The University of the State of New York

The State Education Department
State Review Officer
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No. 13-154

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, Francesca J. Perkins, Esq., of counsel

Milbank, Tweed, Hadley, & McCloy, LLP, attorneys for respondents, Nicole Love Doppelt, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to directly fund the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). A CSE meeting to develop the student's IEP for the 2012-13 school year was originally scheduled for May 18, 2012 but was rescheduled to August 23, 2012 so that the parent could attend (Tr. pp. 40-41, 45; see Joint Ex. 57 at pp. 1-2). In a letter dated August 16, 2012, the district notified the parent of the date and location for the August 2012 CSE meeting (id.). In a letter dated August 21, 2012, the parent notified the district of her intention to

unilaterally place the student at Cooke for the 2012-13 school year because a CSE meeting had not taken place and the student had not been offered a placement for the 2012-13 school year (Joint Ex. 42 at p. 1).[1] On August 22, 2012, the parent signed an enrollment contract for the student's attendance at Cooke for the 2012-13 school year (Joint Ex. 64 at pp. 1-2).[2]

On August 23, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Joint Ex. 63 at p. 10). Noting that the student continued to remain eligible for special education programs and related services, the CSE recommended a 10-month program in a 12:1+1 special class in a community school (id. at pp. 8, 11). The CSE also recommended that the student receive one 30-minute session per week of each individual and group occupational therapy (OT), one 30-minute session per week of each individual and group speech-language therapy and one 30-minute session per week of group counseling (Joint Ex. 59). While the CSE recommended during the August 2012 CSE meeting that the student receive these related services, the recommended related services were not memorialized on the August 2012 IEP and that section was left blank (Tr. pp. 53-61; Joint Ex. 63 at p. 8).

By final notice of recommendation (FNR) dated August 28, 2012, the district summarized the recommendations—including the student's related services—made by the August 2012 CSE, and notified the parent of the public school site to which the district assigned the student for the 2012-13 school year (Joint Ex. 44).

In September 2012, the parent visited the assigned public school site along with her attorney (Tr. pp. 235-236). The parent visited the assigned school a second time with a representative from Cooke sometime in October 2012 (id.). By letter dated November 14, 2012, the parent notified the district that she was rejecting the district's offer and would continue the student's enrollment at Cooke for the 2012-13 school year (Joint Ex. 46 at p. 2). According to the letter, the parent indicated that the "recommended placement" was not appropriate because the August 2012 CSE meeting was held without a representative from Cooke; the recommended related services were not indicated in the August 2012 IEP; and the curriculum, environment, and staff support available at the assigned public school site were inadequate to provide an appropriate education to meet the student's needs (id.). The parent also indicated that she was planning to seek tuition funding for the 2012-13 school year at Cooke and would remain willing to consider any school placement offered (id. at pp. 2-3).

A. Due Process Complaint Notice.

By due process complaint notice dated February 22, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Joint Ex. 47 at p. 2). In particular, the parent alleged that the "August 2012 IEP was the result of a flawed process" because (1) the CSE meeting was held without a Cooke representative present and thus was conducted "without input from those most knowledgeable

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

[2] The student has attended Cooke since the 2010-11 school year (see Tr. p. 220).

about [the student's] educational needs;" (2) the IEP contained no recommendation for related services; (3) the IEP did not adequately address the student's educational needs and contained insufficient information on which to premise an appropriate placement recommendation; and (4) the assigned public school site was inappropriate for the student; (id. at pp. 2-3).

Relative to the assigned public school site, the parent alleged that the recommendation that the student attend a "large community school" was likely to cause the student to regress (Joint Ex. 47 at p. 2). The parent further alleged that the staff and classroom at the assigned public school site were not equipped to address the student's need for multi-sensory instruction; the school lacked sufficient "technological resources to support [the student's] educational development;" the behavioral systems used at the school were not appropriate for the student; the school's use of "a middle-school model" would require the student to have multiple teachers; and the language-based math curriculum was not suitable for the student (id. at pp. 2-3).

As relief, the parent requested public funding for the cost of the student's tuition at Cooke, related services, and transportation for the 2012-13 school year (Joint Ex. 47 at p. 4). The parent also invoked the student's right to a stay put (pendency) placement at Cooke (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference on April 3, 2013 at which evidentiary and scheduling matters were addressed (Tr. pp. 1-13), an impartial hearing was convened on May 24, 2013 (Tr. pp. 14-264). In a decision dated July 11, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, that the student's unilateral placement at Cooke was appropriate, and that equitable considerations weighed in favor of the parent's request for direct funding for the costs of the student's tuition at Cooke for the 2012-13 school year (IHO Decision at pp. 13-22).

Initially, the IHO found that the failure to include related services recommendations on the August 2012 IEP was not rehabilitated by their being referenced in documents other than the IEP, despite the omission resulting from a clerical error (IHO Decision at pp. 15-16). With respect to the related services goals contained in the August 2012 IEP, the IHO found that the goals were developed without regard to the student's present levels of performance and without the parent's participation (id. at pp. 17-18). The IHO next determined that the recommendation for placement in a 12:1+1 special class in a community school was contrary to the evidence available to the CSE and made without regard for the parent's concerns, significantly impeding the parent's opportunity to participate in the development of the student's IEP (id. at p. 17). The IHO also found that the parent's opportunity to participate in the decision making process was significantly impeded by the district's failure to specify related services on the IEP and the lack of evaluations to support the student's placement in a 12:1+1 special class in a community school (id. at p. 18).

Turning to the parent's unilateral placement, the IHO found that the parent "provided ample evidence to establish the appropriateness of Cooke" and that Cooke had met the student's academic, social, emotional, language and sensory needs (IHO Decision at pp. 18-21). More specifically, the IHO found that Cooke's small class setting with a 12:4 student-to-staff ratio addressed the student's learning delays, focusing problems, sensory, and regulation concerns and anxiety (id. at p. 19). The IHO further found that the student had benefited from the technology

used in the class, that the student made academic and social/emotional progress, that the student's anxiety decreased and his communication and articulation skills improved as a result of receiving related services at Cooke, that the program curriculum was modified according to the student's needs and offered him individualized instruction, and that the student was appropriately grouped with students having similar needs (id. at pp. 19-20).

With respect to the remedy for the district's denial of FAPE to the student for the 2012-13 school year, the IHO found that equitable considerations weighed in favor of the parent's request for direct funding of the student's tuition costs at Cooke (IHO Decision at pp. 21-22).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate placement for the student, and that equitable considerations favored the parent. Initially, the district asserts that the IHO erred in finding that the parent's ability to participate in the development of the student's IEP was significantly impeded by the omission of related services from the IEP or the lack of evaluations supporting the student's placement in a 12:1+1 special class, as the parent admitted that she was able to actively participate at the CSE meeting. The district also asserts that the IHO also erred in finding that the related service goals contained in the August 2012 IEP were developed without regard to the student's present level of performance and without the parent's participation, thereby denying the student a FAPE.

The district next alleges that the IHO erred in finding that the recommended placement in a 12:1+1 special class in a community school was inappropriate for the student. The district asserts that the 12:1+1 special class in a community school was the least restrictive environment (LRE) in which the student could make educational progress, providing the student with a small structured environment, established routines, clear expectations and exposure to general education students. To the extent the IHO made findings regarding the appropriateness of the specific public school site to which the student was assigned by the district, the district asserts that the parent's claims thereon were speculative inasmuch as the student never attended the assigned public school site.

Relative to the unilateral placement, the district asserts that the IHO erred in finding that Cooke was appropriate because it could not provide the student with appropriate academic support in conjunction with exposure to general education students. Lastly, the district asserts that the IHO erred in finding that equitable considerations favored the parent's request for relief because the parent had no intention of enrolling the student at the assigned school and the parent did not establish that she was "genuinely legally obligated" to pay the student's tuition costs at Cooke.

The parent answers the district's petition, contending that the IHO correctly found that the district failed to offer the student a FAPE; that Cooke was an appropriate placement for the student; and that equitable considerations weighed in favor of awarding the parent tuition reimbursement.

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 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., 2010 WL 3242234, at *2 [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, 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, 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, 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. Scope of Impartial Hearing and Review

Before reaching the merits in this case, I must determine which issues are properly before me on appeal. First, a review of the entire hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing and relying upon issues that the parent did not raise in the due process complaint notice in concluding that the district failed to offer the student a FAPE for the 2012-13 school year (see Tr. pp. 1-264; see Joint Exs. 23-51; 53-54; 56-57; 59-64; compare Joint Ex. 47 at pp. 1-4, with IHO Decision at pp. 13-22). Specifically, the IHO concluded that the related service goals contained in the August 2012 IEP were developed without regard to the student's present levels of performance and without the parent's participation (IHO Decision at pp. 17-18). The IHO also concluded that the "lack of CSE evaluations" to support the student's program in a community school significantly impeded the parent's opportunity to participate in the decision making process (id.). A review of the hearing record reveals that these issues were not asserted by the parent in the due process complaint notice and, as such, were beyond the scope of the impartial hearing.

With respect to the issues sua sponte addressed and relied upon by the IHO the impartial hearing has the first opportunity to identify the range of issues to be addressed at the impartial hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parent's due process complaint notice cannot be reasonably read to challenge whether the "related service goals" were based on the student's present levels of performance (see Joint Ex. 47 at pp. 1-4). Also, the parent's due process complaint notice cannot be reasonably read to challenge the 12:1+1 special classroom placement recommendation based

on the lack of evaluations conducted by the CSE (id.). Further, the hearing record does not reflect that the parent requested, or that the IHO authorized, an amendment to the due process complaint notice to include these issues. Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, the IHO should not have considered such matters and I decline to review them. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO, is limited to matters either raised in the impartial hearing request or agreed to by [the opposing party]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at *6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Nor can it be said that the district opened the door to such claims by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-50). Consequently, the IHO's determination that the district did not offer the student a FAPE based on the issue of the methodology that a teacher may or may not have selected at the assigned school must be reversed.

To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51), I note that the issue of whether the "related service goals" in the August 2012 IEP were based on the student's present levels of performance was first raised by the IHO and not the parties (see IHO Decision pp. 1-24). Although the district initially raised the issue of the related service goals contained in the IEP, such questioning was in the context of addressing that the related services recommendations being omitted from the August 2012 IEP was a clerical error and not an inquiry into the substantive adequacy of the goals (Tr. pp. 57-60). This appears to have been background or foundation testimony offered for context regarding the parent's participation and events at the CSE meeting rather than an attempt by the district to gain a strategic advantage by raising the substantive adequacy of the IEP goals (A.M. v New York City Dep't of Educ., 2013 WL 4056216, at *10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]). Therefore, I find that the district did not "open the door" to this issue under the holding of M.H.

Regarding the issue of whether there was a "lack of CSE evaluations" to support the CSE's recommendation that the student attend a 12:1+1 special class placement, a review of the hearing record shows that this claim was raised for the first time in the parent's closing brief (IHO Ex. IV at p. 4). The reference to the sufficiency of the evaluative data available to the CSE in the parent's closing brief was not sufficient to expand the scope of the impartial hearing. Raising claims that should reasonably have been known to exist at the time of the due process complaint notice in a

post hearing memorandum is not sufficient to put the claim at issue in an impartial hearing (M.R., 2011 WL 6307563, at *12-*13).

Based on the foregoing, the IHO exceeded her jurisdiction in finding that the related service goals were developed without regard to the student's present levels of performance and without the parent's participation, and that the "lack of CSE evaluations" supporting the recommendation of placement in a 12:1+1 special class in a community school significantly impeded the parent's opportunity to participate in the decision making process. These determinations must, therefore, be reversed.

B. August 2012 IEP

1. CSE Composition/Parent Participation

As for the claims that have been properly asserted against the district, the parent asserts that the student's August 2012 IEP was the result of a flawed process because the CSE meeting was held without a representative from Cooke and was conducted without input from those most knowledgeable about the student's educational needs. Although not addressed by the IHO in her decision, the district alleges in its appeal that any claims regarding the absence of the Cooke representative should be dismissed because the parent did not request that the CSE reschedule or adjourn the August 2012 CSE meeting until such time as a representative from Cooke could participate. The district further maintains that the IHO erred in finding that the parent's ability to participate in the decision making process regarding the student's right to a FAPE was significantly impeded.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

The CSE meeting for the student's annual review was originally scheduled for May 18, 2012 (Tr. pp. 40, 45). The district special education teacher testified that the Cooke representative suggested that the CSE meeting be rescheduled so that the parent could attend (Tr. p. 41). In a letter dated August 16, 2012, the district notified the parent of the scheduled time and location for the August 23, 2012 CSE meeting (Joint Ex. 57 at p. 1). The letter provided a list of invited attendees, including the Cooke representative, and indicated that the parent could "bring other individuals who have knowledge or special expertise regarding your child" (id.). The participants at the August 2012 CSE meeting included the parent, the parent's attorney, the district school

psychologist, and the district special education teacher—who also served as the district representative (Joint Ex. 63 at p. 13). During the CSE meeting, when asked by the district's attorney whether the 12:1+1 special class was appropriate for the student, the parent responded by "deferr[ing] the question to Cooke" because she "felt more comfortable" having one of the student's service providers from Cooke opine on the matter because of their greater familiarity with the student's needs (Tr. p. 246). The district special education teacher testified that he advised the parent that the Cooke representative provided the CSE with the student's most recent progress report—which contained teacher and related service provider narratives that spoke to the student's functional levels, management needs, and goals for the following year—and that that the CSE had "all the documentation" that it needed to conduct the meeting (Tr. pp. 42-43). The special education teacher further testified that, after advising the parent of the information available to the CSE, the parent was "comfortable" with the CSE relying on the Cooke reports (Tr. p. 43).

The hearing record does not support the parent's argument that the absence of the Cooke representative resulted in a deprivation of a FAPE for the 2012-13 school year. Additionally, contrary to the IHO's finding, the evidence does not support the conclusion that the parent's participation during the development of the student's IEP was significantly impeded. While the parent testified that, during the CSE meeting, she "kept deferring to Cooke" for certain issues, the hearing record demonstrates that the parent actively participated in the CSE meeting (Tr. pp. 222-23). The hearing record reflects that the parent expressed her concerns regarding the student's need for a small, specialized class within a small school, which concern is reflected in the August 2012 IEP (Joint Ex. 63 at p. 11). The parent also expressed to the CSE her belief that previous public school sites at which the district had proposed implementing the student's prior IEPs were "too large" for the student and that the student was "sensitive to loud noise" (id.). Furthermore, the hearing record indicates that the parent attended the CSE meeting with her attorney (id. at p. 13). The hearing record indicates that neither the parent nor her attorney requested that the CSE meeting be adjourned in order to secure the appearance of the representative from Cooke. While the parent testified that she was not aware of the option to reconvene the CSE meeting in order to secure the attendance of a representative from Cooke, the parent's attorney represented the parent in the filing of a prior due process complaint notice in connection with the student's education, suggesting that the parent was either aware or was made aware of her procedural rights (Tr. p. 232; see Joint Exs. 38; 47).

In view of the foregoing, the evidence contained in the hearing record does not support the parent's contention that the absence of a Cooke representative from the June 2012 CSE meeting deprived the student of a FAPE or significantly impeded the parent's opportunity to participate in the decision making process for the reasons discussed above (P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *9-*10 [S.D.N.Y. July 22, 2013]; see W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288 [SDNY 2010] [upholding an SRO's determination that where the CSE relied primarily on written reports from a student's private school teachers, they were provided with an adequate opportunity to participate in the development of the student's IEP]; see also S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011]; C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F.Supp.2d 420, 430-31 [S.D.N.Y. 2011]; C.D. v Bedford Cent. Sch. Dist., 2011 WL 4914722, at *11 [SDNY Sept. 22, 2011] [noting that "Courts in this Circuit have upheld the validity of IEPs developed by improperly constituted CSEs when it is found that the parents were able to fully participate in the CSE process"]; Application of the Dep't of Educ., Appeal No. 11-042).

2. 12:1+1 Special Class Placement in a Community School

Upon review, and as more fully described below, the hearing record demonstrates that the August 2012 IEP accurately reflected the student's needs, and that the 12:1+1 special class placement recommended by the CSE for the 2012-13 school year was an appropriate placement for the student.

At the time of the August 2012 CSE meeting, the CSE had available to it the student's June 2012 Cooke progress report, which included teacher and related service provider narratives, the amount of progress the student had made toward achieving his annuals goals, and recommendations for the following school year (Tr. pp. 64-65; Joint Ex. 40). The hearing record also shows that the CSE referenced the student's April 2011 IEP during the August 2012 CSE meeting (Tr. p. 41; Joint Ex. 33). In addition, the parent attended the CSE meeting and provided information regarding the student (Tr. pp. 222-23). A review of the meeting minutes prepared by the district special education teacher indicates that the CSE discussed the student's academic, social, and physical present levels of performance (Tr. pp. 47-49; Joint Ex. 60). The minutes also noted discussion of the student's prior history of attending public schools in the district, difficulty with head-banging behavior, sensitivity to loud noises, and receipt of a diagnosis of a pervasive developmental disorder (Joint Ex. 60 at p. 1; see Joint Ex. 28 at p. 1).

The August 2012 IEP present levels of academic performance contained information commensurate with the information about the student's academic skills from the June 2012 Cooke progress report (compare Joint Ex. 40 at pp. 4-8, with Joint Ex. 63 at pp. 1-2). In reading, the IEP indicated that the student had made "steady progress" in his ability to sustain silent reading for 10-20 minutes, was showing emerging understanding of long and short vowels, and at times needed reminders to slow down while reading a story (Joint Ex. 63 at p. 1). According to the IEP, the student exhibited difficulty answering "why" and "how" questions, needed to use a graphic organizer to answer these questions after reading a book, and continued to work on summarizing the important parts of stories when retelling them to teachers and peers (id. at pp. 1-2). In writing, the IEP indicated that using the phonemic knowledge he had learned, the student had improved his ability to spell multisyllabic words, and enjoyed writing informational text (id. at p. 1). Additionally, the student wrote in complete sentences, had begun to recognize and use interesting language in his writing, and with prompting, independently added more detail and description to his writing (id.). The IEP noted that the student required practice and assistance when writing sentences about a central idea, varying his sentence structure, using a graphic organizer, and feeling comfortable writing about imaginary topics (id. at pp. 1-2). Going forward, the IEP indicated that the student should further his writing skills by practicing using description, detail and interesting language, as well as editing his own writing for capitalization and punctuation (id. at p. 2). In math, the IEP indicated that the student had made progress in his ability to count to 100, count backwards from 20, and counting by 2s, 4s, 5s, and 10s (id. at p. 1). The student also showed improvement in his ability to read word problems and decide whether it required addition or subtraction (id.). According to the IEP, the student knew the values of coins and had begun to add them together, completed simple math patterns, and read time to the hour (id.). The IEP stated that the student needed assistance with more complicated math patterns and telling time to the half hour and five minute intervals (id. at p. 2). Following review of his current math skills, the IEP indicated that the student should begin to work on one and two digit number problems with and without regrouping, and readiness for multiplication (id.).

A review of the August 2012 IEP shows that the present levels of social performance contained therein reflected information contained in the counseling section of the Cooke progress report (compare Joint Ex. 40 at p. 16, with Joint Ex. 63 at p. 2). The IEP indicated that the student engaged in activities that allowed him to explore and verbalize his feelings, and although he often refrained from self-expression, he demonstrated the ability to relay his thoughts (Joint Ex. 63 at p. 2). According to the IEP, the student continued to work on improving his conversational skills, and he was provided with dialogue models and prompts to improve his ability to appropriately respond to peers and increase the duration of conversations (id.). The IEP indicated that the student was also working on using appropriate body language to show that he was attending to a peer, and was encouraged to express his feelings so that he could be provided with the support needed to address his concerns (id.).

The August 2012 IEP also included information from the OT section of the Cooke progress report when reporting the student's present levels of performance in the area of physical development (compare Joint Ex. 40 at p. 18, with Joint Ex. 63 at p. 2). According to the IEP, the student made consistent progress in OT, was able to copy paragraphs with proper size, spatial awareness, and letter formation, and edited his work for errors with increased independence (Joint Ex. 63 at p. 2). The IEP stated that the student exhibited delayed motor skills and "sensory regulation concerns" for which he received OT services (id.). The IEP further stated that the student could tie his shoe laces using an adaptive device, and would benefit from additional practice with the motor planning steps for tying shoelaces, as he exhibited difficulty with adequate lace stabilization (id.). The IEP noted that the student was developing an awareness of right/left discrimination during motor and visual tasks (id.). The IEP also indicated that the student was practicing cursive letter formation and required continued support to integrate spatial and direction concepts, and to develop cursive handwriting and self-help skills (id.). According to the IEP, there were concerns with the student's eating habits in that he only ate certain foods; noting that an "[e]arlier IEP" had indicated the parent sought the assistance of a nutritionist and psychiatrist to address the student's eating habits (id.).

With respect to the August 2012 CSE's recommendation for the student's placement in a 12:1+1 special class, State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The district special education teacher who attended the August 2012 CSE meeting testified that the parent's assertion that the student required "an elementary school model with a self-contained classroom that has clear, consistent routines and expectations," was a description commensurate with a typical 12:1+1 special class placement within a community school (Tr. pp. 39-40, 66; see Joint Ex. 47 at p. 3). The special education teacher further testified that based on his experience teaching in 12:1+1 self-contained classes, 12:1+1 special class placements would

include established routines, set clear expectations, and provided the additional support of an "assistant" to maintain consistency of routines for the students (Tr. p. 67).

Moreover, teacher comments included in the Cooke progress report describe the student as "kind," "helpful," "compliant," and "hard-working" (Joint Ex. 40 at p. 2). The progress report indicated that the student was familiar with the classroom demands and routines, and was "often a role model for demonstrating expected and appropriate behavior" (id.). The student was further described as being intrinsically motivated to learn, and by report, he actively sought out information (id.). The Cooke progress report noted that the student learned through visual, auditory and kinesthetic approaches during instructional activities, displayed strength as a visual learner, and enjoyed working for rewards (id.). Furthermore, the progress report indicated that the student benefitted from receiving visual cues, having verbal directions repeated, and engaging in regular classroom sensory breaks to sustain attention (id.). Additionally, the Cooke progress report noted that the student exhibited difficulty with self-regulation and organization of his thoughts, body, and speech (id.). According to the progress report, the student also demonstrated difficulty tolerating and showing empathy toward certain peers, and needed prompting to express his feelings appropriately (id.). The progress report also indicated that during the 2011-12 school year, the student exhibited skills such as the ability to self-correct during oral reading tasks, follow "all the rules and responds well to peers and adults," write several sentences about a given topic without any prompting from a teacher, independently correct punctuation and capitalization errors, use graphic organizers, and use a checklist to complete math word problems (id. at pp. 4-7). According to the Cooke progress report, with prompting the student added detail and description to writing, independently and correctly sorted items into past/present categories, and successfully observed and collected data about experiments conducted in class, but required staff support when making predictions and analyzing observations (id. at pp. 10, 12). During obstacle course activities, the student was described as "a leader amongst his peers" and executed and sequenced three to four step motor tasks independently after one demonstration (id. at p. 18). A review of the Cooke progress report reveals that during the 2011-12 school year, the student received both whole group (12 students) and small group (3-4 students) instruction during various classroom activities (id. at pp. 6, 10, 12).

In conjunction with the supports available in the 12:1+1 special class placement, the August 2012 IEP provided the student with a number of modifications to the placement to address his management needs, including graphic organizers, graphs, charts, checklists, simple clear directions, small group instruction, a multisensory approach, manipulatives, direct teacher modeling, directions read, rephrased and repeated, allowance for the student to express knowledge learned in his own words, teacher check for comprehension, and verbal and auditory cues (Joint Ex. 63 p. 3). The IEP also contained annual goals to address the student's needs in the areas of reading, writing, math, social, visual motor, visual perceptual, and language with supporting short-term objectives (id. at pp. 4-7). Moreover, the hearing record shows that the August 2012 CSE recommended related services to support the student in his school program that included one individual and one group session of OT per week, one individual and one group session per week of speech-language therapy, and one group session of counseling per week (Tr. p. 53; see Joint Exs. 44; 59; 60). The frequency and duration of the related services the CSE recommended were commensurate with the related services provided to the student at Cooke during the 2011-12 school year (compare Joint Ex. 40 at p. 1, with Joint Ex. 59).

In summary, the evidence in the hearing record supports the conclusion that the August 2012 CSE's determination that a 12:1+1 special class placement with the identified related services and IEP management supports sufficiently addressed the student's identified needs such that it was reasonably calculated to enable him to receive educational benefits for the 2012-13 school year and therefore, the district's recommendations in the 2012-13 IEP offered the student a FAPE.

3. Related Services

The district asserts that the IHO erred in finding that the omission of related services significantly impeded the parent's opportunity to participate in the decision making process. The district maintains that the omission of related services on the August 2012 IEP was a clerical error that did not deprive the student of a FAPE and that the district did not rely on "retrospective testimony" that was deemed improper by the Court in R.E (694 F.3d at 185-89).

In this case, the special education teacher testified that during the August 2012 CSE meeting, the CSE discussed the related services for the student and considered the student's related service provider reports provided by Cooke (see Tr. pp. 49-50). The special education teacher added that the CSE discussed the frequency of each related service for the student and recommended that the student receive one 30-minute session each of individual and group OT, one 30-minute session each of individual and group speech-language therapy, and one 30-minute session per week of group counseling (see Tr. pp. 50-51). The special education teacher further testified that although discussed during the CSE meeting, the related services were not memorialized on the August 2012 IEP due to a clerical error (Tr. p. 61).

The special education teacher's personal notes, taken at the CSE meeting, reflect a discussion of the student's related services along with the frequency of each related service (Joint Ex. 60). Additionally, other documents prepared by the special education teacher at the time of the CSE meeting reflect that there was a discussion of related services during the course of the August 2012 CSE meeting (see Joint Exs. 59; 62). Further, the hearing record reflects that the related services recorded in these documents directly correspond with the related services reflected in the June 2012 Cooke progress report (compare Joint Ex. 40, with Joint Ex. 60). Moreover, the August 28, 2012 FNR reflects the related services offered to the student (Joint Ex. 44).

The determination of whether an IEP is reasonably calculated to enable the student to receive educational benefits is a prospective analysis and includes the consideration of only the information known at the time the IEP was developed (R.E., 694 F. 3d at 185-89 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, *17-*18 [S.D.N.Y. March 21, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *6 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *16 [S.D.N.Y. Nov. 16, 2012]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14 n.19 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491 [W.D.N.Y. Sept. 26, 2012], report and recommendation adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]. However, the Second Circuit rejected a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP (R.E., 694 F.3d at 185-89). Thus, applying the prospective analysis articulated in R.E., and based on the

foregoing, I find that the special education teacher's testimony regarding the discussion of related services at the CSE meeting, along with other evidence in the hearing record, indicate that the omission of the related services from the student's August 2012 IEP was the result of a clerical error, and therefore does not support the conclusion that the student was denied a FAPE on this basis. I note the similarity of this case to M.H. v. New York City Dep't. of Educ., in which the Court found that although the district failed to reflect a related services recommendation on a student's IEP, "it would exalt form over substance to hold that the IEP was inappropriate simply because a recommendation, omitted from the IEP because of a clerical error—but which appeared in the CSE meeting minutes, and was reflected in the conduct of the parties—failed to appear within the four corners of the IEP" (2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [internal quotations and citations omitted]).

C. Challenges to the Public School Site/Assigned Classroom

I next address the parent's contentions regarding the district's choice of the assigned public school site. The district asserts that the IHO erred in reaching the parent's contentions about the assigned public school site since such analysis would require the IHO to determine what might have happened had the district been required to implement the student's August 2012 IEP.

The IDEA and State regulations require that 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; Tarlowe, 2008 WL 2736027, at *6).[3] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York

[3] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187).[4] Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[5]

[4] Although the parents are entitled to rely on the IEP, and a district may not rehabilitate a substantively deficient IEP at the impartial hearing, as noted above, such reliance does not permit the elevation of form over substance in the circumstances of a clerical error in which the proper recommendation of the CSE was very clear at the time of the meeting.

[5] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing and under the circumstances of this case, I find that the parent cannot prevail on the claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's August 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the August 2012 IEP containing the recommendations of the CSE by the district and instead chose to maintain the student's enrollment at Cooke (Joint Ex. 46). While I can understand the parent's concern that IEP services would not be put into effect for her son in conformity with federal and State regulations if she placed him in the public school, the district cannot escape its obligation to put the IEP into effect and such concerns are not automatically transformed into viable claims simply by the parent visiting the public school site and viewing other students receiving services under different IEPs (see F.L., 2012 WL 4891748, at *13-*14).[6] Accordingly, the parent's claims regarding classroom composition, behavioral systems, and lack of technological resources at the assigned public school site were speculative and must be dismissed. The IHO's findings relating to the assigned public school site must be reversed and, under the circumstances of this case, do not constitute a basis for finding that the district failed to offer the student a FAPE.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year must be reversed. As described above, the hearing record demonstrates that the August 2012 CSE's recommendation of a 12:1+1 special class placement in a community school with related services was reasonably calculated to enable the student to receive educational benefits and, thus, the district offered the student a FAPE for the 2012-13

child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[6] While not required, the practice of visiting an assigned school in a unilateral placement case has value for purposes of equitable considerations, especially if it helps the parents further explain to the district their views regarding the alleged defects in the IEP which require correction.

school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether Cooke was an appropriate placement for the student or whether equitable considerations support the parent's claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find that they are either without merit or that I need not consider them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated July 11, 2013 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to fund the student's tuition costs at Cooke.

Dated: **Albany, New York**
October 10 2013

JUSTYN P. BATES
STATE REVIEW OFFICER