The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-169

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

Appearances:
Hinman, Howard & Kattell, LLP, attorneys for petitioner, Harvey D. Mervis, Esq. of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, 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 her daughter's tuition costs for the Arrowsmith program[1] for the 2011-12 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for the 2011-12 school year. 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

[1] The Arrowsmith program is physically housed at the Beth Jacob school but is otherwise unaffiliated therewith (Tr. pp. 114, 182, 206). Beth Jacob is an all-girl, private school that offers general education and religious studies (Tr. at pp. 110, 208, 228). During the 2011-12 school year, the student attended two general education classes at Beth Jacob per day (Tr. p. 208); however, the parent did not seek tuition reimbursement for that portion of the student's education (see Parent Ex. A).

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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student attended private school in "small self-contained classes" from third through sixth grade (Tr. pp. 216, 228; Dist. Ex. 4 at p. 1).[2] During the 2010-11 school year (seventh grade), the parent enrolled the student part-time in the Arrowsmith program at the private school, where she also received instruction in mainstream classes, counseling, and speech therapy services (Tr. pp. 216-17, 221; Dist. Exs. 4 at p. 1; 5).[3] At that time the student's general cognitive and academic abilities were within the borderline range of functioning, and she exhibited social/emotional difficulties related to her academic delays (Dist. Exs. 4 at pp. 1-3; 5).

On March 1, 2011, for the 2011-12 school year (eighth grade), the CSE convened for a triennial review and determined that the student was eligible for special education and related services as a student with a learning disability (Tr. pp. 11, 42; Dist. Exs. 1 at pp. 1-2; 6). The March 2011 CSE recommended placement in a 12:1 special class in a community school with counseling, occupational therapy, and speech-language therapy services (Dist. Ex. 1 at pp. 1, 15). At the March 2011 CSE meeting, the parent expressed that she was "seeking tuition reimbursement" (Dist. Ex. 6).

On July 1, 2011, the student's mother signed a tuition contract re-enrolling her daughter in the Arrowsmith program at the private school and paid a deposit for the 2011-12 school year (Parent Exs. E; F).

In a final notice of recommendation (FNR), dated July 11, 2011, the district summarized the recommendations made by the March 2011 CSE and identified the particular school to which the district assigned the student (Dist. Ex. 7). The FNR listed an address and phone number for the assigned school, as well as the name, address, and telephone number of an individual to contact from the CSE for information (id.). The hearing record reflects that the parent visited the assigned school at the end of August 2011 or the beginning of September 2011 (Tr. pp. 226, 229).

A. Due Process Complaint Notice

By due process complaint notice dated April 3, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at p. 1). Specifically, the parent asserted that she disagreed with the recommended student to staff ratio set forth in the IEP and that the placement offered by the district did not offer a special class with the student to staff ratio provided for in the IEP (id. at p. 2).[4] As relief, the parent sought the cost of tuition at the Arrowsmith program for the 2011-12 school year (id.).

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[2] The hearing record reflects that the student had never attended public school (Tr. p. 228).

[3] The hearing record describes the Arrowsmith program as a series of computer-based and auditory exercises designed to "strengthen parts of the brain that are underperforming" (Tr. pp. 110-11; Parent Ex. B at p. 1).

[4] I note that the April 2012 due process complaint notice indicates that the March 2011 CSE meeting was an annual review, classified the student as speech or language impaired, and recommended that the student attend a special class in a community school with a 12:1+1 student to staff ratio, in contradiction to the hearing record, which reflects that the March 2011 CSE met for a triennial review, classified the student as learning disabled, and recommended a 12:1 special class (see Dist. Ex. 1 at p. 1; Parent Ex. A at p. 1). The due process complaint notice

B. Impartial Hearing Officer Decision

In accordance with a prehearing conference and scheduling order, an impartial hearing convened on May 9, 2012 and concluded on June 4, 2012 after two days of testimony (Tr. pp. 1-231).[5] In a decision dated June 29, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at pp. 5-6). In support of his finding, the IHO indicated that the March 2011 CSE recommended a 12:1 special class; a 12:1 special class was not available for the student at the assigned school; and while a 12:1+1 special class was available at the assigned school, the hearing record did not show that the differences between the two programs were minor (IHO Decision at pp. 5-6). The IHO noted support for finding that the 12:1+1 special class was designed for students with behavioral issues (id. at p. 6). The IHO concluded that the district did not demonstrate that it could implement "material portions" of the student's March 2011 IEP (id. at p. 6).

The IHO next found that the parent's unilateral placement did not provide special education services to meet the student's needs (id. at pp. 6-7). The IHO indicated that the Arrowsmith program did not provide the student with the benefit of "a full range of instruction, including whole group classroom instruction, small group classroom instruction, classes in specific subject matter areas" and also did not provide the benefit of related services (id. at 6). Furthermore, the IHO cited the lack of expert or peer reviewed research that could attest to the methodology of the program, as well as the lack of objective data to establish the student's progress (id. at pp. 6-7). The IHO then denied the parent's request for the cost of tuition for the Arrowsmith program based upon the finding that the parent's unilateral placement did not provide special education services to meet the student's needs (id. at p. 7).

IV. Appeal for State-Level Review

On August 8, 2012, the parent served a notice of petition and petition on the district. The Office of State Review received an unsigned and unverified copy of a petition on August 22, 2012. By facsimile and regular mail dated August 24, 2012, the Office of State Review notified counsel for both the parent and the district that the petition could be dismissed if the parent's failed to file a signed verification and a completed affidavit of service with the Office of State Review by August 27, 2012. An affidavit of service was eventually filed with the Office of State Review on September 6, 2012, showing service of a petition the district on August 8, 2012. The parent never filed an executed verification of the petition with the Office of State Review.

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also alleged that the assigned school only had a 12:1 special class available for the student, whereas the record reflects that the assigned school did not have a 12:1 special class for the student's grade level, but instead had a 12:1+1 special class available for the student (Tr. pp. 77-79; Parent Ex. A at p. 2). I further note that a prehearing conference was held, which clarified the issues to be addressed at hearing, the record reflects that the issues explored comported to a corrected reading of the parent's complaint and that the district did not raise an issue based on the errors in the complaint at the hearing or on appeal (Tr. pp. 5-6; IHO Ex. I; Answer).

[5] Among other things, the prehearing order addressed the scheduling dates, prehearing motions, stipulated facts, clarification and enumeration of the disputed issues after the resolution period expired, the parties' obligations related to their respective burdens of proof, closing statements procedures, the e-mail delivery method of the hearing decision, and directives prohibiting ex parte communications with the IHO (IHO Interim Order).

In the unverified petition, the parent appeals the IHO's finding that the parent's unilateral placement was not appropriate, and asserts that the IHO improperly refused to allow the parent to submit additional documentary evidence with respect to the appropriateness of the Arrowsmith program. The parent further asserts that the disputed documents were produced at the hearing on June 4, 2012 but were not admitted based upon the parent's failure to produce them within five days of the hearing; and that the parent should not have been precluded from entering the documents into the record because the failure to timely produce the documents was the fault of the parent's advocate. In addition, the parent asserts that the evidence excluded was relevant, material and reliable; that there was no proof that the district would have been prejudiced by the admission of the evidence; and that the IHO abused his discretion by not allowing the evidence to be introduced at the hearing. As relief, the parent requests that the documents (attached as exhibits to the petition) be admitted and that the IHO's decision be reversed based upon documentation showing that the Arrowsmith program provided special education services to meet the student's special education needs, or in the alternative that the matter be remanded for submission of the documentation and testimony.

In an answer, the district asserts that the parent's appeal is untimely and should be dismissed because the parent's petition was not filed with the Office of State Review within three days of service as required by State regulations. The district further asserts that the IHO correctly found that the parent's unilateral placement was not appropriate and points out that there is nothing in the hearing record to show that the parent made a request to the IHO to offer additional documents into evidence. The district asserts that even if the parent did make such an offer, the IHO was within his right to exclude the documentary evidence; that the additional exhibits were not relevant; that the documents with descriptions of Arrowsmith were duplicative of testimony; and that the progress reports did not offer objective evidence of educational benefit or academic progress of the student. In addition, the district asserts that the SRO should not consider the new evidence submitted by the parent with the petition.

As for its cross-appeal, the district asserts that the IHO erred in finding that it failed to offer the student a FAPE. The district asserts that the only reason given by the IHO in support of a finding of a denial of FAPE was that the assigned school would not have been able to implement material portions of the student's March 2011 IEP and that such an argument is speculative, but that even if the student had attended the assigned school, the hearing record does not show that the district would have deviated from the March 2011 IEP in a material way. The district asserts, among other things, that a 12:1 or a 12:1+1 class would have been appropriate for the student; that the IHO erred in finding that the 12:1+1 class was for students with behavioral problems; and that there would be no differences in methodology or curriculum between a 12:1+1 and a 12:1 special class. The parent did not submit an answer to the district's cross-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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

