parent's April 26, 2016 due process complaint notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that if the IHO who issued the December 7, 2016 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March 16, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER