The University of the State of New York

The State Education Department
State Review Officer
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No. 12-219

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, Brian J. Reimels, Esq., of counsel

South Brooklyn Legal Services, attorneys for respondent, Nancy Bedard, 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 those parts of an impartial hearing officer's (IHO) decision which determined that the district deprived the student of a free appropriate public education (FAPE) for the 2012-13 school year and awarded respondent (the parent) direct funding by the district of the student's tuition at the Rebecca School for the 2012-13 school year and transportation to the school. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On February 14, 2012, a district social worker conducted a functional behavior analysis (FBA) of the student and prepared a behavioral intervention plan (BIP) (Tr. p. 307; Parent Ex. E).[1] On February 15, 2012, the CSE convened to review the student's program and develop his IEP for

[1] On February 17, 2012, per the parent's request, the student was discharged from the district school that he was attending at that time (Tr. pp. 239-42).

the 2012-13 school year (Tr. pp. 303-04; Parent Ex. D at p. 11).[2] The CSE found the student eligible for special education and related services as a student with autism and recommended a 12-month placement for him in a 6:1+1 special class in a specialized school (Tr. pp. 307-08, 422-24; Parent Ex. D at pp. 6-7, 10-11).[3] The student's BIP was incorporated into the February 2012 IEP (Tr. p. 307; Parent Ex. E). The CSE also recommended that the student receive related services consisting of one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a dyad, and two 30-minute sessions per week of individual occupational therapy (OT) in addition to the provision of individual crisis management paraprofessional services on a full-time basis (Parent Ex. D at p. 7). In addition, the CSE developed annual goals designed to address the student's reading, mathematics, OT, speech-language and transition needs (id. at pp. 3-6). The February 2012 IEP was to be implemented on April 13, 2012 (id. at p. 1).[4] In a final notice of recommendation (FNR) dated April 25, 2012, the district summarized the special education and related services recommended in the February 2012 IEP, and identified the particular public school site to which the district assigned the student for the 2012-13 school year (see Parent Ex. C).

Subsequent to the parent's receipt of the April 2012 FNR, the parent's attorney rejected the February 2012 IEP and assigned public school site on behalf of the parent via letter to the district (Parent Ex. F at p. 2).[5] According to the parent's attorney, the parent was familiar with the assigned public school site because the student had attended preschool there and, although the parent described it as a "wonderful program [,] it [wa]s not a program that [wa]s appropriate for [the student]" (id.). Accordingly, the parent requested that the district provide the student with a placement in an approved or non-approved private school for students with autism that could address the student's social development and "high academic potential," in a therapeutic and structured setting (id.).

On May 4, 2012, the parent rejected the February 2012 IEP and assigned public school site (Parent Ex. A at p. 2). On May 8, 2012, accompanied by her attorney, the parent visited the assigned public school site designated in the April 2012 FNR (Tr. pp. 25-26, 34, 477).

In a June 21, 2012 FNR to the parent, the district identified a different assigned public school to implement the February 2012 IEP for the 2012-13 school year, because the parent had changed residences (Tr. p. 522; Parent Ex. AA). On June 22, 2012, the parties proceeded to an impartial hearing, which concluded on September 7, 2012, following four days of testimony (Tr. pp. 1-574). On June 22, 2012, the first day of testimony, the parties agreed to an interim service

[2] As explained further herein, the February 2012 IEP recommended an educational program for the 2012-13 school year with an implementation date of April 2012. As a result, the February 2012 IEP also applied to the remainder of the 2011-2012 school year.

[3] The student's eligibility for special education programs and related services as a student with autism is not in dispute (Tr. p. 58; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] The February 2012 IEP was not scheduled to be implemented until April 2012, because the student required a change in assigned public school site, and the parent needed time to visit the proposed location (Tr. p. 311).

[5] Although the letter is dated February 8, 2012, based on the context of the hearing record, this date appears to be an error (Parent Ex. F).

plan for the student, pursuant to which the student enrolled in a 6:1+1 special class placement and received related services consisting of speech-language therapy and OT during summer 2012 (Tr. pp. 108-09, 352, 357).[6] On July 5, 2012, the district issued another FNR, designating a different assigned public school for the student for the 2012-13 school year as a result of a change in the parent's address (Tr. p. 523; Parent Ex. Y).[7]

In a July 24, 2012 FNR to the parent, the district identified a different assigned public school site to implement the February 2012 IEP, because the parent had rejected the previous assigned public school sites (Tr. pp. 522-23; Parent Ex. BB).[8]

A. Due Process Complaint Notice

By amended due process complaint notice dated July 26, 2012, the parent asserted that the district denied the student a FAPE during the 2011-12 and 2012-13 school years and requested an award of compensatory education in the form of a placement for the student at the Rebecca School for the 2012-13 school year (Parent Ex. V at pp. 1-2).

The parent alleged that in accordance with the student's 2011-12 IEP, the student attended a special class placement in a district community school; however, this was not an appropriate educational setting for the student (Parent Ex. V at p. 1). Briefly, the parent alleged that although the student had a BIP in place, the district community school was not equipped to address his behavioral needs, and on five separate occasions, district school personnel inappropriately contacted Emergency Medical Services (EMS) personnel to transport the student to a psychiatric emergency room (id.). The parent characterized these incidents as "traumatic and terrifying" for herself and the student (id.). Moreover, the parent claimed that as a result of these incidents, the student became fearful of attending school (id. at p. 2).

Next, the parent argued that the 6:1+1 special class recommended by the February 2012 IEP was not appropriate for the student (Parent Ex. V at p. 2). The parent also alleged that the February 2012 IEP would not have been implemented until April 2012, and that as a result, the student would have been forced to remain in an inappropriate program (id.). With regard to the appropriateness of the assigned public school site designated in the April 2012 FNR, the parent contended that it could not provide the student with an appropriate education to meet his academic and functioning needs (id.). The parent also referenced the assigned public school site identified in the June 2012 FNR, but did not raise any specific claims pertaining to its appropriateness (id.). Regarding the assigned public school site specified in the July 5, 2012 FNR, the parent contended that it was not appropriate to meet the student's academic, social and behavioral needs (id.).

[6] A copy of the IHO's order directing the district to implement the interim service plan was not incorporated into the hearing record, nor did the hearing record include a copy of the interim service plan (see Tr. pp. 109-10).

[7] The student attended the assigned public school site identified in the July 5, 2012 FNR during summer 2012 in accordance to the interim service plan agreed to by the parties (compare Tr. pp. 109-10, 341-42, 352, with Parent Ex. BB).

[8] The parent visited the assigned public school site identified on the July 24, 2012 FNR, but she could not recall the date of her visit (Tr. pp. 481-82).

The parent maintained that the student required a school for students with autism, such as the Rebecca School, that could address the student's social development and academic potential and provide him with a therapeutic environment (Parent Ex. V at p. 2). According to the parent, the Rebecca School had agreed to offer the student a placement for the 2012-13 school year (id.). Alternatively, the parent requested the issuance of a Nickerson letter as a remedy for the district's failure to identify an assigned public school site to implement the February 2012 IEP within 30 days of its development (id.).[9]

B. Impartial Hearing Officer Decision

In a decision dated October 16, 2012, the IHO found that the district did not deny the student a FAPE during the 2011-12 school year; however, with respect to the 2012-13 school year, the IHO determined that the hearing record showed that the district denied the student a FAPE, that the parent established that the Rebecca School was an appropriate private placement for the student and that equitable considerations supported the parent's request for relief (IHO Decision at pp. 17, 20-21).

With respect to the parent's claims surrounding the June 2011 IEP, the IHO concluded that the June 2011 CSE's recommendation to place the student in a 12:1+1 special class with individual paraprofessional services in a district community school was appropriate and reasonably calculated to provide the student with educational benefits (IHO Decision at p. 15). The IHO also found that the district promptly sought to remedy what ultimately became an inappropriate educational setting for the student's behavioral needs, but concluded that the parent's actions, including her refusal to consent to the district's request to evaluate the student, frustrated the district's efforts to remedy the deficiencies in the student's placement for the 2011-12 school year (id. at pp. 16-17). Accordingly, the IHO determined that the parent was not entitled to an award of additional services as a remedy for her claims in relation to the 2011-12 school year (id. at p. 17).

Concerning the parent's allegations surrounding the February 2012 CSE and resultant IEP, the IHO concluded that in light of the student's severe and frequent interfering behaviors that required urgent attention before he was available for learning, the February 2012 CSE's recommendation for placement in a 6:1+1 special class in a specialized school with individual paraprofessional services was appropriate (IHO Decision at pp. 18-19). Furthermore, the IHO rejected the parent's claims that the student was not offered a placement in a timely manner, in light of the April 2012 implementation date and rejected the parent's request for the issuance of a Nickerson letter (id. at p. 17).

[9] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

Notwithstanding the IHO's conclusion that the February 2012 IEP was appropriate within its four corners, the IHO proceeded to find that the district failed to establish that it offered the student a FAPE for the 2012-13 school year, because it did not offer any evidence of the functional grouping and learning characteristics of the students who would be placed in the proposed 6:1+1 special class in the student's assigned school (IHO Decision at p. 20). The IHO determined that functional grouping was "essential as part of [a] FAPE" for the student because, despite some speech-language delays, the student could engage in age appropriate conversation and exhibited the ability to work well independently when calm and on task, "traits that were atypical of students with autism" (id. at p. 19). Accordingly, she concluded that an appropriate program for the student included the presence of some classmates who were verbally and intellectually compatible with the student and would also provide socialization and modeling opportunities for him (id. at p. 20). Although the IHO noted that some 6:1+1 special classes contained higher functioning students, she also indicated that a generic 6:1+1 special class would not necessarily address his needs (id.). The IHO reasoned that because the district had failed to present any evidence regarding the functional grouping of the proposed 6:1+1 special classes in any of the assigned public school sites, it did not establish that it provided the student with a FAPE for the 2012-13 school year (id.).

The IHO determined that the parent established that the Rebecca School would be appropriate to meet the student's educational needs (IHO Decision at p. 20). She noted that the Rebecca School would be able to fulfill the student's related service needs and behavior and sensory needs (id. at p. 21). The IHO concluded that the Rebecca School provided opportunities for modeling and intellectual challenge and was likely to permit the student to make meaningful progress (id.). Lastly, the IHO determined that the parent was cooperative throughout the February 2012 CSE process, and therefore, equitable considerations supported her claim for relief (id.). Accordingly, the IHO directed the district to pay the tuition costs for the student to attend the Rebecca School during the 2012-13 school and to provide the student with transportation (id.).

IV. Appeal for State-Level Review

The district appeals the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief. It also appeals the award to the parent of placement of the student at the Rebecca School with direct payment of tuition and transportation to be provided by the district.

The district alleges that the IHO erred in determining that the district failed to provide the student a FAPE for the 2012-13 school year because it failed to prove that the student would have been appropriately functionally grouped with the other students in the recommended 6:1+1 classroom at the proposed assigned school. As an initial matter, the district asserts that the Due Process Complaint Notice failed to include any claims related to the assigned school or functional grouping and, therefore, such claims should not have been addressed by the IHO. Further, the district asserts that even if the Due Process Complaint Notice could be construed to include assigned school and functional grouping claims, those claims should have been rejected by the IHO as speculative, particularly given her finding that the February 2012 IEP was otherwise appropriate. The district also alleges that the IHO erred in analyzing the matter pursuant to Burlington/Carter, because at the time of the impartial hearing the parent was seeking placement of the student at the Rebecca School and direct payment by the district of tuition as a remedy for

the alleged denial of FAPE during the 2012-2013 school year, and the student had not actually been unilaterally placed at the Rebecca School. It further argues that, in any event, there is no evidence to support a finding that the Rebecca School would be an appropriate placement for the student under the Burlington/Carter test. Lastly, while the district maintains that it was improper for the IHO to consider whether equitable considerations supported the parent's claim for relief, the district also alleges that, in any event, there was no evidence in the hearing record that the parent was legally obligated to pay the tuition at the Rebecca School.

In an answer, the parent maintains that the IHO properly concluded that the district did not establish that the February 2012 IEP would be implemented at any of the offered assigned public school sites, including the assigned public school site identified in the July 24, 2012 FNR, because it failed to provide any evidence with respect to the functional grouping of students in the recommended classroom at the assigned school. She requests that the IHO's order directing the district to fund the student's tuition at the Rebecca School for the 2012-13 school year and to provide transportation be upheld.[10]

V. Applicable Standards

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

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

[10] The parent does not cross-appeal any of the IHO's findings by which she was aggrieved; therefore, these determinations are final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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. Assigned Public School Site

On appeal, the district argues that the IHO erred in determining that the student was denied a FAPE for the 2012-13 school year based upon the district's failure to establish at the impartial hearing that the functional grouping of the students in the classroom at the assigned school site would be appropriate for the student.[11] Challenges pertaining to the assigned public school site generally are relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement.[12] However, 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., 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26,

[11] Contrary to the district's contentions, I construe the parent's Due Process Complaint Notice to encompass claims related to the placement of the student at the assigned school.

[12] Although multiple FNRs were issued identifying different assigned public school sites, it appears that the IHO's decision concerns the assigned public school site designated in the July 24, 2012 FNR.

2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; 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 a student would be placed in 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 Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 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., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [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 continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that where the parents have rejected an IEP 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 [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 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 most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP" (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . 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., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see 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] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 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'"]). When the Second Circuit spoke most 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., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In the instant case, the IHO determined that the February 2012 IEP complied with the FAPE requirements established by federal law and "that the recommended 6:1:1 program with a 1:1 paraprofessional was appropriate" for the student (IHO Decision at p. 19). The hearing record amply supports the IHO's finding. State regulations provide that a 6:1+1 special class placement is designed to address students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Consistent with the student's needs and State regulations, the February 2012 CSE recommended that the student be placed in a 12-month 6:1+1 special class placement in a specialized school (Parent Ex. D at pp. 6, 8). Moreover, recognizing the intensity of the student's management needs, the February 2012 CSE also recommended that the student be provided with a full-time individual crisis management paraprofessional and developed a goal that targeted the student's difficulty making transitions (id. at pp. 6-7). The February 2012 CSE also created a BIP for the student that addressed the student's difficulty attending to and following directions from

[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 R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

his teachers and also targeted his tantrum behaviors (Tr. p. 307; Parent Ex. E at pp. 3-4). In addition, the February 2012 IEP included management strategies that the student required, including the provision of a small structured environment, individual attention in order to attend and follow directions from his teachers, repeated directions, and direct supervision when navigating the hallways, and further noted specific situations that were difficult for the student, such as unstructured activities, changes in routines, sitting and attending for extended periods of times, transitions, and engaging in conversation (id. at pp. 1-2).

In addition to recommending the student for placement in a small, highly structured environment, the February 2012 CSE developed six annual goals designed to address the student's academic needs in the areas of reading and math (Parent Ex. D at pp. 3-4). The February 2012 CSE also developed two annual goals that targeted the student's deficits in the areas of fine and visual motor skills related to improving the student's handwriting skills and also recommended the provision of OT (id. at p. 5). With respect to the student's speech-language needs, the February 2012 CSE developed three annual goals designed to improve the student's expressive, receptive and pragmatic language skills and recommended the provision of individual and group speech-language therapy (id. at pp. 5-6).

Accordingly, the record reflects that the student exhibited highly intensive management needs that required individualized attention and intervention, such that the February 2012 CSE's recommendation to place the student in a 6:1+1 special class in a specialized school with an individual full-time crisis management paraprofessional and related services was designed to address the student's academic, social and behavioral needs, and accordingly, was reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

In view of the foregoing, it was error for the IHO to determine that, although the February 2012 IEP and its proposed educational program and related services were appropriate for FAPE purposes, the district nonetheless deprived the student of a FAPE due to its failure to provide sufficient evidence of appropriate functional grouping at the assigned school. However, speculation requiring a retrospective analysis of whether or not the district would have executed the student's February 2012 IEP at the assigned public school site with respect to functional grouping is not an appropriate inquiry under the circumstances of this case (see generally 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 program recommended by the CSE, intended to enroll the student in a private school if she was awarded direct payment of tuition and the student had not attended the assigned public school site specified in the July 24, 2012 FNR prior to the date of the parent's Amended Request for Impartial Hearing or the impartial hearing itself (Parent Exs. A; F). 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 at the particular public school site to which the student was assigned by the district 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 IHO was in error to rule that the district denied the student a FAPE for the 2012-13 school year by failing to establish at the hearing that the functional grouping in the classroom at the assigned school – which the student admittedly had not attended – would have been appropriate for the student.

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 2012-13 school year, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 16, 2012, is modified by reversing that portion of the IHO's order directing the district to reimburse the parent for the costs of the student's tuition at the Rebecca School and provide transportation services to the student for the 2012-13 school year.

Dated: **Albany, New York**
July 31, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER