The University of the State of New York

The State Education Department
State Review Officer
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No. 13-103

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

Appearances:
Susan Luger Associates, Inc., special education advocates for petitioners, Adriane Gavronsky, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The hearing record reflects that the student received a diagnosis of a mild pervasive developmental disorder at two and a half years of age (Parent Ex. S at p. 3). The record also reflects that the student has a history of significant, early delays in speech and language, chronic academic and social difficulties, and anxiety (id. at p. 2). At the time of the CSE meeting at issue in this matter the student was nearly 20 years old and was attending Winston Prep and participating in a transition program for students with special learning needs (Parent Exs. P; T at p. 1). The program—Skills and Knowledge for Independent Living and Learning (SKILLS)—was developed through a cooperative arrangement between New York University, Winston Prep, and the Cooke Center Academy (Cooke) (Tr. pp. 282-83, 551-53; Parent Exs. J at p. 1; P; R at p. 1; T).

By notice dated May 12, 2011, the district invited the parents to participate in the annual review to develop the student's educational program for the 2011-12 school year (Dist. Ex. 7). By letter dated May 22, 2011, the student's mother forwarded the student's progress report for fall 2010 to the district and indicated that she would forward his progress report for spring 2011 upon receipt (Dist. Ex. 6 at p. 1).[1]

On June 1, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year. Having determined that the student remained eligible for special education and related services as a student with a speech or language impairment, the June 2011 CSE recommended placement in a 15:1 special class in a community school (Parent Ex. B at pp. 1-2).[2] In addition, the June 2011 CSE recommended related services consisting of group speech-language therapy two times per week for 40 minutes per session and group counseling two times per week for 40 minutes per session (id. at p. 18). The June 2011 CSE developed annual goals to address the student's needs in relation to mathematics, writing, decoding, reading comprehension, receptive and expressive language, pragmatic language, and vocational planning (Parent Ex. B at pp. 6-15).

By final notice of recommendation (FNR) dated June 29, 2011, the district summarized the special education and related services recommended in the June 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Parent Ex. D at pp. 1-2). By letter dated August 1, 2011, the student's mother acknowledged receipt of the FNR and informed the district that the recommended assigned public school placement was not appropriate for the student (Parent Ex. E). Further, the student's mother notified the district of her intent to have the student remain at his then-current unilateral placement, Winston Prep, for the 2011-12 school year at district expense (Parent Ex. E).

A. Due Process Complaint Notice

By due process complaint notice dated October 13, 2011, the parents requested an impartial hearing (Parent Ex. A). The parents' due process complaint notice challenged the adequacy and appropriateness of the June 2011 IEP and assigned public school site. Specifically, the parents contended that (1) the June 2011 CSE was improperly composed; (2) the student's Winston Prep providers did not participate in the entire meeting; (3) the district failed to make a timely recommendation; (4) the district failed to recommend an appropriate program with adequate and appropriate supports; (5) the annual goals and short term objectives were not reasonably calculated to confer educational benefit and did not meet the student's needs; (6) transition planning was not developed or discussed at the June 2011 CSE meeting; (7) the student's transition needs were not assessed; (8) the assigned public school site was too large; (9) the recommended class size was too large; and (10) the recommended program did not provide for 1:1 instruction (id. at pp. 2-3).

[1] The student's mother indicated in her letter that she also enclosed a letter from the student's doctor. The doctor's letter is not in evidence (District Ex. 6).

[2] The June 2011 IEP indicated the June 2011 CSE recommended both a twelve-month and 10-month program (Parent Ex. B at p. 1). Subsequently in the document, the twelve-month notation was crossed out and the projected date of implementation is specified as September 7, 2011, reflective of a 10-month program recommendation (id. at p. 2).

The parents alleged that the district denied the student a FAPE; that Winston Prep was an appropriate program for the student and that equitable considerations favored the parents (Parent Ex. A at pp. 2, 5). As a proposed resolution, the parents requested "a small, supportive, structured class, with a small student to teacher ratio and where there is ample opportunity for 1:1 instruction" (id. at p. 5). For relief, the parents requested public funding of the costs of the student's tuition at Winston Prep, including the costs of transportation (id.).

B. Impartial Hearing Officer Decision

After a pre-hearing conference was held on March 5, 2012, the impartial hearing proceeded before an IHO (IHO 1) for an additional five hearing dates (Tr. pp. 1-655). During a telephonic posthearing conference held July 27, 2012, IHO 1 indicated that the record close date was August 29, 2012, and that she would render her decision shortly thereafter (Tr. p. 678). IHO 1 did not render a decision in this matter and on or about December 10, 2012, she recused herself (Parent Ex. Y at p. 5). On or about January 15, 2013, a second IHO (IHO 2) was appointed to complete the impartial hearing (IHO Decision at p. 3). A conference was held January 24, 2013, wherein IHO 2 confirmed that the parties had concluded presenting witnesses and established that the record was complete (Tr. pp. 680-697).

In a decision dated May 7, 2013, IHO 2 determined that the district offered the student a FAPE for the 2011-12 school year and denied the parents' request for tuition reimbursement (IHO Decision at p. 11). IHO 2 found that any procedural violations did not rise to the level of a denial of FAPE (id. at pp. 11-12, 15-16). IHO 2 also found that June 2011 CSE considered both a special class in a specialized school and a special class in a community school and appropriately recommended a 15:1 special class in a community school with the related services of group counseling and group speech-language therapy (id. at p. 15). IHO 2 also concluded that the June 2011 CSE recommended appropriate annual goals and short term objectives and that the recommended transition services and long term adult outcomes were adequate (id. at pp. 13-15). With regard to the parents' assigned school site claims, IHO 2 determined that the parents failed to raise a specific challenge to the district's assigned school site in the due process complaint notice beyond "boilerplate language of uncertain inappropriateness" (id. at p. 6). Therefore, in reaching his conclusions, IHO 2 primarily focused on "the appropriateness of the offered program through the 2011-2012 IEP" (id. at p. 7).

Although evidence was presented as to the appropriateness of Winston Prep, IHO 2 made no findings thereon as he had found that the district offered the student a FAPE (id. at p. 11). Nevertheless, IHO 2 determined that even if the district had failed to offer the student a FAPE, he had "serious doubts" that equitable considerations would favor an award of tuition reimbursement (id. at p. 16).

IV. Appeal for State-Level Review

The parents appeal, requesting that IHO 2's decision be overturned with respect to the appropriateness of the recommended program and placement as well as his findings regarding equitable considerations. The parents also request that an SRO find Winston Prep to be an appropriate placement for the student and order the district to reimburse the parents for the costs of the student's attendance at Winston Prep for the 2011-12 school year. The parents argue that

the district failed to offer the student a FAPE because a 15:1 special class in a community school would not provide sufficient 1:1 support to enable the student to make educational progress; the annual goals and short term objectives were not appropriate; the transition goals and services were inadequate; and the assigned school site was inappropriate. The parents do not appeal IHO 2's determinations that (1) the composition of the June 2011 CSE did not result in a denial of a FAPE to the student; (2) all CSE members participated for the entirety of the June 2011 CSE meeting; and (3) the district timely recommended a program and placement for the student.

In an answer, the district responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. In addition, the district asserts that the June 2011 IEP and the proposed placement in a community school were appropriate, Winston Prep was not appropriate, and equitable considerations favor the district.

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 officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Before reaching the merits of this case, a determination must be made regarding which claims are properly raised on appeal. The district argues that the parents impermissibly raised a number of issues on appeal that were not contained in their due process complaint.

A review of the due process complaint notice reveals that the district is correct. The parents alleged for the first time in their petition that: (1) the June 2011 IEP was altered after the CSE meeting without the parents' consent;[3] (2) the assigned public school site could not implement the June 2011 IEP; (3) the related services were not developed or discussed at the June 2011 CSE meeting and the parents do not agree with them; and (4) the CSE did not consider a privately obtained neuropsychological evaluation.

With respect to these claims, a party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). The parents' due process complaint notice cannot reasonably be read to include these claims (see Parent Ex. A). Further, a review of the hearing record shows that the district did not agree to an expansion of the

[3] The parents claim that the June 2011 CSE recommended 12-month school year services for the student and that the June 2011 IEP was changed after the CSE meeting to reflect that the student was recommended to receive services on a 10-month school year basis. In its answer, the district argues that the June 2011 IEP was not altered, rather it contained a typographical error wherein the check boxes to indicate "yes" or "no" for a 12-month school year were both erroneously checked off. The CSE minutes and the IEP contain no other references to 12-month school year services (Dist. Ex 10; Parent Ex. B). Lastly, this claim is contradicted by the due process complaint notice, wherein the parents challenged the timeliness of the district's recommendation and stated that the student was mandated for a 10-month school year program (Parent Ex. A at p. 3).

scope of the impartial hearing to include these issues, nor did the parents attempt to amend the due process complaint notice to include these issues. Therefore, these allegations are outside the scope of my review and will not be considered.[4]

2. Pleadings on Appeal

In a reply, the parents assert that the district's answer was never received by mail and therefore must be deemed untimely. Counsel for the parents maintains that a copy of the district's answer was received by electronic mail in response to her request for same and therefore the district failed to timely serve the answer. The district has provided an affidavit of service of the answer and the counsel for the parents has provided an affidavit from the mail handler at counsel's mailing address as further proof that the answer was never received. As such, the parents request that the SRO reject the district's answer. The parents argue that the presumption of receipt by the addressee upon proof of service by mail is rebuttable and that the affidavit of the mail handler is sufficient evidence to rebut the presumption that the district's answer was timely served. According to State regulation, however, determination of whether the district's pleading was timely served relates to when the district completed service and not when the pleading was received (see 8 NYCRR 279.5, 279.11; see also 8 NYCRR 275.8[a]-[b]). The district's affidavit of service indicates that the answer was timely mailed to counsel for the parents. The parents do not allege that the answer was not timely mailed, rather they argue that the answer was never received. There being insufficient cause to question the accuracy or reliability of the district's affidavit of service, the answer is accepted.[5]

Also in their reply, the parents reiterate claims made in the petition and the due process complaint notice and generally respond to the district's answer. State regulation provides that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by the respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). As the reply does not address any procedural defenses raised by the district and exceeds the permissible scope of such a pleading, the allegations raised therein will not be considered.

3. Conduct of Impartial Hearing

On appeal, the parents argue that the IHO erred by refusing to consider the testimony of the student's head teacher upon learning that the teacher had reviewed the transcript of her direct testimony before appearing for cross-examination. The parents also allege that the IHO failed to consider any documentary evidence as well as other relevant and material evidence concerning the

[4] Additionally, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to these issues (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; see M.H., 685 F.3d at 250-51; N.K v. New York City Dep't of Educ., 961 F. Supp.2d 577, 585 [S.D.N.Y. 2013]).

[5] However, were the answer to be excluded, the ultimate resolution of this matter would remain the same, as I am required to render an impartial decision based upon an independent review of the entire hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

appropriateness of the district's recommendations in rendering his decision. The parents contend that they were unfairly maligned in the IHO's decision, but do not specifically allege any bias.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of the Bd. of Educ., Appeal No. 09-057). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" and, moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). Nevertheless, it is also an IHO's responsibility to ensure that there is an adequate record upon which to permit meaningful review.

IHO 1 allowed cross-examination of the student's head teacher to proceed and requested that the parties prepare memoranda for her review before determining whether or not to exclude the witness' testimony in its entirety or to draw a negative inference (Tr. pp. 510-12). IHO 2, who did not hear any live testimony during the hearing, stated that he did not consider any of the testimony of the student's head teacher because she reviewed her direct examination prior to appearing for cross-examination (IHO Decision at p. 11). Under the circumstances of this case I find that IHO 2 improperly excluded the testimony of the student's head teacher for reviewing her testimony on direct examination. The head teacher stated that counsel for the parents had provided her with the testimony of multiple witnesses, but that she had reviewed only her own and had not read other witnesses' testimony from the prior hearing dates (Tr. pp. 500-04). In this instance exclusion of the testimony in its entirety was not necessary to prevent a material prejudice to the opposing party; however, counsel is warned not to risk tainting the hearing process by allowing or encouraging witnesses to review transcriptions of the hearing before their hearing testimony is concluded and should advise witnesses against such conduct. I have carefully reviewed the entire hearing record including all of the witness testimony. Although the parents have not alleged that IHO 2 exhibited any bias toward them, it was not proper for IHO 2 to comment on the parents' failure to attend each hearing date (IHO Decision at pp. 16-17).

B. June 2011 IEP

1. Annual Goals

Turning to the merits of the appeal, the parents contend that the IHO 2 erred by finding that the annual goals set forth in the June 2011 IEP were appropriate. The parents also argue that goals contributed by the student's then-current teacher were not included in the June 2011 IEP. IHO 2 found that the annual goals specifically targeted the student's areas of need, aligned with the student's present levels of educational performance and were measurable. The evidence in the hearing record supports the IHO's determination.

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]).

In preparation for the June 2011 CSE meeting, the student's then-current SKILLS teacher developed notes to discuss at the CSE meeting (Parent Ex. T). The teacher described the student's academic and social/emotional performance levels and provided management needs and goals for each area (id. at pp. 1-4). Regarding the student's academic performance, the teacher noted that the student's reading skills were at a fifth grade instructional level and that he demonstrated written expression at a mid-fourth grade level (id. at p. 1).[6] The teacher also noted that the student could write complete, simple sentences, but struggled to develop a cohesive paragraph (id.). Additionally, his writing lacked organization when not provided with sentence starters and graphic organizers (id.). In mathematics, the teacher reported that the student's overall scores yielded a sixth grade performance level and although the student relied on a calculator, he could explain the reasoning behind the operations when prompted (id.). The teacher's notes indicated that the student tutored peers in basic addition and subtraction of decimals, multiplication of fractions, and in percentages (id.). The teacher noted that the student could perform basic algebraic calculations in word problems inconsistently without teacher support (id.). To manage the student's academic needs the student's teacher indicated the student required directions read and re-read, extra time, redirection, and checks for understanding (id.).

Regarding the student's social/emotional performance, the teacher's notes indicated that the student made a smooth transition into his first year in the school's SKILLS program (Parent Ex. T at p. 1). The student's teacher also noted that the student demonstrated improvement in social and academic skills by engaging peers directly when working in small groups, that he volunteered answers once per week in literacy class, and that he participated in every class, but continued to have difficulty restraining himself from calling out answers (id.). The teacher also noted that the student engaged his teachers in polite greetings without prompting (id.). The student's teacher described the management strategies utilized to address the student's social/emotional needs, which included positive reinforcement for self-advocacy and peer interactions, collaborative working with peers, encouragement for class participation, opportunities for school leadership positions, positive reinforcement for class participation regardless of the answer and guiding and/or scaffold questioning (id. at p. 2).

To address the student's needs, the teacher prepared four goals with accompanying short-term objectives (Parent Ex. T at pp. 2-4). The goals provided in the teacher's notes included a goal to address the student's need to increase his class participation, a reading comprehension goal, a goal to address the student's needs in written expression, and a mathematics goal to address the

[6] The student's teacher noted the student has written expression skills at mid-fourth grade level but he showed limited progress (Parent Ex. T at p. 1).

student's need to develop word problem solving skills with an emphasis on practical skill areas (id.).

The June 2011 IEP contained ten annual goals to address the student's needs in the areas of mathematics, writing, reading, speech and language, social pragmatics, and vocational planning (Parent Ex. B at pp. 6-15). The June 2011 CSE developed a goal to address the student's ability to read multisyllabic words using a structured and systematic decoding program with multisensory input with a criterion of 80% accuracy over three consecutive sessions for each targeted skill (id. at p. 6). To improve reading comprehension, the June 2011 CSE identified strategies and tasks for the student to utilize to facilitate the identification of main ideas, essential details, inference, conclusions, cause and effect relationships, and character analysis and identified the criterion level by which to measure the student's progress (id. at p. 7). The June 2011 CSE also developed a goal to address the student's encoding skills using a phonetically based multisensory spelling program to support the encoding of multisyllabic words and specified a specific criterion level by which to measure the student's progress (id. at p. 6). The June 2011 CSE also included a goal to improve the student's writing skills including his need to develop full paragraphs that included supporting details over five consecutive writing samples (id. at p. 9).

Likewise, the June 2011 CSE developed mathematics goals to address the student's need to break down simple algebraic procedures applied to problem solving situations and the student's need to develop skills related to solving mathematic word problems with identified corresponding criterion by which to measure student success (Parent Ex. B at pp. 10-11). The June 2011 CSE also developed receptive and expressive language goals to address the student's need to increase his vocabulary, use complex sentences, use longer cohesive passages, and comprehend such passages with both literal and inferential skills (id. at p. 13). As identified in the present levels of performance, the student had persistent difficulty with reading social cues, making social connections and communicating with others verbally (id. at p. 4). To address this need, the June 2011 CSE developed a goal to facilitate the student's pragmatic social skills by recognizing non-verbal expressions, maintaining conversations on a variety of topics with peers, and responding appropriately to teacher and peer comments (id. at p. 14).

Contrary to the parents' assertions, the goals developed by the June 2011 CSE addressed the student's needs as identified in the present levels of performance in the areas of reading, speech-language, writing, social pragmatic skills, and mathematics (compare Parent Ex. B at pp. 4-5, with Parent Ex. B at pp. 6-14). Each goal identified measurable skills and established criteria by which to assess the student's progress (Parent Ex. B at pp. 6-14). The June 2011 IEP reflects the input of all of the CSE members and included goals proposed by the student's then-current teacher. Therefore, a review of the annual goals set forth in the June 2011 IEP reflects that each goal targeted and appropriately addressed a specific, identified area of the student's needs (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]).

2. 15:1 Special Class in a Community School

The June 2011 CSE further recommended a 15:1 special class placement in a community school with related services (see Dist. Ex. B at pp. 1, 16, 18). The parents allege that a 15:1 special class in a community school would not provide sufficient 1:1 support to enable the student to make

educational progress. In their due process complaint notice, the parents requested a small, supportive, structured class, with a small student-to-teacher ratio that would provide the student with "1:1 instruction" (Parent Ex. A at p. 5). The hearing record does not support the parents' contention that the student requires 1:1 instruction or 1:1 support.

At the time of the student's annual review, the district's CSE had available to it an April 2008 neuropsychological evaluation, a June 2008 audiologist's report, a September 2008 social history, a September 2008 psychological report, and an October 2009 classroom observation (Parent Exs. F; G; Dist. Exs. 3; 4; 5). In addition, the June 2011 CSE considered an October 2009 Level I Vocational Assessment, a fall 2010 progress report from the SKILLS program, the May 2011 letter from the parent, the May 2011 letter from the psychiatrist, and a June 2011 standardized test report, as well as information gathered from the parents and the student's private school teachers (Tr. pp. 62, 66-71, 123; Dist. Exs. 1; 6; 8; 9; 10).[7]

As discussed above, the student's SKILLS teacher prepared notes for her participation in the student's annual review (Parent Ex. T). The student's academic management needs consisted of requiring extra time, directions read twice, checks for understanding, and redirection (id. at p. 1). In the area of social/emotional performance, the student's SKILLS teacher described the student's progress since fall 2010, noting that the student initially would not speak more than one word when prompted and would not speak directly to his peers (id.). At the time of the CSE meeting, the student engaged peers directly when working in small groups, volunteered answers by raising his hand, offered answers in each class, and struggled to keep from calling out the answer (id.). The student was also able to tutor one of his peers in math and greeted his teachers appropriately without prompting (id.).

According to the student's SKILLS teacher, in the area of social/emotional needs, the student benefitted from positive reinforcement, encouragement, and collaboration with peers (Parent Ex. T at p. 2). The student also needed "guiding and/or scaffold questioning" (id.). With regard to behavior, the SKILLS teacher further described the student's need to increase classroom participation through positive reinforcement, regardless of the student's answer to a question posed (id.). The SKILLS teacher did not document any interfering behaviors, nor did she describe a need for prompting or 1:1 support. Additionally, the SKILLS teacher's notes do not contain any mention of the student's anxiety nor describe any educational impact as a result of anxiety (Parent Ex. T).

According to the fall 2010 SKILLS progress report considered by the CSE, the student worked hard and was committed to his internship working with animals (Dist. Ex. 9 at p. 1). The student completed his internship duties independently without needing guidance or prompting (id.). The student was described as an integral part of the volunteer staff and it was reported that he had mastered his job duties (id.). Consistent with the SKILLS teacher's notes, the SKILLS progress report indicated that the student required prompting to share during the forum-classroom portion of the internship (compare Parent Ex. T at p. 2, with Dist. Ex. 9 at p. 1). The SKILLS progress report also indicated that the student had a great experience at his internship and "it would be helpful if he would be more open during the class" (Dist. Ex. 9 at p. 1).

[7] The May 19, 2011, letter from the psychiatrist is not in evidence, however the school psychologist testified to the contents of the letter (Tr. pp. 67-68, 70-71).

The SKILLS progress report further described the student's ability to identify family relationships and the importance of paid providers in his life (Dist. Ex. 9 at p. 2). The SKILLS progress report also indicated that the student had a good understanding of his skills, interests, and qualities and that he appreciated the importance of discussing his identity (id. at p. 3). Also consistent with the SKILLS teacher's notes, the academic areas of the SKILLS progress report indicate that the student completed substantive classroom work independently without the need for prompting, but required prompting to participate in classroom discussions and turn in homework (compare Parent Ex. T at pp. 1-2, with Dist. Ex. 9 at pp. 4-5, 8-9).

As discussed more fully below as it relates to transition planning, the CSE also considered an October 2009 Level I Vocational Assessment. The minutes of the June 2011 CSE meeting reflect a discussion of the student's vocational interests, including the student's successful internship, his ability to track his budget with support, his ability to travel independently, and to use an ATM card (Tr. p. 67; Dist. Exs. 8 at pp. 1-3, 10 at p. 2).

In addition, the present levels of performance on the student's June 2011 IEP, which are not in contention, are silent on the student's need for additional adult support (Parent Ex. B at pp. 3-5). A review of the student's academic and social/emotional management needs, as detailed in the June 2011 IEP, show that they are not so intensive as to suggest that the student's needs cannot be met in a 15:1 special class placement in a community school (id.).[8]

State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for students whose "special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). The recommendation of a 15:1 special class in a community school was appropriate given the information available to the CSE at the time of the student's annual review.

The district school psychologist testified that the student's combination of educational, academic, language, social, and vocational needs were significant and could not be met in the general education setting and that given the student's particular profile his needs could be met in the 15:1 special class placement (Tr. p. 93). She also noted that the parents rejected an alternate recommendation of a 12:1+1 class in a specialized school for career development because the parents wanted the student to earn a local diploma, which he was on track to earn at his private school placement, rather than an IEP diploma provided in the district career development 12:1+1 placement (Tr. pp. 89-91, 93-95, 125). The district school psychologist also testified that the parents expressed concern that the students in the career development school were lower functioning than the student (Tr. pp. 90, 125). The district school psychologist stated that the June 2011 CSE considered the May 2011 letter from the student's psychiatrist, which reportedly stated that the student's future success was "critically linked to maintaining his educational placement in a small, structured, and supportive school setting that can provide him with the individualized

[8] The June 2011 IEP recommended use of the following environmental modifications and human/material resources, among others, to address the student's management needs: a multisensory instructional approach, graphic organizers and outlines, end of page and chapter summaries, proofreading and editing checklists, use of tables/diagrams to help visualize and breakdown multi-step math problems, new information presented within a structured and meaningful context, teacher checks for understanding, praise and positive reinforcement, extra time for completion of work, and frequent feedback from teachers (Parent Ex. B at p. 4).

attention he needs and where the staff specialize in working with student[s] with high-functioning autism disorders" (Tr. pp. 70-71).

Although the student's SKILLS teacher and psychiatrist testified to the student's need for additional adult support and a smaller environment, this testimony is unsupported by the hearing record and conflicts with the discussion of the CSE members as well as the student's reported present levels of performance by his SKILLS teacher. Based on the information considered by the June 2011 CSE and the information reflected in the June 2011 CSE minutes of the discussion that took place at the CSE meeting, the hearing record supports the district's assertion that the 15:1 special class placement—together with the annual goals and recommended supports and related services—was reasonably calculated to enable the student to receive educational benefits, and thus, offered the student a FAPE in the LRE for the 2011-12 school year.

3. Transition Planning

IHO 2 determined that June 2011 CSE sufficiently described the student's vocational interests and future opportunities (IHO Decision at pp. 14-15). The parents argue that the IHO erred by concluding that the transition planning set forth in the June 2011 IEP did not rise to the level of a denial of FAPE. Further, the parents allege the June 2011 IEP does not adequately meet the student's individual needs and is devoid of necessary information, does not contain measurable postsecondary goals, identify the student's interests, does not identify the student's diploma objective, nor provide opportunities for vocational or transitional activities. A review of the hearing record supports IHO 2's determination.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C.§ 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments 20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[9]

An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),[10] as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that a student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community

[9] In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

[10] These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

experiences, the development of employment and other post-school adult living objectives and, when appropriate, the acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

The hearing record demonstrates that the June 2011 CSE considered the October 2009 Level I Vocational Assessment report and the June 2011 CSE meeting minutes reflect the CSE's discussion regarding the student's work program at an animal shelter, his ability to track his budget with support, his ability to travel independently and use an ATM card, and the parents' desire for the student to obtain a local diploma (Tr. p. 67; Dist. Exs. 8 at pp. 1-3, 10 at p. 2). Further, the June 2011 CSE minutes reflect that the June 2011 CSE discussed the student's future occupational opportunities to include such activities as dog walking and animal grooming with support to transition to post-secondary activities (Dist. Ex. 10 at p. 2). The June 2011 IEP social/emotional present levels of performance reflected the student's work at the animal shelter, his level of independence, work skills, and social communication needs (Parent Ex. B at p. 4). Addressing the student's vocational needs, the June 2011 CSE developed a goal for the student to identify and explore career options and resources to set realistic post-secondary goals monitoring progress through three conferences to a level of 80 percent accuracy (id. at p. 15).

The transition portion of the June 2011 IEP identified the student's long-term outcomes to include integration into the community, postsecondary training, independent living with minimal support, and employment (id. at p. 19). To meet the student's identified postsecondary goals, the IEP recommended instructional activities to include time management, organization and self-advocacy skills, development of relationships in community settings, and the development of a program to enhance skills that would support post high school programs of study (id.). For activities of daily living and independent living, the IEP recommended the student develop self-care skills, budgeting, cooking, cleaning, and shopping skills (id.).

The hearing record supports the IHO's determination that the June 2011 IEP, in its entirety, sufficiently reflected instruction and experiences to enable the student to prepare for post-school activities, and provided goals and services as they relate to post-secondary employment and living. Although the level of detail and measurability are marginal, any defects in the transition plan do not rise to the level of a denial of FAPE (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *9 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]).

C. Challenges to the Assigned Public School Site

Finally, with respect to the parents' claims relating to the assigned public school site, the parents' contentions regarding the size of the assigned public school site, as well as the number of students, the level of activity and noise, and the lack of vocational opportunities, turn on how the June 2011 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site, the parents cannot prevail on such speculative claims. The sufficiency of the program offered by the district must be determined on the basis of the IEP itself, as "[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 R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding 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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that the IDEA confers no rights on parents with regard to school site selection]; 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]).[11]

Lastly, I must reiterate that even if the student did in fact have needs that could only be addressed in a certain environment, it was critical that such needs be raised at the time of the June 2011 CSE meeting. In testimony, the student's father and the student's psychiatrist described an event that occurred in January 2009, wherein the student became so overwhelmed by being lost among large crowds that he experienced a "major panic" (Tr. pp. 372-74; see also Tr. pp. 246-48). The student's father also testified that when the student becomes overwhelmed and experiences anxiety, he withdraws from the situation and paces as a coping mechanism (Tr. pp. 245-46). The student's psychiatrist also testified that in 2009, when he began treating the student, he found him to be in distress (Tr. pp. 373-74). The student was treated with medication and talk-therapy before stabilizing after approximately six months (Tr. pp. 374-75). The student's psychiatrist also testified that the student had a history of anxiety prior to 2009, when he began treating the student (Tr. p. 375). Nevertheless, the information considered by the June 2011 CSE does not reflect that the issue of the student's anxiety and how it might impact his ability to receive educational benefit was ever raised, discussed, or even a concern to the student's then-current teachers (compare Dist. Ex. 3 at pp. 2-3, Dist. Ex 4 at pp. 1-2, Dist. Ex. 5 at p. 1, Dist. Ex. 8 at p. 1, Dist. Ex. 9 at pp. 1, 3, and Dist. Ex. 10; with Tr. pp. 245-48; 372-75). Rather, the information considered by the CSE documented the student's sensitivity to noise, which was discussed at the June 2011 CSE meeting and addressed in the June 2011 IEP; and universally described the student as polite, cooperative, and a wonderful person, with no mention of any interfering behaviors (Dist. Exs. 3 at pp. 2, 3; 4 at pp. 1, 2; 9 at pp. 1, 3; 10 at p. 1). According to the minutes of the June 2011 CSE meeting, the

[11] However, while the Second Circuit has held that 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 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 is required to implement the written IEP and parents are within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

only "parent response" to the recommendations related to functional grouping and their desire for the student to receive a local diploma (Dist. Ex. 10 at p. 3).

As described above, the record reflects that the parents' concerns regarding the student's anxiety were not brought to the attention of the CSE. Nor could such a need be reasonably determined from the evaluative information that was shared with and considered by the June 2011 CSE. Therefore, just as it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting in order to render an unimplemented IEP inappropriate, it would likewise be inequitable to permit the parents to withhold relevant information within their control from the CSE and then later attempt to 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 the student's IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

VII. Conclusion

Based on the above, the hearing record supports the conclusion that the district offered the student a FAPE for the 2011-12 school year, having developed an IEP and educational placement that was reasonably calculated to confer educational benefit in the least restrictive environment. As the district sustained its burden of establishing that the program recommended in the June 2011 IEP was reasonably calculated to address the student's needs, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Winston Prep was an appropriate placement or whether equitable considerations support the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 9, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER