The University of the State of New York

The State Education Department
State Review Officer
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No. 12-178

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Dalit Paradis, Esq., and Todd Silverblatt, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to directly fund the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2011-12 school year. The parent cross-appeals from the IHO's finding that the district's failure to conduct an updated speech-language evaluation of the student did not result in a failure to offer the student a free appropriate public education (FAPE). The appeal must be sustained. 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 appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

During the 2010-11 school year, the student attended the "Skills and Knowledge for Independent Living [and] Learning" (SKILLs) program at Cooke (see Dist. Exs. 6 at p. 1; Parent

Ex. C at p. 1).[1] On March 18, 2011, the parent signed an enrollment contract for the student's attendance at Cooke for the 2011-12 school year (see Parent Ex. E at pp. 1-2).

On June 6, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (12th grade) (see Dist. Ex. 8. at pp. 1-2).[2] Finding that the student remained eligible for special education and related services as a student with a learning disability, the June 2011 CSE recommended a 15:1 special class placement at a community school with the following related services: one 45-minute session per week of individual counseling, two 45-minute sessions per week of counseling in a small group, two 45-minute sessions per week of speech-language therapy in a small group, and one 45-minute session per week of individual speech-language therapy (id. at p. 1, 10-12).[3] The June 2011 CSE also recommended that the student participate in State and local assessments with testing accommodations, and as part of the student's transition plan and services, the June 2011 CSE recommended that the student pursue an "IEP diploma" (id. at pp. 12, 14). Finally, the June 2011 CSE recommended a transition plan with a coordinated set of transition activities for the student (id. at pp. 14-15).

By final notice of recommendation (FNR) dated July 11, 2011, the district summarized the special education programs and related services recommended in the June 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 14).

By letter dated July 21, 2011, the parent informed the district that he would schedule a "visit" with the assigned public school site in September—as recommended by the district—so that he could determine whether it was appropriate for the student (Dist. Ex. 15). Thus, at that time, the parent could not "consent or object" to the assigned public school site, but would visit the school "at the earliest opportunity in September" (id.).

By letter dated August 22, 2011, the parent reminded the district of his intention to visit the assigned public school site in "September" (Dist. Ex. 16). In addition, the parent indicated his belief that the "15:1 class" would not "adequately address" the student's learning issues, and rejected the "program recommendation" in the June 2011 IEP (id.). The parent noted that the student required "more intensive remediation" than could be provided in a 15:1 special class placement (id.). The parent also noted that the "recommended program" could not provide the student with the academic management needs in the June 2011 IEP (id.). Consequently, the parent notified the district that he enrolled the student at Cooke for the 2011-12 school year, and he intended to seek reimbursement from the district for the costs of the student's tuition at Cooke (id.). The parent also requested that the district provide the student with transportation services for the

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

[2] According to the June 2011 IEP, the student would turn 21 years old during the 2011-12 school year (see Dist. Ex. 8 at p. 1).

[3] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

2011-12 school year (id.). However, the parent also indicated that he would "withdraw" the student from Cooke and enroll the student at the assigned public school site if it was appropriate (id.).

On September 13, 2011, the parent visited the assigned public school site, and in a letter dated September 14, 2011, advised the district that based upon a tour and discussions with "staff members," the assigned public school site was not appropriate for the student (Dist. Ex. 17). According to the parent, in order for the assigned public school site to "comply" with the IEP diploma objective in the June 2011 IEP, the student must be placed in a "collaborative team teaching" (CTT) classroom so that the student could take the Regents Competency Tests (RCTs) (id.). The parent further indicated that a "collaborative teaching model" would not provide the student with "enough support" to adequately address his "academic and social/emotional deficits," and the June 2011 CSE did not recommend a CTT model (id.). Further, the parent noted that the assigned public school site did not make the "full range of transition services" available to all of the students (id.). In addition, the parent informed the district that the assigned public school site could not provide the student with the academic management needs in the June 2011 IEP (id.). Thus, the parent notified the district that he enrolled the student at Cooke, and he intended to seek reimbursement from the district for the costs of the student's tuition at Cooke for the 2011-12 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated April 23, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at pp. 2-5). Specifically, the parent asserted that the district failed to conduct an updated speech-language evaluation of the student prior to developing the June 2011 IEP (id. at pp. 3-4). Next, the parent alleged that the 15:1 special class placement at a community school was not appropriate because the student required a higher level of academic and social/emotional support than the "recommended program" could provide (id. at p. 4). Additionally, the parent asserted that the 15:1 special class placement would not provide the student with the "intensive support" or the "academic management needs" recommended in the June 2011 IEP (id.). With respect to the assigned public school site, the parent repeated the concerns expressed in his September 2011 letter to the district (compare Dist. Ex. 1 at pp. 4-5, with Dist. Ex. 17). Further, the parent asserted that the assigned public school site could not implement the June 2011 IEP because it did not offer academic courses—such as English, mathematics, science, social studies, and foreign languages—in a 15:1 special class setting, and the student could not participate in the assigned public school site's internship program (see Dist. Ex. 1 at pp. 4-5). Finally, the parent contended that the SKILLs program at Cooke was an appropriate unilateral placement for the student because it was "designed to meet [the student's] individual special education needs, including his need for a high degree of academic support and transition needs" (id. at p. 5). As relief, the parent requested that the district directly pay Cooke for the costs of the student's tuition for the 2011-12 school year (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

On June 6, 2012, the IHO conducted a prehearing conference, and on June 28, 2012, the parties conducted the impartial hearing (see Tr. pp. 1-223). In a decision dated August 1, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, that

Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief; thus, the IHO ordered the district to directly pay Cooke for the costs of the student's tuition for the 2011-12 school year (see IHO Decision at pp. 8-14).

Initially, the IHO found that the June 2011 CSE was properly composed (IHO Decision at p. 9). Next, the IHO concluded that the "absence of a new formal" speech-language evaluation did not result in a failure to offer the student a FAPE (id. at pp. 9-10). Concerning the recommended 15:1 special class placement, the IHO found that the hearing record failed to contain any evidence establishing why the June 2011 CSE believed the student "was ready to learn in a larger environment," and further noted that the individuals who "really kn[e]w" the student testified that he needed a "significant amount of support" (id. at p. 10). Thus, the IHO concluded that the 15:1 special class placement was not appropriate for the student (id.). In addition, the IHO found that the hearing record contained no evidence to support the June 2011 CSE's recommendation that the student participate in State and local assessments, and further, that this recommendation evidenced a "lack of understanding" of the student's individual needs (id.). Finally, the IHO determined that the evidence established that an "IEP diploma" was an "unrealistic objective" for the student (id.).

Next, the IHO found that the assigned public school site was not appropriate for the student (see IHO Decision at p. 11). In this regard, the IHO noted that the classes at the assigned public school site were "'geared toward passing a Regents examination'" and if students failed that examination, students then took the "RCT examination" (id.). The IHO found that these examinations were not appropriate for the student and focusing on examinations "would not allow him to receive instruction at a level that he required" (id.). Thus, the IHO concluded that both the June 2011 IEP and the assigned public school site were not appropriate, and as a result, the district failed to offer the student a FAPE for the 2011-12 school year (id.).

With regard to the unilateral placement, the IHO found that the student made academic, and social/emotional progress at Cooke, and this placement also provided the student with "related services;" thus, the IHO concluded that Cooke was an appropriate unilateral placement (IHO Decision at pp. 11-12). In addition, the IHO found that the parent cooperated with the CSE process, informed the district of his concerns, and provided notice of his intention to unilaterally place the student (id. at p. 13). Finally, the IHO rejected the district's assertion that no contract existed between the parent and Cooke (id. at pp. 13-14). Thus, the IHO found that equitable considerations weighed in favor of the parent's requested relief and directed the district to directly pay Cooke for the costs of the student's tuition for the 2011-12 school year (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations weighed in favor

of the parent's request for relief.[4] Specifically, the district asserts that the IHO erred in finding that the 15:1 special class placement was not appropriate for the student. Next, the district alleges that the IHO erred in determining that the June 2011 CSE's recommendation for the student to participate in both State and local assessments (i.e., Regents examinations and RCT examinations) was not appropriate. The district also asserts that the IHO exceeded her jurisdiction in finding that the assigned public school site was not appropriate because the classes were "geared towards Regents and RCT exam preparation" given that the parent did not raise this issue in the due process complaint notice. With respect to other allegations raised by the parent in the due process complaint notice regarding the assigned public school site that the IHO did not address—including the assigned public school site's ability to implement the June 2011 IEP, the availability of 15:1 special class placements at the assigned public school site, and the student's alleged inability to participate in the internship program—the district argues to dismiss such allegations. Finally, the district asserts that equitable considerations precluded the parent's request for relief and that the parent failed to establish that he was entitled to prospective or direct funding of the costs of the student's tuition at Cooke.

In an answer, the parent responds to the district's allegations, and generally argues to uphold the IHO's decision. Additionally, the parent asserts that the IHO did not exceed her jurisdiction by deciding whether the assigned public school site was appropriate based on the fact that the classrooms were "geared" towards passing the "Regents" or "RCT" examinations because this issue was raised in the due process complaint notice. Alternatively, the parent argues that the district raised this issue during the direct examination of one of its witnesses. Further, the parent alleges that although not decided by the IHO, the assigned public school site was not appropriate because it could not implement the June 2011 IEP and could not provide the student with "appropriate transition services." As a cross-appeal, the parent alleges that the IHO erred in finding that the district's failure to conduct an "updated" speech-language evaluation did not result in a failure to offer the student a FAPE.

In an answer to the parent's cross-appeal, the district rejects the parent's allegation and generally argues to uphold the IHO's finding with respect to the absence of a speech-language evaluation.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

[4] The district does not appeal the IHO's finding that Cooke was an appropriate unilateral placement for the student for the 2011-12 school year; accordingly, the IHO's determination is final and binding on both parties and will not be further addressed in this decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 11-12).

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. Preliminary Matters—Scope of Impartial Hearing

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. Initially, a review of the hearing record establishes that the IHO sua sponte addressed and decided issues that the parent did not raise in the due process complaint notice—namely, whether the June 2011 CSE's recommendation that the student

participate in State and local assessments was appropriate, whether an "IEP diploma" was an "unrealistic objective" for the student, and whether the assigned public school site was appropriate because classes were "geared towards passing a Regents examination" (compare Dist. Ex. 1 at pp. 3-5, with IHO Decision at pp. 10-11).

With respect to the issues raised and decided sua sponte by the IHO in the decision, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, 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][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 77-78 [2d Cir. 2014]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO regarding whether the June 2011 CSE's recommendation for the student to participate in State and local assessments was

appropriate,[5] whether an "IEP diploma" was an "unrealistic objective" for the student, and whether the assigned public school site was appropriate because classes were "geared towards passing a Regents examination" (see Dist. Ex. 1 at pp. 3-5). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-223; Dist. Exs. 1-18; Parent Exs. A-C; E-F).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues, or seek to include these issues in an amended due process complaint notice, the issues of whether the June 2011 CSE's recommendation for the student to participate in State and local assessments was appropriate, whether an "IEP diploma" was an "unrealistic objective" for the student, and whether the assigned public school site was appropriate because classes were "geared towards passing a Regents examination" are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

[5] Assuming for the sake of argument that the issue of the appropriateness of the State and local assessments was raised or the district opened the door to the issue, the evidence in the hearing record does not support the IHO's finding that the June 2011 CSE's recommendation was not appropriate. All students with disabilities must be included in all general State and local assessment programs with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective IEPs (20 U.S.C. §1412[a][16][A]; 34 CFR 300.160[a]; "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Feb. 2010 Revised Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The CSE cannot exempt students with disabilities from participating in State or local assessments (Letter to State Directors of Special Education, 34 IDELR 119 [OSEP 2000]). If the CSE determines that the student cannot participate in State or local assessments even with accommodations, then the CSE must recommend that the student participate in alternate assessments (id.). Only students with severe cognitive disabilities are eligible for the New York State Alternate Assessment (see "New York State Office of State Assessment, Eligibility and Participation Criteria- NYSAA 1," available at http://www.p12.nysed.gov/assessment/nysaa/nysaa-eligibility.pdf). Students with severe disabilities are defined as "students who have limited cognitive abilities combined with behavioral and/or physical limitations and who require highly specialized education, social, psychological and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment" (8 NYCRR 100.1 [t][2][iv]; see New York State Office of State Assessment, Eligibility and Participation Criteria-NYSAA 1, available at http://www.p12.nysed.gov/assessment/nysaa/nysaa-eligibility.pdf; "Revised Guidelines for Participation of Students with Disabilities in State Assessments for 2006-07," Vocational Education Services for Individuals with Disabilities (VESID) Mem. [Aug. 2006], available at http://www.p12.nysed.gov/specialed/publications/policy/ungraded.pdf).

Accordingly, the IHO exceeded her jurisdiction by addressing the abovementioned issues in the decision, and these particular findings must be annulled.[6]

B. CSE Process

1. Evaluative Information

Turning, next, to the parent's contention that the district's failure to conduct an updated speech-language evaluation of the student resulted in a failure to offer the student a FAPE, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the evidence in the hearing record reflects that the June 2011 CSE considered and relied upon the following evaluative information in the development of the June 2011 IEP: a November 2009 psychoeducational reevaluation report (Dist. Ex. 3 at pp. 1-5), a December 2009 social history evaluation report (Dist. Ex. 5 at pp. 1-2), a December 2010 classroom observation

[6] 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 "open[s] 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 217, at 250-51; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84[S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), I am not persuaded by the parent's contention that the district raised the issue of whether the June 2011 CSE's recommendation for the student to participate in State and local assessments was first elicited through the direct examination of a district witness. Rather, it appears that the direct examination pertained to routine questioning about the June 2011 IEP, and thus, the district did not "open the door" to this issue under the holding of M.H. (see B.M., 2013 WL 1972144, at *6; see, e.g., Tr. pp. 15-29, 59-77).

report (Dist. Ex. 6 at p. 1-2), and a spring 2011 Cooke progress report (Dist. Ex, 12 at pp. 1-5; see Tr. pp. 63-65). In addition, the district special education teacher—who attended the June 2011 CSE meeting—testified that the June 2011 CSE also reviewed the student's May 2010 IEP and considered input from the student's then-current teacher (see Tr. pp. 65-67; Dist. Exs. 9 at pp. 1-2; 13 at pp. 1-15).

According to the November 2009 psychoeducational reevaluation report, an administration of the Stanford Binet Intelligence Scale-Fifth Edition (SB-V) to the student yielded a nonverbal IQ of 82, a verbal IQ of 68, and a full-scale IQ of 74 (Dist. Ex. 3 at p. 2). The evaluator indicated that the student exhibited "significant perceptive and expressive language difficulties" that negatively affected his ability to learn and "perform well in academics" (id.). In addition, the report indicated that the student tended to perform better regarding nonverbal fluid reasoning subtests related to preverbal and perceptual tasks (id.). With respect to the Woodcock-Johnson Tests of Individual Achievement-Third Edition (WJ-III ACH), the student achieved the following grade equivalent scores: 5.3 in letter word identification, 4.1 in spelling, 5.8 in passage comprehension, 3.8 in calculation, and 4.1 in applied problems (id.). The student multiplied with single digits but not with multiple digits, and he could not complete division calculations (id. at p. 3). The student's math reasoning skills were similarly developed when compared to his calculation skills (id.). The report indicated that the student demonstrated decoding and reading comprehension skills at the fifth grade level, as well as early fourth grade level spelling skills (id.). The report also indicated that the student tended to read "very slowly," but it did not appear to affect his overall performance (id.). Regarding vocational pursuits, the student showed an interest in construction work (id.). The report indicated that the student would benefit from developing skills regarding reading blue prints and following directions based on his vocational interests (id.). The report also indicated that the student presented as friendly and understood the necessity of performing well in school (id.). Projective drawings indicated that the student's views of the world were "somewhat simplistic" and that he exhibited difficulty with identifying nuances that were more complex during social interactions (id.).

The June 2011 CSE also considered a December 2009 social history evaluation of the student (Dist. Ex. 5 at p. 1). According to the report, the district requested a three-year reevaluation of the student (id.). The report reflected that the student's last evaluation occurred approximately six years ago (id.). At that time, the parent reported that the student's initial evaluation occurred during third or fourth grade due to the student's academic struggles (id.). The report also indicated that the student was hyperactive and received a diagnosis of an attention deficit hyperactivity disorder (ADHD) at the age of nine (id.). Under a physician's supervision, the student discontinued his ADHD related medication during 10th grade (id.). According to the report, the student enjoyed attending Cooke and completed his classwork (id. at p. 2). The social history report further indicated that the student received two sessions per week of counseling and two sessions per week of speech-language services (individual and group) at Cooke (id.). The parent described the student as respectful and that he enjoyed spending time with his friends (id.).

On December 16, 2010, a district special education teacher conducted a classroom observation of the student (see Dist. Ex. 6 at p. 1). The December 2010 classroom observation report indicated that the student participated in a specially designed academic and transition program (SKILLs) for senior students at Cooke who had been identified as having potential within the academic and social skills arenas to be successfully integrated into the workforce and

community at large (id.). The report reflected that the student engaged in academic coursework, advisory for social skills, job skills training, self-advocacy development, and internships (id.). During the observation, the four students completed worksheets while seated at a table facing a Smart Board (id.). The assignment centered on the student developing a monthly reality-based budget that included filling in all expenses, and the teacher expected the students to complete math calculations in developing the budgets (id.). The student maintained attention during the lesson and raised his hand to answer the teacher's questions (id. at p. 2). The report indicated that the student presented as being verbal and engaged (id.). The report also indicated that the student participated in the lesson and used his calculator to complete the calculations (id.). The teacher indicated the student's behavior during the observation was typical for the student (id.).

In the spring 2011 Cooke progress report, the student's teachers described him as a "hard worker" with a "strong work ethic," as well as being motivated and committed to his work (Dist. Ex. 12 at p. 1). The report indicated that the student excelled at his work during his internship (id.). The report also indicated the student "worked hard to gain mastery of the job tasks and routines" and "made a great deal of progress working independently" (id.). According to the spring 2011 Cooke progress report, the student's work ethic would "serve him well as he continue[d] to assume additional responsibilities" (id.). In addition, the student demonstrated progress in the areas of current events and debate (id. at p. 2). At that time, the student was working on banking skills, but did not yet demonstrate independent skills regarding his bank account (id. at p. 4). In the area of math, the student managed his savings account and created a travel budget with support (id.). In the area of life skills, the student demonstrated skills such as understanding privileges and responsibilities and predicting consequences (id. at p. 5).

At the impartial hearing, the district special education teacher testified that the June 2011 CSE did not obtain a speech-language progress report from Cooke because the student did not receive speech-language therapy at Cooke during the 2010-11 school year (see Tr. p. 81; Dist. Ex. 9 at p. 2).[7] The district special education teacher further testified that to determine the student's speech-language needs without a speech-language therapy progress report, the June 2011 CSE relied, instead, upon information in the November 2009 psychoeducational reevaluation report and information obtained from the student's then-current teacher and other Cooke staff attending the June 2011 CSE meeting about "how they felt he was performing" (id. at pp. 81-82). In addition the June 2011 CSE reviewed the speech-language annual goals in the student's May 2010 IEP with the student's then-current teacher and Cooke staff, and inquired as to whether "they felt that he should still use those goals" (id.; see Dist. Ex. 13 at p. 9). According to the district special education teacher, the student's then-current teacher and Cooke staff informed the June 2011 CSE that the student was still working on the speech-language annual goals in the May 2010 IEP (see Tr. p. 83). Furthermore, a review of the June 2011 CSE meeting minutes revealed that the CSE reviewed and updated the speech-language annual goals (see Dist. Ex. 9 at p. 2). A review of the May 2010 IEP and the June 2011 IEP reveals that the June 2011 CSE copied the two speech-language annual goals in the May 2010 IEP—verbatim—into the June 2011 IEP (compare Dist. Ex. 13 at p. 9, with Dist. Ex. 8 at p. 8).

[7] The evidence in the hearing record inconsistently described whether the student received speech-language therapy at Cooke during the 2010-11 school year (see Tr. pp. 81-85; Dist. Exs. 8 at p. 3; 9 at p. 2).

A review of the June 2011 CSE meeting minutes indicates that the June 2011 CSE noted that the student "stuggle[d] with verbal and oral language," and although he did not receive speech-language therapy during the 2010-11 school year, the student would receive such related service during the 2011-12 school year at Cooke (see Dist. Ex. 9 at p. 2). In addition, the June IEP reflected the student's language needs in the present levels of academic performance and learning characteristics section, which indicated that he "struggle[d] with expressive and receptive language skills" and that the student spoke better when using catch phrases (Dist. Ex. 8 at p. 3). To address the student's speech-language needs, the June 2011 CSE recommended that the student receive two 45-minutes sessions per week of speech-language therapy in a small-group and one 45-minute session per week of individual speech-language therapy (see Dist. Ex. 8 at p. 12). The district special education teacher testified that at the June 2011 CSE meeting, neither the parent nor the student's then-current teacher or Cooke staff requested that the June 2011 CSE conduct a speech-language evaluation of the student (see Tr. pp. 82-83). In addition, the district special education teacher testified that the June 2011 CSE believed that a speech-language evaluation was not necessary because the student would be evaluated when he began receiving speech-language therapy during the 2011-12 school year (see Tr. pp. 83-84).

Based upon the foregoing, it is undisputed that the student exhibited speech-language needs and delays in language processing. The November 2009 psychoeducational reevaluation of the student indicated he exhibited significant receptive and expressive language delays to the extent of interfering with his learning (see Dist. Ex. 3 at p. 2). The June 2011 CSE meeting minutes also indicated the student's language processing skills were an area of need (see Dist. Ex. 9 at pp. 1-2). Moreover, the information in the June 2011 IEP indicated that the student exhibited receptive and expressive language deficits (see Dist. Ex. 8 at p. 3). Notwithstanding, the evidence in the hearing record indicates that the June 2011 CSE did not conduct an updated speech-language evaluation of the student (see Tr. pp. 1-223; Dist. Exs. 1-18; Parent Exs. A-C; E-F). Given the student's speech-language needs and under the circumstances of this case, the parent correctly argues that the June 2011 CSE should have conducted an updated speech-language evaluation of the student and the failure to do so constitutes a procedural violation. However, in this instance, the evidence in the hearing record also establishes that, while a procedural violation, such procedural inadequacy did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year because, here, the June 2011 CSE had sufficient evaluative information available to determine the student's speech-language needs and to appropriately address those needs. Thus, the parent's contention asserted in the cross-appeal must be dismissed.

C. June 2011 IEP

1. 15:1 Special Class Placement

The district asserts that the IHO improperly determined that the recommended 15:1 special class placement was not appropriate for the student. In this case, contrary to the IHO's determination, the evidence in the hearing record supports a finding that the 15:1 special class placement was reasonably calculated to enable the student to receive educational benefits.

Initially, the June 2011 IEP noted that the student functioned at a second grade level in "overall reading," a third grade level in "reading comprehension," and with a "significant" amount of teacher support, the student could "function with a fifth grade level text" (Dist. Ex. 8 at p. 3). In writing, the June 2011 IEP indicated that although the student used "incomplete sentences" and demonstrated difficulties with "mechanics," he could make "inferences and predictions" (id.). The June 2011 IEP further indicated that the student functioned at a fourth grade level in "overall math skills," he struggled with "multi-digit addition," and he was working on "how to use a calculator effectively and to solve two-step problems" (id.). In addition, it was noted that the student "struggle[d] with expressive and receptive language skills" and that he was "more fluent when using catch phrases" (id.). Socially, the student "ask[ed] for help when needed" and was viewed by his peers as a "leader," although it was noted that he did not "take initiative with his leadership" (id. at p. 4).

With respect to strategies to address the student's management needs, the June 2011 IEP indicated that the student required "small group instruction" and recommended the following accommodations and supports: a multisensory approach; the use of manipulatives; scaffolding; additional time to complete work; repetition and rehearsal; verbal and visual cues; graphic organizers, charts, graphs, and checklists; direct teacher modeling and prompts; questions read aloud; and directions read, repeated, and rephrased as needed (Dist. Ex. 8 at p. 3). The June 2011 IEP also included testing accommodations related to the student's participation in State and local assessments (extended time, separate location, calculator except on tests measuring computations, questions read aloud on tests that did not measure reading comprehension, direction read and reread aloud, answers recorded) and included a transition plan outlining the student's post-secondary goals and transition services (id. at pp. 12-15; see Tr. pp. 75-76).

To address the student's needs as identified in the June 2011 IEP, the June 2011 CSE recommended a 15:1 special class placement at a community school with related services (see Dist. Ex. 8 at p. 1, 10-12). State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for students whose "special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). The district special education teacher testified that in reaching the decision to recommend a 15:1 special class placement, the June 2011 CSE considered and discussed the student's evaluative information and input provided by individuals attending the June 2011 CSE meeting (see Tr. pp. 66-77, 89-90). In particular, the district special education teacher testified that the student's then-current teacher provided information to the June 2011 CSE regarding the student's present levels of academic performance and that the annual goals in the June 2011 IEP were drafted with extensive input from the student's then-current teacher (see Tr. p. 71). To this end, the district special education teacher indicated that the annual goals in the June 2011 IEP targeted the student's areas of need as identified by the student's then-current teacher and focused on what the student was working on at Cooke at the time of the June 2011 CSE meeting (see Tr. pp. 71-73).

In addition, the district special education teacher testified that in arriving at the decision to recommend a 15:1 special class placement, the June 2011 CSE considered, but rejected, a 12:1+1 special class placement at a specialized school because it was "too restrictive" for the student (see Tr. p. 73; Dist. Ex. 8 at p. 11). The district special education teacher further testified that the June 2011 CSE believed that the student would benefit most from a "self-contained class with 15

students and a teacher" at a community school where he could "interact with his typically developing peers," but still have the "supports of the smaller classroom" (Tr. p. 74). The district special education teacher acknowledged that at the June 2011 CSE meeting, both the parent and a Cooke representative voiced their opinions that the recommended 15:1 special class placement was not appropriate for the student (see Tr. p. 89-90). However, the district special education teacher testified that after the parent and the Cooke representative voiced this concern, she explained the "continuum of services" and the June 2011 CSE's reasoning for recommending the 15:1 special class placement (Tr. p. 90).

In this case, the June 2011 CSE recommended a 15:1 special class placement for the student based upon his academic and social skills, as well as his progress at his internship and the student's strengths as identified in the spring 2011 Cooke progress report (see Dist. Exs. 8; 12). In addition to the 15:1 special class placement, the evidence indicates that the June 2011 CSE also recommended extensive related services, annual goals, a transition plan, testing accommodations, and strategies to address the student's academic and social/emotional management needs (see Dist. Ex. 8 at pp. 1-15). The district special education teacher testified that a 15:1 special class placement offered the student the supports of a smaller classroom but also promoted the student's independence in preparation for post-secondary life (see Tr. p. 74).

Based upon the foregoing, the evidence in the hearing record supports the district's assertion that the 15:1 special class placement—together with the annual goals and recommended supports and related services—was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE in the LRE for the 2011-12 school year. Consequently, the IHO's finding must be reversed.

D. Challenges to the Assigned Public School Site

The district asserts that the parent's contentions regarding whether the assigned public school site could implement the June 2011 IEP—namely, that the student would have been placed in a CTT class and that the student would not have the opportunity to participate in an internship—must be dismissed. Generally, challenges to an assigned public school site are 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., 553 Fed. App'x at 9; 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., 746 F.3d at 79). 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]).[8] 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 his claims regarding implementation of the June 2011 IEP because a retrospective analysis of how the district would have implemented the student's June 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 his choosing prior to the time the district became obligated to implement the June 2011 IEP (see Dist. Ex. 16). Therefore, the district is correct that the issues raised and the arguments asserted by the parent 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

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

meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the 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 his claims that the assigned public school site could not properly implemented the June 2011 IEP.[9]

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 (see Tr. pp. at 19-28) (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 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12

[9] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. 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., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated August 1, 2012, is modified by reversing that portion which determined that the district failed to offer the student a FAPE in the LRE for the 2011-12 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated August 1, 2012, is modified by reversing that portion which directed the district to directly pay Cooke for the costs of the student's tuition for 2011-12 school year.

Dated: **Albany, New York**
November 25, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER