The University of the State of New York

The State Education Department
State Review Officer
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No. 12-145

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, Cynthia Sheps, Esq., of counsel

DLA Piper, LLP, attorneys for respondents, Spencer Stiefel, Esq., and Justin J. Farrell, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

During the 2010-11 school year, the student attended Cooke (see Dist. Ex. 6; Parent Ex. 8 at pp. 1-17).[1] On April 1, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Parent Ex. 2 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with an orthopedic

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

impairment, the April 2011 CSE recommended a 15:1 special class placement in a community school together with related services and the services of a full-time, 1:1 paraprofessional (id. at pp. 1, 6, 14, 16; see also Dist. Ex. 3 at pp. 1-2).[2]

By letter dated June 10, 2011, the parents advised the district that they rejected the April 2011 IEP and outlined their objections to the proposed program (see Dist. Ex. 2 at pp. 1-2). On July 26, 2011, the parent executed an enrollment agreement with Cooke for the student's attendance for the 2011-12 school year (see Dist. Ex. 7). By final notice of recommendation (FNR) dated August 9, 2011, the district summarized the recommendations in the April 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 16).

A. Due Process Complaint Notice

In an amended due process complaint notice dated November 30, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Dist. Ex. 1 at p. 2). Specifically, the parents argued that a 15:1 special class placement was not adequate for the student's needs (id.). Moreover, the parents contended that, in light of the April 2011 CSE's program recommendation, the student would be placed in mainstream classes for elective subjects (id. at p. 6). They further submitted that the student's management needs should include small group instruction, teacher modeling, redirection to task, and the provision of auditory and visual cues (id. at p. 2). The parents maintained that a 12:1+1 special class placement would address the student's needs in the least restrictive environment (LRE) and confer educational benefits on her (id. at pp. 2-3). Next, the parents claimed that the assigned public school site could not provide the student with a FAPE for the following reasons: the student would not receive occupational therapy (OT) or physical therapy (PT) in accordance with the April 2011 IEP; the assigned public school site did not offer IEP diplomas or life skills training, as recommended in the student's IEP; and the student would experience difficulty navigating the school building (id. at pp. 5-6). As relief, the parents requested payment of the student's tuition at Cooke for the 2011-12 school year (id. at p. 7).

B. Impartial Hearing Officer Decision

On August 23, 2011, the parties proceeded to an impartial hearing, which concluded on May 3, 2012, after six days of proceedings (see Tr. pp. 1-790). In a decision dated June 18, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2011-12 school year and directed the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2011-12 school year (IHO Decision at pp. 10-11). In particular, the IHO found that the hearing record failed to include sufficient evidence to establish that the April 2011 CSE's recommended 15:1 special class placement was reasonably calculated to enable the student to make educational progress (id. at p. 5).[3] The IHO further determined that the April 2011 CSE's decision to

[2] The student's eligibility for special education programs and related services as a student with an orthopedic impairment is not in dispute (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

[3] At the impartial hearing, the parents testified that the recommended 15:1 special class placement was the sole objection to the April 2011 IEP (see Tr. p. 386).

recommend a 15:1 special class placement was not based on the student's individual needs; rather, the April 2011 CSE recommended a 15:1 special class placement based on the student's age and lack of 12:1 special class placements at district high schools (id.). Moreover, although the IHO was persuaded by evidence that indicated that the student could not be educated in the general education setting, she noted that the April 2011 IEP provided two to three periods per day in the general education environment without the support of a special education teacher (id.).

Next, the IHO determined that the assigned public school site could not implement the student's April 2011 IEP, in part, because the evidence demonstrated that the school offered limited sessions of PT and did not offer OT, and the IHO was not persuaded that the provision of a related services authorization (RSAs) rendered the assigned public school site adequate to meet the student's needs (see IHO Decision at pp. 5-6). The IHO also noted that the district failed to present testimony from personnel from the assigned school, and aside from evidence that it was a barrier-free school, the district's witnesses lacked knowledge regarding how the student's April 2011 IEP would be implemented (id.). In addition, the IHO did not find that the assigned public school site could provide the student's "IEP-mandated transition services" or help the student work toward her IEP diploma objectives (id. at p. 6). The IHO further reasoned that given that the student's academic skills and achievement levels were below the requisite skills to function in Regents-track classes, it was not likely that the student would receive educational benefits in a Regents-level program (id.). Finally, the IHO noted that the evidence indicated that the assigned public school site did not offer the life skills, daily living skills, or vocational programming that would help the student work toward her transition goals (id.).

The IHO proceeded to find that Cooke was an appropriate unilateral placement for the student (see IHO Decision at pp. 7-8). With respect to equitable considerations, the IHO concluded that the parents fully cooperated with the CSE and the district interfered with the parents' efforts to visit the assigned public school site, which further tipped the weight of equitable considerations in favor of the parents' requested relief (id.). Finally, regarding the parents' claim that they lacked the financial resources to pay the costs of the student's tuition at Cooke for the 2011-12 school year, the IHO did not find sufficient evidence to support this allegation (id. at pp. 9-10). As a result, the IHO determined that the parents were not entitled to direct payment to Cooke for the costs of the student's tuition (id.).

IV. Appeal for State-Level Review

The district appeals, and argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2011-12 school year. Specifically, the district maintains that the April 2011 IEP was based on appropriate evaluative information, including input from the student's teachers and parents, and in turn, was reasonably calculated to enable the student to receive educational benefits. The district further asserts that the recommended 15:1 special class placement at a community school—combined with the services of a full-time, 1:1 paraprofessional and related services—was designed to address the student's instructional needs and was reasonably calculated to confer educational benefits to the student. Moreover, the district contends that it could have met the student's special education needs in the 15:1 special class placement, and the absence of a special education teacher in the student's elective classes did not rise to the level of a denial of a FAPE. Next, the district argues that the hearing record did not substantiate the IHO's determination that it could not implement the student's April 2011 IEP at the assigned public school

site. The district also asserts that equitable considerations should bar an award of relief in this matter, in part, because the parents did not seriously consider enrolling the student in a district public school. Furthermore, regarding the IHO's finding that the district hindered the parents' attempts to visit the assigned public school site, the district argues that the IHO erred because parents have no statutory right to visit a classroom. The district also asserts that the hearing record did not establish that the parents were entitled to direct payment of the costs of the student's tuition at Cooke.

In an answer, the parents seek to uphold the IHO's decision in its entirety.[4]

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)

[4] On appeal, the district submits additional documentary evidence for consideration on appeal; the parents object to its consideration. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024). Here, given that such information was available at the time of the impartial hearing and the district could have introduced it as evidence, and further, because the additional documentary evidence is unnecessary for rendering a decision in this case, I decline to consider the additional evidence.

caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. April 2011 IEP—15:1 Special Class Placement

Turning to the parties' dispute regarding the April 2011 CSE's recommended 15:1 special class placement, contrary to the IHO's determination and as detailed more fully below a review of the evidence in the hearing record supports a finding that the 15:1 special class placement—combined with the services of a full-time, 1:1 paraprofessional and related services—was appropriate to meet the student's unique special education needs and was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

In this case, the student received diagnoses of cerebral palsy and spastic quadriplegic type, and she required a powered wheelchair to access her environment (see Tr. p. 347; Dist. Ex. 5 at p. 8). Pursuant to an April 2009 psychoeducational evaluation, an administration of the Wechsler Intelligence Scale for Children—Fourth Edition to the student revealed that her cognitive functioning fell within the extremely low range (see Dist. Ex. 5 at pp. 4, 7). An administration of selected subtests of the Woodcock-Johnson, Third Edition to the student revealed that she functioned at a beginning second grade level in mathematics and at a mid-second grade level in reading; however, per teacher report, the student functioned at a beginning fourth grade level in reading and a mid-third grade level in mathematics (id. at pp. 6-8).

In reaching the decision to recommend a 15:1 special class placement in a community school—together with the services of a full-time, 1:1 paraprofessional and related services consisting of one 45-minute session per week of counseling in a small group, two 45-minute sessions per week of individual OT, three 45-minute sessions per week of individual PT, and two 45-minute sessions per week of individual speech-language therapy—the April 2011 CSE considered the April 2009 psychoeducational evaluation report, as well as teacher and related

service progress reports (see Tr. pp. 266, 274-76; Parent Ex. 2 at pp. 1, 16). The hearing record also reflects that the April 2011 CSE reviewed a November 2010 classroom observation report, which described the student as a "quiet, attentive participant throughout the observation" (Dist. Ex. 6). According to the December 2010 Cooke progress report, the student's English Language Arts (ELA) teachers reported that the student could make connections and predictions with supporting evidence (see Dist. Ex. 4 at p. 2). The student's math teachers described her as a "model student," who was eager to participate in classroom activities and projects and who was always willing to try new problems that she knew might be difficult (id. at p. 3). Similarly, her American history teachers characterized the student as a "positive member of [the] classroom community" (id. at p. 5). They further reported that the student demonstrated her understanding of main ideas and key concepts, the student grasped the essential understandings, and she could synthesize information about communities (id.). Likewise, the student's health instructors depicted her as a "very smart young lady," who was very respectful and a pleasure to have in class (id. at p. 11). The December 2010 Cooke progress report also included information from the student's related services providers (id. at pp. 16-20). In addition, the hearing record reveals that the student's teachers from Cooke and the parents provided input regarding the student's present levels of academic, social/emotional, and health and physical levels of performance (see Tr. pp. 171-73, 179-81; Dist. Ex. 3). A review of the student's April 2011 IEP indicates that the academic, social/emotional, and health and physical present levels of performance were consistent with evaluative information available to the April 2011 CSE (compare Tr. p. 179, with Parent Ex. 2 at pp. 3, 5-6, and Dist. Ex. 4 at pp. 2-3, and Dist. Ex. 3 at p. 2).

At the impartial hearing, the district representative testified that the April 2011 CSE recommended a 15:1 special class placement on the IEP because the student's academic skills were similar to other students that would attend a 15:1 setting (Tr. p. 204). Contrary to the parents' contention that the student's special education needs would be better served in a 12:1+1 special class placement, the district representative indicated that the April 2011 CSE rejected that placement option because the student exhibited higher academic skills than students in a 12:1+1 special class placement, and unlike students in a 12:1+1 special class placement, the student did not present with a learning disability or a speech or language impairment (see Tr. pp. 205-06, 361).[5] Moreover, the district representative testified that the student exhibited stronger reading and listening comprehension skills than students that would be placed in a 12:1+1 special class, and she further opined that it would not benefit the student to be placed with students who performed below her academic level (see Tr. p. 206).

Additionally, in light of the student's orthopedic impairment, the April 2011 IEP provided the student with the services of a full-time, 1:1 paraprofessional to support the student in the classroom and with her health-related needs (see Tr. pp. 204, 249; Parent Ex. 2 at pp. 1, 6, 16). Specifically, the district representative testified that the paraprofessional would support the student academically, and help the student complete tasks and assist her with organization, while also

[5] Notwithstanding the parents' concerns about the recommended 15:1 special class placement at a community school and the Cooke representatives' opinions that Cooke constituted an appropriate placement for the student, while a CSE must consider parents' suggestions or input offered from privately retained experts, a CSE is not required to merely adopt such recommendations for different programming (see, e.g., Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]).

supporting the student during lunch and toileting (see Tr. pp. 180, 361-62).[6] The April 2011 CSE also recommended strategies to address the student's academic management needs, such as delivering instruction in a small group setting; directions read, rephrased, and repeated as needed; scaffolding; the provision of graphic organizers, graphs, charts, and checklists; teacher modeling; preferential seating; use of a calculator; provision of an opportunity to self-talk to reinforce learning; the provision of learning breaks; provision of a scribe; teacher cues and redirection to task; auditory and visual cues; visual and oral presentation of mathematics problems; a multisensory approach to instruction; and presentation of visual material in large print (see Tr. p. 178; Dist. Ex. 3; Parent Ex. 2 at p. 2). Social/emotional management needs in the April 2011 IEP included the provision of prompts and a warning prior to placing the student in social situations that differed from her usual routine, in addition to paraprofessional services to help the student complete tasks (see Parent Ex. 2 at p. 5). The April 2011 CSE also created annual goals to address the student's identified needs in the areas of ELA, mathematics, counseling, PT, OT and speech-language skills (id. at pp. 7-12). According to the district representative, no one attending the April 2011 CSE meeting objected to any of the annual goals; however, she had there been any dispute with any of the annual goals, the April 2011 CSE would have discussed it and made modifications, if possible (see Tr. pp. 202-03).

In light of the student's present levels of performance, which the parents do not contest as inaccurate, and a review of the evaluative information available to the April 2011 CSE, the evidence in the hearing record supports a finding that the April 2011 CSE developed an IEP with appropriate recommendations for the student's program and services and that the recommended 15:1 special class placement—together with the services of a full-time, 1:1 paraprofessional and related services and management needs—was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE in the LRE for the 2011-12 school year.

B. Challenges to the Assigned Public School Site

Turning to the parties' dispute regarding the IHO finding that the hearing record failed to contain sufficient evidence to demonstrate that the assigned public school site could implement the student's April 2011 IEP, a review of the hearing record supports the district's contentions that the IHO erred in finding a denial of FAPE because the district would not implement the IEP.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8 2014]; see also K.L., 530 Fed. App'x 81, 87; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient

[6] The health and physical management needs section in the April 2011 IEP further described the 1:1 paraprofessional's duties and responsibilities (see Parent Ex. 2 at p. 6).

IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[7] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the March 2011 IEP because a retrospective analysis of how the district would have implemented the student's March 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694

[7] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the March 2011 IEP (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the March 2011 IEP.[8]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v.

[8] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4

[E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]). The IHO also failed to apply a material or substantial deviation standard to the service implementations that she found questionable.

1. Related Services

The parents allege that the assigned public school site could not provide the student with related services. Conversely, the district maintains that the student's related services needs could have been fulfilled through the provision of RSAs. A June 2, 2010 guidance document issued by the State Education Department clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control (see http://www.emsc.nysed.gov/resources/contractsforinstruction/qa.html, Question 5; see also http://www.emsc.nysed.gov/resources/contractsforinstruction/). In this case, the evidence in the hearing record indicates that—consistent with State guidance—the assigned public school site could deliver the requisite OT services to the student through the provision of an RSA (Tr. pp. 329-30; see Tr. pp. 263-65; Parent Exs. 26; 27). In addition, information indicating that a school has not previously delivered full special education services to its students does not mean that the school would have been unable to provide the services to another student whose IEP is being challenged in a due process proceeding (see M.S, 734 F. Supp. 2d 271 at 278-79). Therefore, even if the district had needed to provide the student with an RSA for related services, the IHO overstated the conclusion this resulted in a denial of a FAPE to the student. Although the parents alleged in the due process complaint notice that the assigned public school site could not deliver the PT services in the April 2011 IEP, during the impartial hearing the parents testified that the assigned public school site could provide the PT services as recommended in the IEP (Tr. pp. 375-76).

2. Environment at Assigned Public School Site

To the extent that the parents challenge the assigned public school site due to its size, and the difficulty that the student would experience navigating the building, the placement officer testified that the school was a barrier-free school (Tr. p. 323). Similarly, the parent testified that the assigned public school site had an elevator that was accessible to the student (Tr. pp. 378-79). Based on the foregoing, it appears that the assigned public school site would have been a barrier-free school in accordance with the student's IEP.

Additionally, to the extent that the parents argue that the assigned public school site could not meet the student's special education needs because the student would receive art education in a ratio inconsistent with her IEP and without the presence of a special education teacher in the classroom, the absence of a special education teacher in the student's elective subjects does not amount to a denial of a FAPE to the student, particularly, whereas here, an overall reading of the hearing record suggests that the district would have been able to implement the student's IEP without substantial deviation from its terms (Tr. pp. 293, 374; Application of the Dep't of Educ.,

Appeal No. 10-001).[9] Finally, while I sympathize with the parents' difficulty envisioning how the student would succeed at the assigned public school site, such speculation that the district would not adequately adhere to the IEP does not suffice as an appropriate basis for a unilateral placement (R.E., 2012 WL 4125833, at *21).

3. Diploma Objectives

Next, the parents allege that the assigned public school site could not meet the student's IEP diploma objectives, which indicated that the student would attain an IEP diploma (see Parent Ex. 2 at p. 18). According to the hearing record, the assigned public school site only offered a Regents diploma or a local diploma (Tr. p. 373). Here, although the district representative testified that in light of the student's levels with respect to reading and math she might not be able to participate in a Regents-level 10th grade program, the hearing record further indicates that personnel at the assigned public school site would wait a year to assess whether the student could keep pace academically with the other students in the class, and if she fell behind, the school could "scale back" and give the student a different type of diploma (Tr. pp. 230, 373). Moreover, diploma objectives are not required to be placed on an IEP under the IDEA or State law and do not alter a districts obligation to implement the services on a student's IEP.[10] Under these circumstances, the parents' claim that the assigned public school site would not comply with the student's IEP diploma objectives does not form the basis upon which to conclude that the district would have failed to provide the student with a FAPE.

4. Life Skills Training Program

Finally, the parents contend that the lack of a life skills training program at the assigned public school site rendered the school inappropriate for the student. In the instant matter, the April 2011 IEP indicated that the student would receive "academic instruction to support long term educational objectives and independent living goals" (Parent Ex. 2 at 18). Specifically, the district representative explained that through reading and math instruction, the student would learn how to shop and would attain basic banking skills (Tr. p. 283). Although the parents testified that the assigned public school site did not offer a life skills program, they also indicated that the school worked with Vocational and Educational Services for Individuals with Disabilities (VESID) to provide transitional services for students upon graduation (Tr. pp. 373-74). Based on the foregoing, given its utilization of academic instruction to help the student build a foundation in basic life skills and its communication with VESID,[11] the parents' claim that the assigned public

[9] Although the parents also asserted in the due process complaint notice that the assigned public school site was not an appropriate placement for the student because it did not have a 12:1 classroom, the unavailability of a 12:1 classroom does not give rise to the conclusion that a 15:1 special class placement was not appropriate for the student.

[10] Receipt of a Regents or local high school diploma may require prior written notice and affect a student's continued eligibility for special education services (8 NYCRR 200.5[a][5][ii]-[iii]), but that type of eligibility issue is not at all present in this case.

[11] VESID has been renamed as Adult Career and Continuing Education Services-Vocational Rehabilitation (ACCES-VR).

school site lacked a life skills training program does not give rise to a finding that the district failed to provide the student with a FAPE.

VII. Conclusion

Having determined that, contrary to the IHO's determination, the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Cooke was appropriate or whether equitable considerations weight in favor of the parents' requested relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's June, 18, 2012 decision is modified by reversing those portions which found that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year and directed the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2012-13 school year.

Dated: **Albany, New York**
November 14, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER