The University of the State of New York

The State Education Department
State Review Officer
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No. 13-001

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, Jessica C. Darpino, Esq., of counsel

Law Offices of Neil Howard Rosenberg, attorneys for respondents, Neil H. Rosenberg, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The hearing record reflects that the student suffered a stroke at the age of three weeks old and has received diagnoses of a seizure disorder and right hemiplegia (Parent Ex. A at p. 1; Dist. Ex. 3 at p. 2). The student received early intervention services and preschool special education services, including special education itinerant teacher (SEIT) services, occupational therapy (OT),

speech-language therapy, and physical therapy (PT) (Dist. Ex. 12 at p. 1). The student attended an integrated co-teaching (ICT) preschool program (Dist. Ex. 7 at p. 1).[1]

On April 29, 2011, the CSE convened to conduct a "turning five" conference regarding the student which anticipated the student's transition from preschool into kindergarten, and determined that the student continued to be eligible to receive special education services as a student classified with a traumatic brain injury (TBI) (Tr. p. 74-75; Dist. Ex. 3 at pp. 12-13). The CSE recommended that the student be placed in a 12:1+1 special class in a community school with a 1:1 full time health paraprofessional and the following related individual services: one 30-minute session per week of speech-language therapy; three 30-minute sessions per week of OT; and five 30-minute sessions per week of PT (Dist. Ex. 3 at p. 9). In addition, the CSE recommended two 30-minute sessions per week of speechlanguage therapy in a group (id.)

In a final notice of recommendation dated June 15, 2011, the district reiterated the 12:1+1 special class recommendation and identified the particular school that the student would be assigned to for the 2011-12 school year (Dist. Ex. 17 at p. 1). The parents visited the assigned school on two separate occasions and by letters dated August 24, 2011, and September 12, 2011, the father informed the district of his concerns that the recommended placement was not appropriate for the student and that he would be sending the student to Aaron for the 2011-12 school year (Dist. Ex. 18 at p. 1; Parent Ex. A at p. 1).[2]

A. Due Process Complaint Notice

By due process complaint notice dated October 21, 2011, the parents alleged that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1). Specifically, the parents alleged that: the CSE did not properly convene the April 2011 CSE meeting; the CSE was invalidly composed; the April 2011 IEP failed to accurately describe the student and did not reflect provided documentation; and the goals and objectives in the April 2011 IEP did not address the special education needs of the student (id. at p. 1). The parents also alleged that the assigned public school site was inappropriate because the school size and class size were too large to enable the student to make educational progress; the grouping in the proposed classroom was inappropriate; the student would not receive support to address his' safety and social needs, and the student would not be able to navigate the stairs at the school (id. at pp. 1-2). For relief, the parents requested tuition reimbursement, transportation, and related services at Aaron for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

On January 26, 2012, the parties proceeded to an impartial hearing, which after four nonconsecutive days of proceedings, concluded on May 8, 2012 (see Tr. pp. 1-392). By decision dated November 26, 2012, the IHO concluded that the district failed to offer the student a FAPE

[1] Although the terms collaborative team teaching or CTT are used interchangeably with ICT in the hearing record (see, e.g., Tr. pp. 79, 120, 122, 166), this decision refers to these services as ICT services for the sake of consistency with State regulations (see 8 NYCRR 200.6[g]).

[2] I note that the parents visited the assigned school on two separate occasions because they were notified during their initial visit that the school would be changing locations for the 2011-12 school year.

for the 2011-12 school year, the student's unilateral placement at Aaron was appropriate, and equitable considerations weighed in favor of the parent's request for tuition reimbursement (see IHO Decision at pp. 6-18).

With regard to the parents' claim that the CSE was invalidly composed, the IHO determined that any inadequacies with respect to the presence of a general education and special education teacher who would implement the IEP did not rise to the level of a denial of FAPE (IHO Decision at pp. 7-8). The IHO determined that the student was not being considered for a general education placement and, nevertheless, the district school psychologist qualified as a general education teacher (id. at p. 8). Furthermore, the IHO found that there were two qualified special education teachers present at the CSE meeting, and while it was troubling that neither were familiar with the district programs, this procedural infirmity, standing alone, did not rise to the level of a denial of FAPE (id.). Additionally, the IHO determined that the CSE followed the correct procedures in convening and conducting the meeting (id. at pp. 8-9). The IHO found that evaluations were available and a program was recommended (id. at p. 9). While the parents claimed they were uninformed at the CSE meeting, the IHO held that they were accompanied by educators who knew the student and actively participated in the meeting (id.).

The IHO determined that the hearing record supported the parents' assertions that the goals were developed in advance of the April 2011 CSE meeting and without any meaningful discussion during the CSE meeting (IHO Decision at p. 6). Furthermore, the IHO found that many of the goals were taken from teacher reports, prior years' goal statements, and input from preschool teachers who were not familiar with the proposed district elementary school program (id.). According to the IHO, the goals lacked specificity, failed to address the student's' math and reading needs, and lacked methods of measurement (id. at p. 10-11). In addition, the IHO noted that the IEP did not detail the role of the recommended health paraprofessional, that some sections of the IEP were left incomplete, and that the IEP did not address the student's tendency to have episodes where he became unfocused and did not respond to verbal prompts (id. at p. 6-7, 10-11).

With regard to the parents' assigned school claims, the IHO determined that since the parents' did not accept the proposed public school placement, any claims regarding its appropriateness were speculative and the district was not required to prove that it could implement the April 2011 IEP (IHO Decision at p. 10). Instead, the IHO stated that he would determine the sufficiency of the district's offered program on the basis of the IEP itself (id.). The IHO then found that the April 2011 IEP did not adequately address the student's seizure disorder and mobility issues (id. at pp. 12-14). Specifically, the IHO noted that the student's seizure disorder was exacerbated by large over-stimulating environments, found that the absence of an elevator in the assigned school would make it difficult for the student to navigate his environment, and the student's lack of stamina would make it difficult for him to access the recommended related services during the school day (id.).[3]

[3] The parents due process complaint does not include claims related to the IHO's findings that the April 2011 IEP was inappropriate because it did not address how the student's seizure disorder is affected by large environments, the student's need for an elevator, or how the student's lack of stamina would affect his access to related services during the school day (Dist. Ex. 1). Instead, to the extent that any of these claims are raised in the due process complaint notice, they were raised as allegations that the assigned public school site was inappropriate (id.). Accordingly, arguments relative to these allegations as claims that the April 2011 IEP was not appropriate are not

The IHO determined that Aaron was an appropriate placement for the student for the 2011-12 school year (IHO Decision at pp. 15-17). The IHO found that Aaron addressed the student's special needs and provided a safe environment and that the student had made progress (id.). The IHO also determined that there was no basis to deny the parents' request for tuition reimbursement based on equitable considerations, finding that the parents provided the district with proper notice of their intention to place the student at Aaron (id. at pp. 17-18). The IHO awarded the parents reimbursement for the cost of the student's tuition at Aaron (id. at p. 18).

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, that Aaron was an appropriate placement, and that equitable considerations weighed in favor of the parents. Specifically, the district argues that placement in a 12:1+1 special class in a community school with a 1:1 health paraprofessional and related services was appropriate. Additionally, the district asserts that the goals set forth in the April 2011 IEP addressed the student's special education needs and included criteria and methods of measurement. Finally, the district notes that a barrier free environment was not recommended because the student was capable of using stairs and the playground with assistance.

The parents answer, denying the substance of the district's allegations and contending, among other things, that a 12:1+1 special class in a community school is too large for the student, the role of the 1:1 health paraprofessional is unclear, and the IEP goals are inappropriate and were never discussed during the CSE meeting.

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

properly raised in this appeal and are outside the scope of review (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d 167, 188-89 & n.4; see also M.H. v. New York City Dep't of Educ., 685 F.3d 217, 249-50 [2d Cir. 2012]).

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. April 2011 IEP

1. Evaluative Information and Present Levels of Performance

On appeal, the district argues that the IHO erred in determining that the goals in the April 2011 IEP were improperly formulated and failed to address the student's educational needs. Specifically, the IHO found that the goals "were not developed in any meaningful way at the CSE meeting but, rather they were pieced together from teacher reports, prior year goal statements and from input from preschool teachers who were not familiar with the proposed elementary program" (IHO Decision at p. 6). To address whether the goals were appropriate to meet the student's needs, it is first necessary to briefly review the evaluative information available to the CSE.

The hearing record indicates that at the April 2011 CSE meeting, the CSE had available for its consideration 'a March 2010 SEIT progress report, a January 2011 1:1 paraprofessional rationale, a January 2011 speech-language progress report, a February 2011 OT progress report, a February 2011 preschool program progress report, a February 2011 PT report, and an April 2011

classroom observation (Tr. pp. 84- 85; Dist. Exs. 4-8; 10; 12). A review of the April 2011 IEP indicates that the CSE utilized these assessments to describe the student's present levels of performance and special education needs. For example, the present levels of performance contained in the April 2011 IEP for the student stated that the student possessed some pre-academic skills, such as recognizing most upper case letters, rote counting up to 12, identifying basic shapes and colors, and the ability to follow one step directions, closely mirroring the description contained in the February 2011 preschool progress report (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 7 at p. 1). Also in accordance with the February 2011 preschool progress report, the April 2011 IEP stated that while the student was enthusiastic during class activities, he exhibited difficulty attending to tasks, seemed unfocused at times, required 1:1 support during teacher directed activities, exhibited poor short term memory and that the student benefitted from verbal repetition and having tasks broken down (id.). Furthermore, as conveyed in the February 2011 preschool progress report, the April 2011 IEP revealed that the student had significant difficulty with gross motor planning, exhibited rigid behavior when faced with challenges and needed teacher support with social interactions and play skills (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at p. 2). Finally, as described in the February 2011 PT report, the April 2011 IEP asserted that the student's medical issues significantly impacted his abilities in the classroom and in therapy (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 5 at p. 3).

Thus, a review of the information considered by the April 2011 CSE shows that the district utilized the available evaluations to reflect the student's present levels of academic achievement and functional performance in an IEP that indicated the student's special education needs arising from his disability (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see also P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *11 [S.D.N.Y. July 22, 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that "addresses those issues"]).

2. Adequacy of Goals

Relative to the parties' dispute concerning the substantive adequacy of the annual goals and short-term objectives set forth in the April 2011 IEP, State and federal regulations require that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Upon review of the hearing record, the district did not deny the student a FAPE based upon inadequate, vague, and immeasurable annual goals. Here, the April 2011 IEP contains approximately 16 annual goals that addressed the student's needs in the areas of academics, speech-language, attention, and fine and gross motor skills (Dist. Ex. 3 at pp. 3-8). Specifically, to address the student's academic abilities goals were developed to improve the student's understanding of basic concepts such as close/open and empty/full, identify similarities and differences between

common objects, to count by rote, to match objects according to shape, and to sequence pictures and events (Dist. Ex. 3 at pp. 3-4; see Dist. Ex. 7). To address the student's significant difficulty with attending to tasks goals were developed to increase his ability to remain on task with minimal verbal prompts, return to task after being distracted, and attend to task for five minutes (Dist. Ex. 3 at pp. 5-6; see Dist. Exs. 4-7; 12). To address the student's difficulty with responding to questions and difficulties with language comprehension, goals were developed to work on his ability to respond to questions about pictures and make simple inferences, and respond to yes/no and wh-questions during simple board games (Dist. Ex. 3 at pp. 5-6; see Dist. Ex. 4). As indicated in the student's February 2011 preschool OT report, the student used a tripod grasp at times but often reverted to less mature grasp; and was unable to copy lines and circles (Dist. Ex. 6 at p. 3). In order to address this need, the April 2011 IEP included a goal for the student to copy shapes using tripod grasp (Dist. Ex. 3 at p. 6-7). The February 2011 PT evaluation stated that the student enjoyed ball activities, was able to throw a ball overhead with good force and direction, and was able to catch a ball consistently with verbal cues to visually focus (Dist. Ex. 5 at p. 3). To further develop the student's abilities, the April 2011 IEP included a goal for the student to throw a ball at a target and catch a ball using both hands (Dist. Ex. 3 at p. 7).[4] The student's needs with regard to motor planning, balance and coordination and poor body awareness were addressed with goals to push a toy through an obstacle course; ascend stairs with use of a handrail; and descend stairs without using a handrail (Dist. Ex. 3 at pp. 7-8, Dist. Ex. 5 at pp. 2-3). Thus, the record supports a conclusion that the CSE adequately addressed the students' needs as reflected in the evaluative data available to the CSE with goals that were reasonably calculated to produce educational progress (see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]). To the extent that the goals were not as well-tailored as could be desired, they were aligned with the student's needs sufficiently to guide a teacher in providing his instruction (see D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 360-61 [S.D.N.Y. Sept. 16, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

3. 12:1+1 Special Class

The parties also dispute on appeal whether the April 2011 IEP's recommendation for a 12:1+1 special class in a community school with a full-time 1:1 health paraprofessional was appropriate to address the student's needs. Specifically, the district argues that the IHO erred in finding that the placement would not provide the student with sufficient support and individualized instruction to make educational progress. For the reasons that follow, the hearing record supports a finding that a 12:1+1 class with the services of a 1:1 paraprofessional would have met the student's needs.

[4] Although the IHO indicated that this goal was unrealistic because the student did not use his right hand (IHO Decision at p. 11), upon review of the hearing record, this goal was included as part of the PT report and the PT report indicated that the student used his right hand as a "gross assist when encouraged to do so" (Dist. Ex. 5 at pp. 2, 4).

State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). According to testimony of the district representative at the April 2011 CSE meeting, the decision to recommend a 12:1+1 special class placement was based on discussions with the student's teacher and the reports, which indicated that the student required a small, structured setting (Tr. pp. 112-13). The district representative contended that because the 12:1+1 class was small, the student would receive the supports and task breakdown that he required (Tr. p. 112). The April 2011 CSE considered placing the student in an ICT program and a general education program, but agreed that they would not be supportive enough for the student (Tr. p. 120; Dist. Ex. 3 at p. 14). The district representative also testified that the district had classes with six students but she thought they were "too restrictive" for the student because of his academic abilities (Tr. pp. 148-49). In addition, the parent testified that the April 2011 CSE discussed an 8:1+1 special class, which he opined would be better for the student than a 12:1+1 special class due to the smaller size but would still be inappropriate for the student, as the 8:1+1 special class served students with severe behavior needs (Tr. pp. 350-51). The special education director at the student's preschool program testified that at the April 2011 CSE meeting, the majority of the meeting was dedicated to a discussion regarding the appropriate class size for the student for the coming school year (Tr. p. 252). The preschool program special education director contended that she was afforded the opportunity during the April 2011 CSE meeting to express her opinion regarding this issue (Tr. p. 253). The special education director also stated that the parent wanted the student to "remain in the community" because of the student's strengths in the area of socialization, and that he enjoyed interacting with his peers (Tr. p. 254).

With regard to the parent's claim that the district failed to specify the role of the 1:1 health paraprofessional on the April 2011 IEP, I note that while the district is responsible for ensuring that the recommendations contained in the IEP are properly implemented, neither the IDEA nor federal or State regulations require as a general matter that the duties or training of district staff be specified in a student's IEP (20 U.S.C. § 1414[d][1][A]; 34 CFR 300.320; 8 NYCRR 200.4[d][2]; Application of a Student with a Disability, Appeal No. 12-098). When describing the role of the 1:1 paraprofessional, the district representative testified that this individual would be for "during lunch and recess and to navigate the classroom" and stairs; needs that the student's preschool special education teacher stated that the student demonstrated (Tr. pp. 143, 157-58). Moreover, the April 2011 IEP identified the student's present levels of performance, which state that the student required 1:1 teacher support to sit and engage in a teacher directed activity, that unless the student had 1:1 teacher support, he would move from one activity to the next with no closure, that difficulties with gross motor planning and attention necessitate significant teacher support, and that he needed strong teacher support to mediate social relationships and play skills (Dist. Ex. 3 at pp. 1-2). Finally, the physical development section of the April 2011 IEP details the student's medical history and diagnoses of right hemiplegia and a seizure disorder, a condition for which the student took medication (Dist. Ex. 3 at p. 2). Thus, while a detailed role for the health paraprofessional is not indicated on the IEP, the IEP documents the health concerns of the student and how they impact his performance in the classroom (id.). In light of these considerations, I find that the CSE's failure to include a detailed list of duties for the 1:1 health paraprofessional on the April 2011 IEP does not rise to the level of a denial of a FAPE.

Based on the above, the April 2011 CSE considered the parent's concerns about class size and determined that the structure and support offered in the 12:1+1 special class placement, together with the recommended 1:1 paraprofessional, annual goals and management needs was appropriate to address the student's needs. The district's placement of the student in a class that was larger than may have been desired by the parents "does not mean that the placement was not reasonably calculated to provide educational benefits" (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012]). In addition, the April 2011 CSE developed a program that was reasonably calculated to enable the student to receive educational benefits in a setting in which the CSE believed the student would have access to nondisabled peers to the maximum extent appropriate (Newington, 546 F.3d at 119-20). Accordingly, although the district might not have offered a program that would maximize the student's potential, in this instance the district has met its obligation to offer the student an appropriate one (Rowley, 458 U.S. at 189).

C. Assigned Public School Site

On appeal, the district asserts that while the IHO correctly found the parent's claims related to the assigned public school site to be speculative, the IHO erred in determining that the the size of the school and class, the lack of an elevator in the assigned school, and the delivery of related services at the school rendered the placement inappropriate. The district argues that any claims regarding the recommended placement are speculative because the parents did not accept the placement or send their student to the district public school. The parent's answer, arguing that claims regarding the assigned school are not speculative since they were concrete recommendations made by the district that were fixed at the time of the IEP.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 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]).[5] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the April 2011 IEP because a retrospective analysis of how the district would have implemented the student's April 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 parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the April 2011 IEP (see Dist. Ex. 18; Parent Ex. A). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered

[5] 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.

inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the April 2011 IEP.[6]

Even assuming that the student had attended the district's assigned school, I have reviewed the evidence in the hearing record and, as discussed below, find that the deficiencies alleged by the parents would not rise to the level of a denial of a FAPE.

1. Size of Assigned School

According to the April 2011 IEP, the student would benefit from a "small structured language based program with no more than 12 students" (Dist. Ex. 3 at p. 1). While the assigned school in this case had approximately 300 students between kindergarten and second grade, the hearing record indicates that the student would have limited exposure to the entire student body (Tr. p. 27) and there is nothing in the evaluative information available to the CSE indicating that the student would not receive educational benefits if he was in the general vicinity of a larger number of people. The hearing record further indicates that transitions at the assigned public school site were staggered in an effort to limit the number of students in the hallway at any given time (id.). Additionally, lunchtime and recess each had a maximum of forty students accompanied by 10 adults (Tr. pp. 29-30). Accordingly, inasmuch as the student would be in a small structured classroom environment and have the assistance of a 1:1 health paraprofessional to help him navigate the school throughout the day, the hearing record does not support a finding that the student would have been denied a FAPE on the basis of the size of the assigned public school site if he had attended the public school (Dist. Ex. 3 at p. 9).

[6] 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]; 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]).

2. Lack of an Elevator

With regard to the IHO's determination that the absence of an elevator at the assigned school made it an inappropriate placement for the student, I note that the hearing record indicates that the student is capable of using stairs and playground equipment with assistance (Dist. Ex. 6 at p. 3). The hearing record indicates that neither a barrier free environment nor the need for an elevator was discussed during the April 2011 CSE meeting because the student is able to navigate stairs with assistance (Tr. pp. 159-161). Nevertheless, the CSE recognized that the student has mobility issues and as a result, the April 2011 IEP recommended a full-time 1:1 health paraprofessional to assist the student with, among other things, his ambulatory issues (Tr. pp. 158, 160). Additionally, among the student's PT goals were ascending "1 flight of stairs independently, a reciprocal gait, leading with either leg, with use of a handrail and without posturing his arms for stability" and descending "1 flight of stairs non-reciprocally and reciprocally without use of a handrail" (Dist. Ex. 3 at p. 8). Furthermore, the hearing record indicates that mobility issues were very common at the assigned school and thus the teacher of the proposed classroom often had accommodated students who required additional time to transition from room to room within the school (Tr. p. 27-28). In such situations, the teacher of the proposed classroom stated she would leave the class with the student five minutes early and accompany them to the next class (Tr. p. 28). Thus, while I can appreciate the parents' preference for a school with an elevator, failure to accommodate that preference does not amount to a denial of FAPE by the district.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Aaron or whether the equities support the parents' claim for the tuition costs at public expense (Burlington, 471 U.S. at 370; MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

THE APPEAL IS SUSTAINED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER