The University of the State of New York

The State Education Department
State Review Officer
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No. 13-139

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

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

Law Offices of Regina Skyer & Associates, attorneys for respondent, Jaime Chlupsa, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Winston Preparatory School (Winston Prep) for the 2012-13 school year. The parent cross-appeals from the IHO's decision to the extent the IHO did not find that the district failed to offer an appropriate educational program to the student on an additional basis asserted by the parent. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

The decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8

NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on March 27, 2012, to formulate the student's individualized education program (IEP) for the 2012-13 school year (Dist. Ex. 3). The parent disagreed with the recommendations contained in the March 2012 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, as a result, notified the district of her intent to unilaterally place the student at Winston Prep and seek public funding therefor (see Dist. Ex. 12; Parent Ex. I). In an amended due process complaint notice, dated January 29, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).[1]

An impartial hearing convened on February 7, 2013 and concluded on May 13, 2013 after two days of proceedings (Tr. pp. 1-197).[2] In a decision dated June 24, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 12-22).[3] As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Winston Prep for the 2012-13 school year (IHO Decision at p. 22).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parent's answer and cross-appeal is presumed and they will not be recited here in detail.

The following issues presented on appeal must be resolved in order to render a decision in this case:

[1] The parent originally filed a due process complaint notice on November 9, 2012 (Dist. Ex. 1).

[2] The first day of transcript is incorrectly dated February 7, 2012.

[3] The IHO decision is dated June 24, 2013. A "corrected" IHO decision, dated July 2, 2013, indicated that the original decision was issued on June 28, 2013. However, as the parties apparently agree that the decision was issued on June 24, 2013 (Pet. ¶ 33; Answer ¶ 33), and it does not affect the resolution of any of the issues presented on appeal, the date specified in the original decision is used herein.

1. whether the IHO erred in determining that the March 2012 CSE was improperly composed because it lacked a district regular education teacher and the parent's ability to participate in the placement determination was impeded as a result;

2. whether the IHO erred in determining that the evaluative information about the student available to the CSE did not support the recommendation for a general education placement with integrated co-teaching (ICT) services;

3. whether the IHO erred in determining that the ICT services recommended in the March 2012 IEP were not appropriate to address the student's needs;

4. whether the IHO erred in determining that any deficiencies in the transition services listed in the March 2012 did not rise to the level of a denial of a FAPE;

5. whether the IHO erred in determining that the parent was impeded from participating in the decision as to which public school site the student would attend;

6. whether the district was required to establish that the assigned public school was capable of implementing the March 2012 IEP.

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]).

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. FAPE

1. CSE Composition

Turning first to the issue of whether the March 2012 CSE was not properly composed because it lacked a district regular education teacher member, the evidence in the hearing record shows that attendees at the meeting were a district special education teacher who also served as the district representative, a district school psychologist, the parent, and the student's focus teacher from Winston Prep (Tr. p. 18; Dist. Ex. 3 at p. 11; see Dist. Ex. 6 at p. 1). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). As noted above, however, 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]).

The IHO determined that the failure to have a district regular education teacher at the CSE meeting was a procedural violation that rose to the level of a denial of a FAPE (IHO Decision at p. 14). According to the district school psychologist, the role of the regular education teacher at a CSE meeting is to be knowledgeable about general education, become familiar with the evaluative information about the student, discuss how to modify the curriculum for students, and make contributions the teacher feels are "appropriate and relevant" to the program recommendation (Tr. pp. 20, 42). The hearing record indicates that the student's Winston Prep teacher—who the district asserts is certified in general education—provided the student with one to one instruction at

Winston Prep, which is described as a "special education school" for students with learning difficulties (Tr. pp. 20-21, 42, 94-95; Dist. Ex. 6 at p. 1). Although the Winston Prep teacher was not providing instruction to the student in the type of instructional environment that the March 2012 CSE contemplated for the student, the hearing record showed that the Winston Prep teacher, who was a "teacher of the student," participated in the meeting by providing information about the student's vocational interests and academic and social skills, and expressing her concerns about the class size the district proposed (Tr. pp. 20-22; Dist. Ex. 4 at pp. 1-3). Additionally, the parent participated during the meeting by expressing her thoughts and concerns about the student's performance, the size of the "ICT class," the student's ability to function in large groups, and the number of students in lunch and physical education settings; all of which were reflected in the IEP (Tr. pp. 22-23, 175-76; Dist. Exs. 3 at pp. 1-2, 10; 4 at pp. 1-3). While the parent asserts that none of the CSE members could discuss how the student's IEP would have been implemented in the recommended placement and how the placement would meet the student's needs, even assuming that such a discussion were required, a review of her testimony does not indicate that she asked any questions about the proposed placement at the March 2012 CSE meeting that went unanswered because of the failure of the district to include a district regular education teacher in the CSE (see Tr. pp. 173-96). The school psychologist further testified that the district special education teacher who participated in the CSE meeting was "definitely familiar" with the ICT services the district offered (Tr. pp. 18, 55-56). As discussed in more detail below, the hearing record supports the district's contention that the March 2012 CSE was able to sufficiently consider whether a general education setting was appropriate for the student based upon the overall discussion of the student's needs and abilities, reflected in the documents available and the discussion held by the CSE.

Therefore, the evidence in the hearing record does not support a determination that the absence of a regular education teacher—as a procedural violation—impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits in this instance (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that the lack of a regular education teacher did not render an IEP inappropriate when there was no evidence of any concerns stated by the parent during the CSE meeting that required a regular education teacher to resolve and "no reason to believe" that such a teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012]).

2. ICT Services

Turning next to the IHO's finding that the evaluative data available to the March 2012 CSE did not support its recommendation for a general education placement with ICT services, a review of the hearing record supports a contrary conclusion. The hearing record shows that the March 2012 CSE considered and rejected special education teacher support services as not providing enough instruction and support, and because the student required more than a "part time" program (Tr. pp. 27-28; Dist. Ex. 3 at p. 10). The CSE considered and rejected a special class placement as "too restrictive," given the student's academic and cognitive strengths, and her interest in going to college (Tr. pp. 27-28; Dist. Ex. 3 at p. 10). Ultimately the CSE recommended daily ICT services for the student in math, English language arts, social studies and science classes, and one period per week of an elective class (Dist. Ex. 3 at p. 6).

The hearing record shows that the March 2012 CSE had available to it a February 2011 classroom observation report, results from a spring 2011 administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III), a May 2011 Level 1 Vocational Interview form completed by both the parent and student, and the student's fall 2011 Winston Prep progress report (Tr. pp. 15-17, 39-40; see Dist. Exs. 5-8). The school psychologist testified that the CSE did not require any other evaluations of the student, nor did anyone at the meeting request that any additional evaluations be conducted (Tr. p. 30).

The documents available to the March 2012 CSE indicated that cognitive testing administered to the student in 2008 yielded a verbal comprehension composite score in the 79th percentile, and a perceptual reasoning index score in the 90th percentile (Dist. Ex. 6 at p. 1).[4] Academic achievement testing conducted in spring 2011 and reflected in the March 2012 IEP indicated that the student's performance was in the average range on the Gray Oral Reading Tests-Fourth Edition (GORT-4), Gates MacGinitie Reading Tests-Fourth Edition, and WIAT-III subtests measuring skills in vocabulary, passage accuracy, listening comprehension, oral expression, word reading, pseudoword decoding, reading comprehension, oral reading fluency, sentence combining, essay composition, spelling, and math addition, subtraction, and multiplication fluency (Dist. Exs. 5; 6 at p. 1). The student exhibited scores in lower percentiles on WIAT-III tasks measuring sentence building, math problem solving, and numerical operations; and on GORT-4 subtests measuring passage rate, fluency, and comprehension (id.).

In a February 2011 classroom observation of the student at Winston Prep, the district special education teacher reported that the student read text accurately, provided answers to homework tasks, attended closely to the teacher and followed along, made an appropriate prediction about a story, asked her teacher to provide her with a homework assignment, and followed up with a discussion about the homework due date (Dist. Ex. 7 at p. 1). Additionally, the student was observed to remain focused on her work despite a classmate's repeated attempts to distract her (id. at p. 2).

At the time of the March 2012 CSE meeting, the Winston Prep teacher reported and the IEP indicated that the student—who was currently in ninth grade—exhibited reading decoding and written expression skills at a ninth grade level, independent reading comprehension skills at a seventh to eighth grade level, spelling skills at an eighth to ninth grade level, and math computation/problem solving skills at a sixth to seventh grade level (Dist. Exs. 3 at p. 1; 4 at pp. 1-2).[5] According to the March 2012 IEP, the student took her academics "seriously" and was a "hard worker" (Dist. Ex. 3 at p. 2). The March 2012 IEP reflected the CSE's discussion that the student had difficulty with abstract reasoning and figurative language, finding important details, and taking margin notes, noting that she rushed through reading and needed to slow down (Dist.

[4] The hearing record does not contain the results of cognitive testing conducted with the student within three years of the March 2012 CSE meeting. Although I agree with the IHO's finding that in this instance "in and of itself," the district's failure to obtain and consider a psychological evaluation of the student did not result in a denial of a FAPE (IHO Decision at p. 13), I remind the district of its obligation to conduct a reevaluation of the student "at least once every three years, except where the school district and the parent agree in writing that such reevaluation is unnecessary" (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]).

[5] The parent does not dispute the accuracy of the present levels of performance contained in the March 2012 IEP (Parent Ex. A).

Exs. 3 at p. 1; 4 at p. 1; see Dist. Ex. 6 at pp. 1-2). CSE discussion about the student's written language skills reflected in the IEP indicated that she expressed herself better in writing than verbally, and that while she produced multiparagraph essays she needed encouragement to add details and proofread/edit her work (Dist. Exs. 3 at p. 1; 4 at p. 2; see Dist. Ex. 6 at pp. 2, 4). The IEP reflected the CSE's discussion of the student's math skills, in that her concrete linear skills were better than her abstract skills, and that "messy" handwriting caused careless math errors (Dist. Exs. 3 at p. 1; 4 at p. 2; see Dist. Ex. 6 at pp. 6-7). Parent input provided during the CSE meeting and reflected in the IEP indicated that the student needed "enormous" structure and a schedule, and that she was not as independent as she could be (Dist. Exs. 3 at pp. 1-2; 4 at p. 1; see Dist. Ex. 6 at pp. 2, 4-5).

Socially, the March 2012 IEP reflected the CSE's discussion that the student exhibited poor eye contact, weak verbal communication skills especially with teachers, difficulty with social interaction and reading social cues, and a lack of awareness of how her facial expressions affected other people (Dist. Exs. 3 at p. 2; 4 at p. 2; see Dist. Ex. 6 at pp. 2-3). The IEP also reflected the parent's input that the student preferred one-to-one social settings, was trying to be more social, and that she received social skills instruction outside of school (Dist. Exs. 3 at p. 2; 4 at p. 1). Physically, the IEP indicated reports that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) (id.).

Contrary to the IHO's finding, the district asserts that the evaluative information relied upon by the March 2012 CSE supported its decision to recommend ICT services. A review of the evidence in the hearing record supports the district's assertion, and thus, the IHO's finding that the recommended ICT services—together with the related services and management needs—were not supported by the evaluative information available to the April 2013 CSE must be reversed.

State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class providing ICT services "shall minimally include a special education teacher and a general education teacher," and each such class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

In reaching the decision to recommend ICT services, the school psychologist testified that due to test results showing the student was generally functioning in the average range in most areas, progress reports indicating she was "doing well," and the student's desire to attend college, the district members of the March 2012 CSE "wanted [the student] to be exposed to a full, general education curriculum that she would receive in an [ICT] class" (Tr. p. 26; see Dist. Ex. 4 at p. 2). The school psychologist further indicated that the special education teacher providing the ICT services would adapt the methodology and implement the management strategies recommended in the March 2012 IEP (Tr. pp. 28-29).

In conjunction with full time special education teacher support in the classroom, the March 2012 IEP provided the student with the following modifications/accommodations to address her management needs: extended time to complete work, directions read and reread, a calculator, graphic organizers and outlines, checklists for proofreading/editing writing, tables/diagrams to visualize multistep math problems, material chunked into manageable units, teacher checks for

understanding, teacher explanation of relative importance of assignments and prioritizing of assignments to organize time, daily/weekly/monthly planner-organizer, and teacher prompts to refocus (Dist. Ex. 3 at p. 2). The IEP also provided annual goals targeting the student's need to improve her reading comprehension, math computation, and math problem solving skills (id. at pp. 3-4). Testing accommodations for classroom assessments and standardized tests provided in the IEP included extended (double) time, separate location (small group in a quiet setting), use of a calculator, and directions read and reread (id. at p. 7).

To address the student's documented difficulty with social and expressive language skills, the March 2012 CSE recommended that she receive two individual and one 40-minute group session of speech-language therapy per week, and one 40 minute group session of counseling per week (Dist. Ex. 3 at p. 6). Annual goals in the March 2012 IEP targeted the student's need to improve her self-esteem, and her social interaction, expressive language, oral communication, and pragmatic language skills (id. at pp. 4-5). The IEP also provided the student with frequent teacher feedback and positive reinforcement (id. at p. 2).

To the extent the IHO determined that the hearing record lacked evidence that the student could "have success" in a general education class with twice the number of students as her class at Winston Prep, and that the CSE's determination that she could function in such a setting was "speculative," as described above, the CSE had adequate evaluative information to identify the student's needs, reflected those needs in the March 2012 IEP, considered the student's post-secondary goal of attending college, and provided full time special education teacher support in academic classes in conjunction with related services and management strategies to address those needs as per its obligation (Dist. Ex. 3 at pp. 1-2, 6; see Tr. pp. 35-36). Accordingly, the IHO's conclusion on this issue must be reversed (see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335-36 [E.D.N.Y. 2012] [holding that where the district recommended services to meet a student's individual needs, "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"]).

3. Transition Services

The parent cross-appeals the IHO's determination that deficiencies in the assessment of the student's transition needs and the description of the transition plan in the March 2012 IEP did not rise to the level of a denial of a FAPE. A review of the hearing record supports the IHO's finding as detailed below.

Among the documents the March 2012 CSE reviewed were May 2011 Level 1 Vocational Interviews completed by the student and the parent (Tr. pp. 39-40; Dist. Ex. 8 at pp. 1-2). According to the school psychologist, the information reflected in the IEP was gathered directly from the vocational assessment the student and the parent completed (Tr. p. 33). Measurable post-secondary goals discussed at the CSE meeting and in the March 2012 IEP included that the student will attend a post-secondary program to prepare for a career and become employed in an area of interest and/or special skill (Dist. Exs. 3 at p. 3; 4 at p. 2). The IEP indicated that the student's transition needs consisted of the development of self-advocacy skills involved in post-secondary life, such as time management and self-care skills (Dist. Ex. 3 at p. 3). The coordinated set of transition activities included in the IEP indicated that the student needed to identify personal

strengths and weaknesses to aid in planning study and possible careers, receive the related services of counseling and speech-language therapy, and develop appropriate contacts with community resources (Dist. Ex. 3 at pp. 7-8). The IEP further indicated that vocational workshops permitted exploration of a range of possible fields based on interest inventories, skills, and abilities assessments (Dist. Ex. 3 at p. 8).

Although the parent alleges that the IEP transition services were "inadequate, generic, and vague," I note that the student was not yet 15 years old at the time of the March 2012 CSE meeting, and when in May 2011 the parent was asked what kinds of jobs the student seemed interested in she replied on the interview form "[the student's] only 14!" (Dist. Ex. 8 at p. 1). While some of the transition information for a student of this age may appear to be vague, generally the May 2011 vocational assessments and the March 2012 IEP reflected the student's overall post-secondary goal of attending college, and as described above, the IEP provided her with special education and related services to address the needs that would affect her progress toward that goal; therefore, the IHO's finding on this issue must be upheld (compare Dist. Ex. 3 at pp. 3, 6-8, with Dist. Ex. 8 at pp. 1-2).

4. Parental Participation in Assigned School Selection

Finally, the district contends on appeal that the IHO erred in finding that the district failed to offer the student a FAPE because the delay in issuing the final notice of recommendation (FNR) resulted in a violation of the parent's right to participate in the placement decision regarding the recommended ICT program at the assigned school. Specifically, the IHO found that the parent had "clearly expressed an interest in observing the recommended ICT program before making a decision on the placement as is the parent's right" (IHO Decision at p. 15). However, for the reasons explained below, the IHO's finding on this issue must be reversed.

Although the school psychologist testified that the March 2012 CSE was not aware at the time of the meeting to which public school site the student would be assigned, the March 2012 IEP documented the parent's request that an assigned school offer be made before the end of the school year so she could observe a class "in progress" (Tr. pp. 43-44; Dist. Ex. 3 at p. 10). The district issued the FNR to the parent on or about August 2, 2012 (Dist. Ex. 10). In letters dated August 14 and August 22, 2012, the parent informed the district that she was unable to accept or reject the assigned public school site until she had the opportunity to visit the school, which she could not do until it "re-open[ed]" in September 2012 (Dist. Exs. 11; 12). Based on these facts, the IHO determined that the assignment of a particular public school site was untimely since the CSE meeting was held in March 2012 and the parent was not sent an FNR until August 2012, at which time the assigned school was closed, precluding her from visiting. However, I am unable to find that the parent's lack of opportunity to visit the assigned school site prior to the beginning of the school year resulted in a denial of a FAPE.

As an initial matter, and with respect to the parent's contention that she did not receive a timely FNR, to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *8-*9 [S.D.N.Y. Dec. 3, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City

Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational—as opposed to educational—placement of their child (see 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 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92).

Here, the hearing record shows that the March 2012 CSE developed an IEP for the student for the 2012-13 school year, and the parent did not allege in her due process complaint notices that she did not receive a copy of the IEP prior to the beginning of the 2012-13 school year (Dist. Ex. 3; see Dist. Ex. 1; Parent Ex. A). On August 22, 2012 the parent provided the district with timely notice of her intent to place the student at Winston Prep for the 2012-13 school year and seek tuition reimbursement (Dist. Ex. 12). In her notice letter, the parent indicated that although she was "unable to visit this recommended placement until the school re-opens in September," based upon her experience the year before visiting an ICT class in a large community high school she did not believe that an ICT class would be able to meet the student's academic and social/emotional needs (id. at p. 2). Despite the parent's preference to observe the specific classroom in the assigned school in which the student would have been educated, the hearing record shows that she had general knowledge about the provision of ICT services, and was able to express her concerns about the student's educational placement on the district's continuum of services on at least two occasions (Dist. Exs. 3 at p. 10; 12 at p. 2). In a similar situation, the Second Circuit has held that where parents are "includ[ed] . . . in the determination of the type of placement, . . . the difficulties that [the parents] had in communicating with the school site . . . d[o] not change the type of placement and therefore d[o] not violate the procedures of the IDEA" (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [emphasis in original]).

Additionally, to the extent the parent continues to assert claims regarding the appropriateness of the assigned public school site and its ability to implement the March 2012 IEP, such claims are speculative because the student did not attend the recommended program for the 2012-13 school year, and thus, the sufficiency of the district's offered program must be determined on the basis of the IEP itself. Challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended school. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to

the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 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]; see also C.F., 746 F.3d at 79; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

In view of the forgoing, the parent cannot prevail on claims that the district would have failed to implement the March 2012 IEP at the assigned school because a retrospective analysis of how the district would have executed the student's IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 187). In this case, these issues are speculative insofar as the parent did not accept the IEP containing the recommendations of the March 2012 CSE or the program offered by the district and instead enrolled the student in a nonpublic school of her choosing (see Dist. Exs. 11; 12). 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 CPSE 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., 2013 WL 6818376, at *13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Winston Prep was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 24, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and directed the district to reimburse the parents for the costs of the student's tuition at Winston Prep.

Dated: **Albany, New York**
December 30, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER