The University of the State of New York

The State Education Department
State Review Officer
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No. 12-168

Application of a STUDENT WITH A DISABILITY, by his 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:
Advocates for Children of New York, Inc., attorneys for petitioner, Bernard Dufresne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 be reimbursed for the costs of the student's tuition at the Sterling School (Sterling) for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determinations that the parent's unilateral placement at Sterling was appropriate and that equitable considerations support the parent's request for reimbursement. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

With regard to the student's educational history, the hearing record shows that the student attended a district public school until February 2011 (during the student's fifth grade), when he began attending Sterling (Dist. Ex. 1 at p. 3; Parent Ex. E at pp. 1-2).[1]

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

On May 18, 2011, a CSE convened to conduct the student's annual review and to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1 at pp. 1-2). Finding the student eligible for special education as a student with a speech or language impairment, the May 2011 CSE recommended a 12:1 special class placement in a community school, along with five periods per week of special education teacher support services (SETSS) (id. at pp. 1-2, 15).[2] In addition, the May 2011 CSE recommended the following related services: five 40-minute sessions per week of individual speech-language therapy and one 30-minute session per week of individual counseling (id. at p. 17). The May 2011 CSE also recommended support for management needs, 13 annual goals, testing accommodations, and modified promotion criteria (id. at pp. 4-10, 17).

In a final notice of recommendation (FNR) dated August 15, 2011, the district summarized the 12:1 special class placement, SETSS, counseling, and speech-language therapy recommended in the May 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 Parent Ex. J).

By letter dated August 23, 2011, the parent rejected "offered placement" and notified the district of her intention to place the student at Sterling for the 2011-12 school year at public expense (Parent Ex. B at pp. 1-2). Regarding the May 2011 IEP, the parent indicated that the "only change" from the prior year's IEP was that the district offered the student "five periods of SETSS and one period of counseling" (id. at p. 1). This was insufficient to meet the student's needs, argued the parent, because the student had been enrolled in a "12:1 program for five years [and] remain[ed] a non-reader" (id.). Further, the parent objected to the assigned public school site because the student previously attended this school and it failed to meet the student's needs (id.). Specifically, the parent averred that the assigned public school site could not provide the student with necessary "one-on-one reading remediation" (id.).

During or around fall 2011, the parent executed an enrollment contract with Sterling for the student's attendance during the 2011-12 school year (see Tr. pp. 381-82; Parent Ex. G at pp. 1-2).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated April 24, 2012, the parent argued that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 year, that Sterling was an appropriate unilateral placement for the student, and that no equitable factors justified a reduction in an award of tuition reimbursement to the parent (Parent Ex. A at pp. 1-4). With regard to the May 2011 IEP, the parent argued that, notwithstanding recommendations in a private evaluation, the CSE failed to recommend "multi-sensory academic instruction and intensive reading remediation" (id. at p. 3). The parent further averred that such instruction was employed at Sterling during the previous academic year and proved successful (id.). Additionally, the parent asserted that the May 2011 IEP should have included the strategy of provision of "non-symbolic visual/tactile representations of mathematical quantities such as blocks, manipulatives, etc.," as recommended in the private evaluation (id.). As to the appropriateness of the assigned

[2] The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] The enrollment contract with Sterling is undated but the parent testified that she believed she signed the contract during fall 2011 (see Tr. pp. 381-82; Parent Ex. G at pp. 1-2).

public school site, the parent contended that it was inappropriate for the student because it was "the same school that [the student] previously attended" and where "school staff . . . informed the parent that they did not have the capacity to meet [the student's] needs" (id.).

With respect to the parent's unilateral placement, the parent alleged that Sterling was appropriate because it offered "specialized and individualized support" to the student (Parent Ex. A at p. 3). Specifically, the parent alleged that Sterling employed "the Orton-Gillingham multi-modal methodology" and provided students with "one-on-one research based reading remediation four days a week for 45 minutes a day" (id.). Further, the parent averred that the student made progress in his reading skill at Sterling (id.). Finally, the parent contended that the equitable considerations weighed in her favor because she timely notified the district that the student would not attend the assigned school (id.). Accordingly, the parent requested that the IHO order the district to fund the costs of the student's tuition at Sterling during the 2011-12 school year (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened in this matter on June 5, 2012 and concluded on June 22, 2012, after four days of proceedings (see Tr. pp. 1-413). In a decision dated July 18, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 14-15). Specifically, the IHO found that the May 2011 CSE's recommendation of a 12:1 special class placement with five sessions per week of SETSS and related services was reasonably calculated to provide the student with meaningful educational progress (id. at pp. 13-15). Although the IHO expressed doubt as to whether the program would have offered the student a FAPE without SETSS, the addition of these services resulted in a program that "[wa]s not the same program as had been previously offered" to the student, for prior school years (id. at p. 14). The IHO also recognized the addition of counseling services to the student's May 2011 IEP, relative to prior school years, noting that the services "might have successfully addressed the [student's] social[/]emotional needs" (id.). The IHO further explained that "[b]oth the special education class teacher and the SET[S]S teacher would have likely focused on remediating the [student's] areas of academic skill deficiency" (id. at p. 13).

Relevant to the ability of the assigned public school site to implement the May 2011 IEP, the IHO observed that both the classroom special education teacher and the SETSS provider were "licensed special education teachers with training in working to remediate academic delays" (IHO Decision at p. 13). On the other hand, the IHO acknowledged that the student previously attended the assigned public school site in a classroom with the same teacher of the proposed classroom and failed to make progress (id. at p. 14). Nonetheless, given the additional supports in the May 2011 IEP, the IHO determined that the student may have made progress during the 2011-12 school year (see id.). Further, the IHO found that the functional levels of the students in the assigned public school classroom would have exceeded three years and that this disparity constituted a procedural violation of the IDEA (id. at pp. 9, 14). However, the IHO found that this procedural violation did not result in a denial of FAPE to the student for the 2011-12 school year because the testimony of the teacher of the proposed classroom "did give the impression" that the variable classifications and functioning levels "would [not] have impaired the educational climate for [the student]" (id. at p. 14).

Based on the IHO's observations with regard to the May 2011 IEP, as well as the assigned public school site, he determined that "[t]aken together, there [were] good reasons to believe that the program the [district] offered would have met the [student's] needs" (IHO Decision at p. 14).

Although the IHO determined that the district offered the student a FAPE, he also found that the student's unilateral placement at Sterling was appropriate (IHO Decision at p. 13). The IHO additionally found that no equitable considerations would serve to preclude or diminish the parent's sought award of tuition reimbursement (id.). In this regard, the IHO observed that the parent did not visit the assigned public school site, a visit that might have resulted in the parent "learn[ing] that the program [wa]s different from what was offered previously at that school" (id.). Nevertheless, because the parent "experienced great frustration with that school in the past", the fact that she did not visit it prior to the beginning of the 2011-12 school year would not have affected her request for tuition reimbursement (id.). Finally, if the parent were entitled to an award of tuition reimbursement, the IHO found that the parent had "limited income" that would qualify her for an award of direct tuition payment from the district (id. at p. 15). Accordingly, the IHO denied the parent's request for tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. The parent argues that the May 2011 CSE was improperly composed because a SETSS provider did not attend the May 2011 CSE meeting. The parent additionally argues that May 2011 CSE failed to consider a private evaluation from August 2010. The parent contends that the recommendations contained in this evaluation were "uncontested" and, thus, should have been adopted by the May 2011 CSE. In particular, the parent alleges that the May 2011 IEP failed to include provision for "intensive and specialized reading instruction" as recommended in the private evaluation. Further based on the CSE's failure in this respect, the parent asserts that the recommended 12:1 special class placement with the SETSS was inappropriate. In particular the parent asserts that the student failed to achieve progress in a 12:1 special class setting in previous school years and that one session of SETSS per day was insufficient to "remediat[e]" the student's academic deficits.

With respect to the assigned public school site, the parent argues that the IHO erred by concluding that the district permissibly assigned the student to a school that was unable to meet his reading needs. The parent also argued that the IHO erred in failing to consider whether the assigned public school site could implement the May 2011 IEP. In this respect, the parent argues that a district SETSS provider was not qualified to provide reading services to the student. The parent additionally argues that the IHO erred in concluding that the range of ages and functional levels within the assigned public school classroom did not result in a denial of FAPE to the student.

In an answer, the district denies the parent's assertions and argues that it offered the student a FAPE for the 2011-12 school year. With respect to the composition of the May 2011 CSE, the parent argues that the parent's due process complaint notice does not contain a claim that the CSE was improperly composed for lack of a SETSS provider. In any event, the district argues that a SETSS provider was not a required member of the CSE and, moreover, there was no harm or prejudice to the student because a SETSS provider did not attend the May 2011CSE meeting. The district also argues that the May 2011 CSE considered the August 2010 evaluation and added five weekly sessions of SETSS to the student's IEP after considering its recommendations. The district further argues that it could and would have properly implemented the student's IEP at the assigned

school. Regarding the parent's age range and functional grouping arguments, the district contends that these issues cannot be addressed because they were not raised in the due process complaint notice and are otherwise legally speculative.

The district also interposes a cross-appeal, contending that the IHO erred in concluding that Sterling was an appropriate unilateral placement for the student. The district argues that the IHO's conclusions in this regard were legally insufficient because they were not accompanied by references to the hearing record. Moreover, the district argues that Sterling, a private school exclusively composed of special education students, did not constitute the LRE for the student. The district further cross-appeals the IHO's determination that equitable considerations did not preclude or diminish an award of tuition reimbursement to the student, arguing that the parent had no intention of attending a public school and unreasonably delayed communicating her objections to the district regarding the May 2011 IEP. Finally, the district argues that the IHO erred in determining that the parent could not afford the costs of the student's education at Sterling because he did not consider proof of the student's non-petitioner parent's assets.

In an answer to the district's cross-appeal, the parent argues that IHO properly found that Sterling was an appropriate unilateral placement and that no equitable considerations would preclude or diminish an award of tuition reimbursement to the parent. The parent further contends that evidence regarding the non-petitioner parent's assets is irrelevant because the non-petitioner parent is not involved in the student's life. The parent also replies to the procedural defenses raised in the district's answer, arguing that the district opened the door at the impartial hearing to the issues of the composition of the May 2011 CSE, as well as the age and functional grouping of students in the assigned public school classroom. Thus, the parent argues that these issues are properly preserved for consideration on appeal.

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, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at

245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Scope of Impartial Hearing/Review

The district asserts that the parent now raises the following issues in her petition—which she did not raise in the due process complaint notice—as bases upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year: (1) the May 2011 CSE was improperly composed for lack of a SETSS provider; (2) the age range of the students in the assigned public school classroom violated State regulations; and (3) the student would have been improperly grouped in the assigned public school classroom. With respect to these claims, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]). The parent's due process complaint notice cannot reasonably be read to include claims regarding CSE composition or the age and functional levels of the assigned public school classroom (see Parent Ex. A). A review of the hearing record shows that the district did not agree to an expansion of the scope of the impartial hearing to include these

issues, and the parent did not attempt to amend the due process complaint notice to include these issues.[4] Therefore, these allegations are outside the scope of review and will not be considered.

B. May 2011 IEP

On appeal, the parents allege that the May 2011 CSE failed to consider an August 2010 private evaluation in making its recommendations. A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require a [CSE] to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013]).

The hearing record is unclear as to whether the May 2011 CSE considered the August 2010 private psychological evaluation of the student (see Tr. pp. 202-03, 212). The district school psychologist who attended the May 2011 CSE meeting testified that she "generally reviewed . . . [p]retty much anything in the [student's] file" but she did not "remember specifically" if the August 2010 private psychological evaluation was reviewed at the May 2011 CSE meeting (Tr. p. 212). Similarly, the parent testified that she shared the August 2010 private psychological evaluation with the CSE, but the hearing record is unclear as to whether the parent was referring to the May 2011 CSE or CSE that had convened prior to that meeting (Tr. p. 348; see also Tr. pp. 347-52, 376-77). This evidence, while unclear, does not support a conclusion that the May 2011 CSE considered the August 2010 evaluation. However, even if this constituted a procedural inadequacy, the evidence in the hearing record does not support a finding that, as a result, the district (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]). On the contrary, review of the hearing record reveals that the May 2011 CSE relied on more current information regarding the student provided and included supports and services to address the student's needs in the May 2011 that were consistent with those recommendations contained in the August 2010 evaluation (see Dist. Ex. 1 at p. 2; Tr. pp. 359-61).

[4] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M. v. New York City Dep't of Educ., 2014 WL 2748756, at *2 [2d Cir. Jun. 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270,283-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]), it cannot be asserted that the district opened the door to these issues under the holding of M.H.

The parent testified that the student's present levels of performance were discussed at the meeting, including the student's academic management needs (Tr. pp. 359-63). The director of Sterling also attended the May 2011 CSE meeting and contributed to this discussion (Tr. p. 360; see Dist. Ex. 1 at p. 2). Further, it appears from the hearing record that the May 2011 CSE reviewed a teacher report from the student's current teacher at Sterling (see Tr. pp. 206-07).[5] Therefore, it appears that the May 2011 CSE relied upon more current information to ascertain the student's present levels of performance rather than the August 2010 evaluation, which was permissible under the circumstances of this case (see T.G., 973 F. Supp. 2d at 340 [upholding a CSE's "reli[ance] on more current input from [the student's current special education teacher and parent] rather than [a private] evaluation from about nineteen months before the CSE meeting"]).

Furthermore, the hearing record reflects that the May 2011 IEP incorporated each of the August 2010 evaluation's recommendations that the parent contends were absent from the May 2011 IEP; namely, multi-sensory academic instruction; intensive reading remediation; and the provision of "non-symbolic visual/tactile representations of mathematical quantities such as blocks, manipulatives, etc." (Parent Ex. A at p. 3). First, with respect to multisensory instruction, the May 2011 IEP explicitly indicated that multisensory instruction would be provided to the student "across [the] curriculum" (Dist. Ex. 1 at p. 4). The IEP also included several specific strategies to address the student's academic management needs that are multisensory in nature, including hands on activities, visual aids, and concrete materials (such as "charts, maps, graphs, numberline, templates, visual schedule[s], [and] graphic organizers") (id.).

Second, regarding the student's need for intensive reading remediation, the May 2011 IEP explicitly states that the CSE prescribed SETSS to address the student's need for intensive reading remediation (Dist. Ex. 1 at p. 16). In describing the other programs considered by the May 2011 CSE, the IEP states that because the student "continue[d] to need intensive reading remediation," the CSE decided to initiate SETSS for the student (id.). Testimony from the district school psychologist confirmed that the May 2011 CSE added SETSS to bolster the student's reading abilities (Tr. pp. 208, 219, 221).

Third, while the parent does specifically identify this specific recommendation from the August 2010 private psychological evaluation as an issue on appeal, with regard to the parent's contention in her due process complaint notice that the May 2011 CSE failed to incorporate learning strategies that are "non-symbolic visual/tactile representations of mathematical quantities such as blocks, manipulatives, etc.," I note that the 2010 evaluation indicated that the purpose of such strategies was to "allow [the student] to work with number values without needing to rely purely on symbols, with the aim of eventually helping to create a conceptual link between numerical symbols and the tangible quantities they represent" (Parent Ex. D at p. 16). As mentioned above, the strategies listed in the IEP to address the student's academic management needs included, among other things, the use of hands on activities, a numberline, graphs, and concrete materials (Dist. Ex. 1 at p. 4; see Parent Ex.; D at p. 16). Although the May 2011 IEP does not explicitly reference the blocks and manipulatives named in the evaluation, the provision of concrete materials and hands-on activities would encompass the use of a variety of materials including blocks and manipulatives (id.). As such, the CSE incorporated the type of learning

[5] This report was not introduced into evidence at the impartial hearing.

strategies that would benefit the student and that the August 2010 private evaluation recommended.

Based on the foregoing, the recommendations set forth in the May 2013 IEP were consistent with the evaluative information considered by the CSE, as well as with the recommendations set forth in the October 2010 private psychological evaluation.[6]

C. Assigned Public School Site

Turning next to the considerations regarding the assigned public school site, a substantial portion of the impartial hearing as well as the IHO's decision revolved around the issue of whether the assigned public school site would have been able to implement the May 2011 IEP. For the reasons explained more fully below, the district properly asserts that the parent's arguments in this regard were speculative because the student did not attend the assigned public school site during the 2011-12 school year.

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. 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a 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

[6] To the extent that the parent asserts that the student's lack of progress during the 2010-11 school year supports her claim that the May 2011 was inappropriate, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]). In the present case, however, the student's October 2010 IEP and May 2011 differ in material respects, most notably in the addition of SETSS and counseling services, such that an examination of the student's progress, or lack thereof, under the October 2010 IEP would not invalidate the May 2011 IEP (compare Dist. Ex. 1, with Parent Ex. L).

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 parent cannot prevail on her claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's May 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 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the May 2011 IEP (see Parent Ex. B). Therefore, the issues raised and the arguments asserted by the parties 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 parent 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

[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. 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.

the execution of the student's program or to refute the parent's 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 parent cannot prevail on her claims that the assigned public school site would not have properly implemented the May 2011 IEP.[8]

However, even assuming for the sake of argument that the parent 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. 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 492, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Sterling or consider whether equitable factors weighed in favor of the parents' request for relief (see M.C., 226 F.3d at 66 [2d Cir. 2000]; D.D-S, 2011 WL 3919040, at *13).

[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 P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. Jul. 24, 2014]; 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. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; 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 v, 961 F. Supp.2d at 589-90; 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], rev'd on other grounds, 2014 WL 3685943 [2d Cir. July 25, 2014]; 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]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 31, 2013

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JUSTYN P. BATES
STATE REVIEW OFFICER