1. Timeliness of Appeal

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]). Exceptions to the general rule requiring personal service include the following: (1) if a respondent

cannot be found upon diligent search, a petitioner may effectuate service by delivering and leaving the petition, affidavits, exhibits, and other supporting papers at respondent's residence with some person of suitable age and discretion between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the Commissioner (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 08-006); (2) the parties may agree to waive personal service (Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 07-037; Application of the Dep't of Educ., Appeal No. 05-082; Application of the Bd. of Educ., Appeal No. 05-067; Application of the Bd. of Educ., Appeal No. 04-058); or (3) permission is obtained from an SRO for an alternate method of service (8 NYCRR 275.8[a]; Application of the Dep't of Educ., Appeal No. 08-056; Application of a Student with a Disability, Appeal No. 08-022; Application of the Dep't of Educ., Appeal No. 08-006; Application of the Dep't of Educ., Appeal No. 05-082; Application of a Child with a Disability, Appeal No. 05-045; Application of the Bd. of Educ., Appeal No. 01-048).[6]

A parent who seeks review of an IHO's decision by an SRO shall serve upon the school district a notice of intention to seek review (8 NYCRR 279.2[a]). The notice of intention to seek review must be personally served upon the school district not less then 10 days before service of a copy of the petition upon such school district, and within 25 days from the date of the IHO's decision sought to be reviewed (8 NYCRR 279.2[b]). A notice of intention to seek review is not required when the school district seeks review of an IHO's decision (8 NYCRR 279.2[c]). The notice of intention to seek review serves the purpose of facilitating the timely filing of the hearing record by the district with the Office of State Review (Application of a Student with a Disability, Appeal No. 10-038; Application of a Child with a Disability, Appeal No. 04-018).

Additionally, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition (8 NYCRR 279.2[b], [c]). The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). An SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for

[6] Pursuant to 8 NYCRR 279.1(a), "references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires."

failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

In this case, the parent did not comply with the requirements of Part 279 of State regulations in initiating the appeal. According to the district, on August 8, 2012, the parent served the district with a petition (Answer ¶ 39). The petition and verification received in the Office of State Review on August 22, 2012 were unsigned and failed to include the required affidavit of service showing proof of personal service of these documents upon the district (8 NYCRR 279.4[a]). The affidavit of service was eventually filed with the Office of State Review on September 6, 2012, showing service on the district on August 8, 2012,[7] however, a properly verified copy of the pleading was never submitted to the Office of State Review. Accordingly, the I find that parent failed to comply with State regulations regarding proper service of verified petition (8 NYCRR 279.4[a]), failed to timely file an affidavit of service in the first instance, and thereafter failed to adhere to the further directive to file an affidavit of service by August 27, 2012, and never complied with the directive to file a verification of the pleading (8 NYCRR 279.7) and, consequently the petition is dismissed.[8] Generally, a cross-appeal is considered timely when it is served upon petitioner with an answer within ten days after the date of service of a copy of the petition (see 8 NYCRR 279.4[b], 279.5); however, this is predicated upon the appeal itself being timely commenced. In this matter, the petition for review was untimely and, therefore, the cross-appeal is also untimely (see, e.g., Endicott Johnson Corp. v. Liberty Mutual Insurance Co., 116 F.3d 53 [2d Cir. 1997] [finding plaintiff's untimely notice of appeal made defendant's subsequent cross-appeal also untimely]). The district's cross-appeal is, therefore, also dismissed (Application of a Child with a Disability, Appeal No. 05-078).

[7] On August 29, 2012, the Office of State Review received a facsimile copy of a cover letter and the affidavit of service of the petition from the parent's attorney. The cover letter stated that the parent did not keep a copy of the signed verification and that the original was served on the district. The letter requests that the district provide a copy of the signed verification. Attorneys for the parent are hereby cautioned that it is not the district's responsibility under the regulations to complete the parent's filing requirements.

[8] Upon receipt by mail of the parent's petition, the Office of State Review notified the attorney for the parent that the verification required by 8 NYCRR 279.7 was unsigned and the affidavit of personal service required by 8 NYCRR 279.4(a) did not accompany the filing. The letter noted that the parent was granted leave to re-serve and re-file a corrected set of pleadings.

Out of an abundance of caution and notwithstanding the dismissal of the petition for procedural noncompliance, I have reviewed the entire hearing record and provided alternative findings on the remaining issues raised in the appeal and cross-appeal.

2. Additional Evidence

The district asserts that the additional documentary evidence attached to the petition as exhibits A and B and submitted to the Office of State Review should be rejected because the documents were available at the time of the impartial hearing and are not necessary for the SRO to render a decision. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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. 11-017; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, I decline to accept the additional documentary evidence, as the additional evidence was available at the time of the impartial hearing and not timely offered into evidence for the IHO's consideration, and consideration of the additional documentary evidence is not necessary in order to render a decision in this case. The IHO's exclusion of the same evidence is further discussed below.

3. Excluded Evidence

The parent asserts that the IHO erred in excluding from evidence at the impartial hearing certain documents (attached to the petition as exhibits A and B). While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. § 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), each party has the right to prohibit introduction of any evidence which has not been disclosed at least five business days before the hearing (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2],[3]). In addition, the impartial hearing officer "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

Initially, upon review of the hearing record, I find nothing that supports a finding that the IHO excluded from evidence documents that were offered by the parent at the impartial hearing, (see Tr. pp. 1-231). The hearing record shows that all of the evidence offered by the parent was admitted by the IHO without objection by the district (Tr. pp. 164-65). The parent's assertion that the documents were excluded as a result of the five business day disclosure rule (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2],[3]), or IHO's discretion to exclude certain evidence (see 8 NYCRR 200.5[j][3][xii][c]), lacks any foundation and I hereby decline to reach the

conclusion that any error by the IHO was made (see L.J. v. Audubon Bd. of Educ., 2008 WL 4276908. at *4-*5 [D.N.J. Sept. 10, 2008]).[9]

B. Challenges to the Assigned Public School Site

The parent has set forth as her main concern the unavailability of a 12:1 special class at the assigned public school site.[10] The district asserts that placement of the student in a 12:1+1 special class would not have been a material deviation from the student's March 2011 IEP because a 12:1 or a 12:1+1 special class would have been appropriate for the student.[11]

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[12] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). 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). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

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., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v.

[9] If anything, the thoroughness of prehearing order discussed above points to how carefully and thoughtfully the IHO managed the proceeding and respectfully observed each party's right to present its case in an orderly fashion.

[10] The parent's concern is somewhat belied by the fact that the parent rejected the IEP at the March 2011 CSE meeting, before visiting the assigned school and learning that a 12:1 special class was not available and further that she contracted with Arrowsmith for the student's enrollment for the 2011-12 school year on July 1, 2011, prior to receiving the FNR from the district (Dist. Ex. 7; Parent Ex. E).

[11] The parent has not cited and the hearing record has not revealed any dispute over the procedure underlying the creation of the March 2011 IEP or of the content thereof. Although the parent's April 3, 2012 due process complaint notice stated an objection to the recommended placement—specifically, the recommended student to adult ratio—this issue was not raised in the parent's petition. In any event, the hearing record demonstrates that the 12:1 special class was appropriate to meet the student's needs.

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

Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, 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 Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [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., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). 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]).[13]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the forgoing and under the circumstances of this case, I find that the parent cannot prevail on the claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, these issues are speculative insofar as the parent did not accept the IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of her choosing. Consequently, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, therefore, there is no basis for concluding that it failed to do so. Accordingly, the parent's claims regarding the inadequacy of public school site and classroom must be dismissed.

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. As further described below, the evidence would nevertheless show that the 12:1+1 special class at the assigned district school was capable of providing the student with a suitable classroom environment and appropriate grouping, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing

[13] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular 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 T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D.Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. 12:1+1 Special Class - Functional Grouping

Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school was capable of providing the student with appropriate instruction. In addition, the evidence does not support the conclusion that assigning the student to a 12:1+1 special class instead of a 12:1 special class would have caused deviation from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at * 14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at *13; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]).

State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]).

In this case, the IHO found that the 12:1 special class recommended by the March 2011 CSE was not available at the assigned school but that a 12:1+1 special class was available instead (IHO Decision at p. 6; see Tr. pp. 77-79). The IHO concluded that "[t]he record does not contain sufficient testimony and evidence to find the differences in the two programs were minor" (IHO Decision at p. 6). In reaching this conclusion, the IHO relied on the testimony of the district's school psychologist who had evaluated the student and participated in the March 2011 CSE meeting and testified that the student did not need a 12:1+1 class composition because she did not have behavior "issues" and did not need the second adult in the room for purposes of facilitating focus or controlling behavior (Tr. pp. 9, 11, 53-54; Dist. Ex. 4 at p. 4). The IHO deduced from

this testimony that students in a 12:1+1 class are more likely to have behavioral difficulties, which the student did not exhibit (IHO Decision at pp. 2, 6). However, this finding is not supported by the hearing record.

The assistant principal responsible for special education at the assigned school testified that upon reviewing the March 2011 IEP present levels of performance, the student's academic skill levels were consistent with the academic skill levels of students in the 12:1+1 special class (Tr. pp. 88-90, 101). After a review of the March 2011 IEP annual goals, the assistant principal testified that the student's goals could have been implemented in the classroom, and were consistent with the goals of the other students in the 12:1+1 special class (Tr. pp. 90-95). Contrary to the IHO's speculation that students in the 12:1+1 special class exhibited behavioral difficulties, the hearing record does not show that as the reason for having the paraprofessional in the classroom. Rather, the assistant principal testified that some students in the 12:1+1 special class required additional help, including three to four students who received Spanish translation services from the bilingual paraprofessional (Tr. pp. 102-03, 106-07). He also testified that there was no difference in the methodology or curriculum used in the 12:1 and 12:1+1 special classes (Tr. pp. 75, 77, 100). In consideration of the foregoing, I find that the hearing record demonstrates that had the parent elected to place the student at the proposed site and in the available 12:1+1 class, the student would have been appropriately grouped with students of similar needs and abilities, and received instruction similar to that provided within a 12:1 special class.

State regulations provide 12:1+1 special classes for students with disabilities "whose management needs interfere with the instructional process, to the extent that an additional adult is needed with in the classroom to assist in the instruction of such students . . ." (8 NYCRR 200.6[h][4][i]). Although the hearing record does not show that the student required a 12:1+1 special class in order to attain educational benefit (as opposed to a 12:1 special class), I find that the hearing record in its entirety does not support the conclusion that, had the student attended a 12:1+1 special class at the assigned school, the district would have "materially deviated" from the student's March 2011 IEP due having an extra adult in the classroom to support the other students.

A review of the hearing record shows that the student exhibited academic skills well below grade level, social/emotional difficulties related to her academic deficits, and some distractibility in classroom settings (Dist. Ex. 2; 4 at pp. 2-3, 6; 5). The March 2011 IEP provided the student with repetition, assignments broken down into smaller units, prompts and visual cues to progress through assignments, simplification of vocabulary, and preview/review of material (Dist. Ex. 1 at p. 4). The IEP also indicated that the student needed encouragement to persevere on tasks and praise for her effort (Dist. Ex. 1 at p. 6). I note that the school psychologist testified that a 12:1+1 class would have been appropriate for the student; that the assistant principal testified that the paraprofessional in the 12:1+1 special class was there to assist students with their academic needs; and that the hearing record shows that the 12:1+1 special class would have been able to address the student's social emotional difficulties and academic deficits in conformity with the student's March 2011 IEP (Tr. pp. 53-54, 55-56, 89-96, 98-103, 106).

Furthermore, a district is not prohibited from providing services or support to a student in addition to the services or support recommended in a student's IEP (see Application of a Student with a Disability, Appeal No. 11-042 [although assigned school may have provided ten periods of SETSS per week, as opposed to the five periods recommended in the student's IEP, this did not

constitute a deprivation of a FAPE]). This provision of additional support is evident in this case and referenced by the assistant principal of the assigned school when she testified that the district was allowed to "overserve" students (Tr. pp. 105-06).

Accordingly, although the hearing record shows that the student did not require the support of an additional adult in the classroom, given her special education needs and recommended IEP management strategies, she may have benefitted from such support. Upon review of the hearing record, I can not conclude that the district would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).[14]

VII. Conclusion

In summary, I dismiss the parties' appeals on the procedural grounds identified herein. As described above, the hearing record contains evidence showing that there would not be a material deviation from the student's the March 2011 IEP, which recommended placement of the student in a 12:1 special class in a community school with related services of speech-language therapy and counseling, had the student instead received services in a 12:1+1 special class, and thus, the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While I disagree with the IHO's finding that the district failed to provide the student a FAPE for the 2011-12 school year with respect to the difference between the 12:1 and 12:1+1 special class in this case, I nevertheless would reach the same ultimate result as he and would also dismiss the parent's tuition reimbursement claim on the merits.[15] Having reached this alternative conclusion, it is not necessary to review whether the Arrowsmith program was appropriate for the student or whether equitable considerations support the parent's claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

[14] I note that the assistant principal also testified that the assigned public school would have met the student's related services mandates and "provided the services indicated on [the March 2011] IEP" (Tr. pp. 90, 95).

[15] In all fairness to the IHO, many of the interpretive cases in this decision had not yet been issued yet at the time he rendered his decision.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 23, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER