The University of the State of New York

The State Education Department
State Review Officer
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No. 13-161

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

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, H. Jeffrey Marcus, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2012-13 school year were appropriate. The district cross-appeals that portion of the IHO's decision which determined that the assigned public school site was not appropriate. The appeal must be dismissed. The cross-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 CSE that includes, but is not limited to, parent, 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 parent 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 parent and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

On May 30, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (sixth grade) (Dist. Ex. 3 at pp. 1, 14; see Parent Ex. B). Finding that the student remained eligible for special education programs and related services as a student with a speech or language impairment, the May 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school (Dist. Ex. 3 at pp. 1, 10-11, 14-15).[1, 2] The May 2012 CSE

[1] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The district school psychologist testified at the impartial hearing that the May 2012 CSE's failure to check the appropriate "box" to denote that the student was eligible for a 12-month school year program constituted a clerical

also recommended related services consisting of two 40-minute sessions per week of speech-language therapy in a small group delivered in the classroom, two 40-minute sessions per week of individual physical therapy (PT), two 40-minute sessions per week of occupational therapy (OT) in a small group, and one session per week of counseling in a small group (id. at p. 10). The May 2012 CSE also developed annual goals in the areas of reading, writing, mathematics, receptive and expressive language, OT and PT, and to address his social/emotional needs (id. at pp. 3-9). In addition, the May 2012 CSE found that the student did not require a behavioral intervention plan (BIP) (id. at p. 2).

By final notice of recommendation (FNR) dated July 2, 2012, the district summarized the special education programs and related services recommended by the May 2012 CSE, and notified the parent of the particular public school site the district assigned the student to attend during the 2012-13 school year (see Dist. Ex. 11).

By letter dated July 13, 2012, the parent indicated that because she could not visit the assigned public school site until September 2012 to "assess the appropriateness of [the assigned public school site]", she notified the district of her intentions to unilaterally place the student at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year and to seek reimbursement for the costs of the student's tuition at Cooke from the district (Parent Ex. E at p. 1).[3] The parent also requested the provision of door-to-door transportation and related services (id.).[4]

A. Due Process Complaint Notice

By due process complaint notice dated January 11, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2012-13 school year (Dist. Ex. 1 at p. 1). The parent alleged that during the May 2012 CSE meeting, she expressed her concerns about the recommended 12:1+1 special class placement, particularly in light of the student's difficulty learning in a larger classroom size with a mix of students with higher skill levels (id. at p. 5). In addition, the parent raised several allegations in relation to the appropriateness of the assigned public school site, including but not limited to the following claims: the classifications of the students in the proposed classroom differed from the student's classification; the students in the proposed classroom were "higher functioning and more socially mature" than the student in the instant case; the student's reading level was "far below" the levels of the other students in the proposed classroom and the student would not receive the necessary individualized instruction in

error (compare Tr. pp. 61-62, 70, with Dist. Ex. 3 at pp. 11, 15, and Parent Ex. 2). The parent understood at the time of the May 2012 CSE meeting that the student was eligible for a 12-month school year program (see Tr. pp. 220-21).

[3] On April 21, 2012, the parent signed a Cooke "2012-2013 Enrollment Package" form, and on or about August or September 2012, executed an enrollment contract with Cooke for the student's attendance during the 2012-13 academic school year (see Dist. Ex. 13 at pp. 1-4; Parent Ex. K at pp. 1-2; see also Tr. pp. 249, 256-58). 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]). The student began attending Cooke for the 2011-12 school year (see Tr. pp. 215-17, 263).

[4] On October 2, 2012, accompanied by a school psychologist from Cooke, the parent visited the assigned public school site (see Dist. Ex. 12 at p. 1).

order to improve his reading comprehension, because reading was taught in a group in the proposed classroom; and the assigned public school site did not offer OT or PT on-site (id. at pp. 5-6).

The parent further maintained that Cooke provided the student with an appropriate educational program, in part, because it offered him a small class setting (Dist. Ex. 1 at p. 6). As a remedy, the parent requested an award of payment of the student's tuition to be provided at public expense, as well as door-to-door transportation services (id.).

B. Impartial Hearing Officer Decision

On March 12, 2013, an impartial hearing convened, and after two days of proceedings, concluded on May 23, 2013 (Tr. pp. 1-268). In a decision dated July 30, 2013, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year and accordingly, denied the parent's request for relief (IHO Decision at pp. 16-17).[5]

Turning to the parent's allegations regarding the "implementation of the IEP," the IHO initially concluded that the issues were not speculative in this particular instance, because the parent rejected the May 2012 IEP subsequent to the time that the district was obligated to implement it, which was on July 1, 2012 (see IHO Decision at pp. 11-15). In any event, the IHO concluded that had the student enrolled in the 12:1+1 special class placement in the assigned public school site, the student would have been suitably grouped for instructional purposes (id. at p. 14). Specifically, the IHO found that based on the evidence, the student would have been appropriately grouped in the 12:1+1 special placement with other students within the same age range (id.). The IHO also considered the range of achievement levels of the students in the proposed 12:1+1 special class placement with respect to mathematics and reading, and did not find that they differed from those of the student (id.). Next, the IHO rejected the parent's contention that the proposed 12:1+1 special class placement was not appropriate because the students in the proposed classroom had different classifications than the student (id. at p. 15). In addition, the IHO determined that although the student's related services needs would have been fulfilled by independent contractors, this did not give rise to a conclusion that the district would have deviated from the student's IEP in a material or substantial way resulting in a failure to offer the student a FAPE for the 2012-13 school year (id. at p. 16). The IHO did not reach the issues regarding whether Cooke was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's requested relief (id.).

IV. Appeal for State-Level Review

The parent appeals, and seeks findings that the district denied the student a FAPE during 2012-13 school year, that Cooke constituted an appropriate unilateral placement for the student, and that equitable considerations weighed in favor her requested relief. Regarding the provision of a FAPE to the student, the parent alleges that the IHO erred in finding that the student would

[5] Prior to addressing the merits, the IHO analyzed and rejected the parent's request to expand the scope of the due process complaint notice to include an allegation raised at the impartial hearing regarding the district's failure to memorialize the student's eligibility for a 12-month school year program in the May 2012 IEP as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 10-11; see also Tr. pp. 17-21).

have been suitably grouped for instructional purposes in the proposed 12:1+1 special class placement. The parent further submits that the IHO erred in failing to address the allegation the student would not receive the individualized instruction that he required in order to improve his reading, and also noted that most of the students within the proposed classroom worked at higher reading and math levels than the student in the instant case. Additionally, the parent claims that although the May 2012 CSE recognized the student's need for small group instruction, reading was taught as an entire class in the proposed 12:1+1 special class placement, in contravention of the May 2012 IEP. Moreover, the parent asserts that the grouping in the proposed 12:1+1 special class placement was not appropriate because most of the students in the proposed classroom were students with emotional disturbances, whereas the student in the instant case was eligible for special education services as a student with a speech or language impairment. Furthermore, the parent contends that the student would not have been appropriately grouped in the proposed classroom based on his age. The parent also claims the assigned public school site was not appropriate for the student, because it could not address his related services needs on site. In addition, the parent alleges that despite the student's need for a very structured environment, the hearing record contained no evidence that the proposed 12:1+1 special class placement could offer the student the structured setting he required in order to make educational progress.

The parent also alleges that Cooke constituted an appropriate unilateral placement for the student, in part due to the meaningful academic and social/emotional progress that the student made during the 2012-13 school year. Additionally, the parent argues that at Cooke, the student was grouped with students who had similar needs. Lastly, the parent asserts that equitable considerations weighed in favor of her request for relief, because she afforded the district timely notice of her intention to place the student in Cooke for the 2012-13 school year and the evidence showed that she cooperated with the district in order to develop an appropriate program for the student. She further notes that the district did not reconvene the CSE upon receipt of the parent's 10-day notice letter to discuss her concerns. As a remedy, the parent requests an award of direct payment of the costs of the student's tuition at Cooke for the 2012-13 school year.

In an answer, the district seeks to uphold the IHO's decision in its entirety. Although the district maintains that the parent's allegations regarding the propriety of the functional grouping of the students within the proposed classroom were speculative, the district alternatively argues that the student would have been functionally grouped for instructional purposes at the assigned public school site, because his achievement levels fell within those of other students enrolled in the proposed 12:1+1 special class placement. Furthermore, the district contends that the classifications of the other students enrolled in the proposed 12:1+1 special class placement did not render the proposed grouping inappropriate. The district also contends that while the parent's allegations regarding the assigned public school site are speculative, there is no evidence in the hearing record to demonstrate that the student would have regressed academically had he enrolled in the proposed 12:1+1 special class placement at the assigned public school site. Next, the district asserts that the hearing record does not substantiate the parent's allegation that the student would not have received his related services in accordance with his May 2012 IEP or the services of the classroom paraprofessional had he enrolled in the assigned public school site. In addition, although the district asserts that the parent's assertions in relation to the assigned public school site are speculative, the district argues that the parent's allegation that personnel employed at the assigned public school site could not accommodate the student's management needs lacks a basis

in the hearing record. Finally, the district alleges that the May 2012 IEP appropriately addressed the student's reading deficits.

In addition, the district asserts that Cooke did not constitute an appropriate unilateral placement for the student, in part because the hearing record contains no evidence to demonstrate that Cooke provided the student with specially designed instruction to meet all of his unique needs or to support a finding that the student made more than trivial academic progress during the 2012-13 school year. Lastly, the district argues that equitable considerations preclude relief in this instance, because the parent failed to timely notify the district of her concerns about the May 2012 IEP. Moreover, the district alleges that the parent's 10-day notice was insufficient as a matter of law given the lack of detail in describing her concerns with the May 2012 IEP. In any event, the district maintains that the parent is not entitled to an award of relief, because there is no evidence to demonstrate that she was legally obligated to pay the student's tuition at Cooke.

The district also cross-appeals the IHO's decision to the extent that he found that the parent's assertions with respect to the assigned public school site were not speculative, because the parent rejected the May 2012 IEP and enrolled the student in Cooke after the time that the district was required to implement the May 2012 IEP. The district maintains that any allegations with respect to the assigned public school site are speculative in nature, because the student never attended the assigned public school site.[6]

The parent submitted an answer to the cross-appeal. The parent generally denies the allegations set forth in the cross-appeal and further maintains that the IHO properly determined that issues raised regarding the appropriateness of the assigned public school site were not speculative in nature.

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 parent 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

[6] As neither party has appealed from the IHO's determination that the issue raised at the impartial hearing related to the provision of a 12-month school year program was outside the scope of the impartial hearing because the parent failed to raise the issue in the due process complaint notice and the district did not otherwise "open the door", that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 10-11).

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 parent' 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 parent" (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 parent for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent' 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 parent 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 Review

In support of her contention that the district did not offer the student a FAPE during the 2012-13 school year, the parent asserts on appeal that the proposed classroom was not an appropriate educational placement for the student because it could not accommodate the student's management needs and in light of his need for a more structured environment. However, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the 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 300.508[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]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 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 [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).

Upon review, the parent's due process complaint notice cannot be reasonably read to include this particular issue now raised for the first time on appeal in the parent's petition—specified above—as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year. The hearing record demonstrates that the issues for resolution before the IHO included challenges to the proposed classroom at the assigned public school site (see Parent Ex. A at pp. 1-6). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-268; Dist. Exs. 1-14; Parent Exs. B; E; I-N; IHO Exs. I-VII).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this particular issue now raised for the first time in the petition or seek to include this issue in an amended due process complaint notice, I decline to review it. 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., 2012 WL 33984, at *4-*5 [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]).

Consequently, the contention in the parent's petition raised for the first time on appeal is outside the scope of my review, and therefore, I will not consider it (see M.P.G., 2010 WL 3398256, at *8; Snyder, 2009 WL 3246579, at *7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application

of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).[7]

B. 12:1+1 Special Class Placement

In this case, while it is unclear from the parent's petition whether she disputes the appropriateness of the 12:1+1 special class placement recommended in the student's May 2012 IEP, a review of the hearing record undertaken out of an abundance of caution on this issue reflects that the May 2012 IEP—and in particular, the recommended 12:1+1 special class placement—was reasonably calculated to enable the student to receive educational benefits, and offered the student a FAPE for the 2012-13 school year.

To the extent that the parent asserts that the district failed to offer the student a FAPE because a 12:1+1 special class placement would not have met the student's need for small group instruction and additional staffing, State regulation provides that the "maximum class size for special classes containing 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, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). In accordance with State regulation and in order to address the student's academic delays, the May 2012 CSE recommended a 12:1+1 special class placement in a specialized school (Dist. Ex. 3 at p. 10).

According to the student's July 2010 psycho-educational evaluation, the student recently completed third grade in a 12:1 special class placement in a community school and would be entering fourth grade (see Dist. Ex. 4 at p. 1). At that time, administrations of the Stanford Binet Intelligence Scales-5th Edition Abbreviated Version (SB-5), the Woodcock Johnson III-Tests of Achievement (WJ-III ACH), the Bender Gestalt Test, figure drawings, and a clinical interview were used to assess the student (id.). The student was cooperative and actively participated in the testing; however, as testing progressed, the student exhibited increased difficulty paying attention, especially with more challenging tasks (id. at p. 2).

Overall, the evaluator reported that the student functioned in the low average range of cognitive abilities with strengths in verbal skills and weakness in perceptual organization and visual perceptual motor skills (Dist. Ex. 4 at p. 6). The evaluator noted that the student demonstrated significant delay in all areas of his academic skills, and reported that the student was basically a non-reader (id.). According to the evaluation results, language and oral comprehension were areas of strength for the student (id.). Socially, the student presented as immature, although he was talkative, active and pleasant, and got along well with peers and adults (id.). More specifically, results of the SB-5 revealed that the student's test composite and verbal reasoning

[7] 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 additional issue raised in the petition was not initially elicited by the district in testimony, and therefore, I find that the district did not "open the door" to this claim under the holding of M.H. (see J.C.S., 2013 WL 3975942, at *9; B.M. v New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]).

scores fell within the average range, while his visual perception skills fell within the borderline deficient range (id. at p. 3). The evaluator opined that the student's deficits in visual perception and visual organization affected his ability to copy assignments, complete written work in a timely manner, and perform other fine motor tasks (id. at pp. 3-4). The administration of the WJ-III ACH revealed that the student's reading, writing, mathematics, and academic functioning in all areas were significantly delayed (id. at pp. 4-7). Specifically, the student's broad reading scores were assessed at the 1.4 grade level (id. at p. 4). In addition, the student's difficulties in decoding and writing affected his fluency, comprehension, and spelling skills, which all fell below the first percentile (id.). With respect to the student's mathematics skills, although he exhibited a relative strength in mathematics calculation, his broad mathematics skills were limited and fell below the first percentile (id. at p. 5). The student also displayed significant delay in his ability to organize ideas and convey them in written form (id.).

In testimony, the district school psychologist explained that the May 2012 CSE based its recommendation for a 12:1+1 special class placement in light of the student's considerable academic delays that could not be addressed in a larger class setting (Tr. p. 51).[8] Similarly, the district school psychologist added that the May 2012 CSE recommended a 12:1+1 special class placement because the student did not present with severe interfering behaviors nor did he exhibit severe physical or management needs, which would have required a smaller staff ratio or a larger complement of paraprofessional staff (Tr. pp. 51, 55). Regarding the role of the paraprofessional in a 12:1+1 special class placement, the district school psychologist described the paraprofessional as an individual who was there to assist the special education teacher in running the class, who could implement the teacher's initiatives, and provide prompting and support to students (Tr. p. 52). Moreover, the additional paraprofessional in the classroom could help the teacher form smaller groups during the instructional day (Tr. pp. 54-55). The district school psychologist testified that the May 2012 CSE agreed that a "full sized" and general education setting could not adequately support the student, given the nature of the student's difficulties (Tr. p. 53). Moreover, the May 2012 CSE further noted that the student had not exhibited difficulties in a class with similar staffing ratios while enrolled at Cooke (id.).[9] Furthermore, the May 2012 CSE determined that based on information gleaned from "former evaluations" and information from Cooke personnel, a staffing ratio of 12:1+1 was sufficient and appropriate to enable the student to meet his annual goals (Tr. p. 53). According to the district school psychologist, the May 2012 CSE did not determine the student's program recommendation based upon his eligibility classification of speech or language impairment, but rather, that consideration was given to the "levels of performance," and on the annual goals and the difficulties that the student might face in meeting those annual goals, and on the student's profiled strengths and weaknesses (Tr. p. 55). The hearing record also indicates that the May 2012 CSE considered and rejected a 12:1+1 special class placement in a community school, having determined that the student's delays precluded a

[8] Contrary to the parent's testimony that she raised concerns during the May 2012 CSE that placement in larger environment would hinder the student and that the student would not receive the small group instruction that he required, the district school psychologist testified that during the May 2012 CSE meeting, the parent did not raise any objections to the May 2012 CSE's recommended 12:1+1 special class placement (compare Tr. p. 62 with, Tr. p. 220).

[9] The district school psychologist later clarified that while at Cooke, the student participated in a smaller group setting for some academic areas (Tr. p. 54).

placement in that program (Dist. Ex. 3 at p. 15). Additionally, the hearing record reflects that the May 2012 CSE also considered a 6:1+1 special class placement; however, the May 2012 CSE determined that a 6:1+1 special class placement was not appropriate for the student because he did not present with "significant interfering behavior" (id. at p. 16).

Additionally, the May 2012 CSE recommended the numerous environmental modifications and human or material resources in the May 2012 IEP, including the use of a pencil grip, graphic organizers, verbal prompts, and immediate responsiveness from the teacher, structured environment, in addition to the provision of positive peer models (Dist. Ex. 3 at pp. 2, 10). Consistent with the student's identified needs, the May 2012 CSE also developed annual goals that targeted the student's deficits in mathematics, English language arts (ELA), written expression, and physical development (id. at pp. 3-9). The May 2012 CSE also built strategies into the annual goals to support the student's learning, such as teacher assistance and modeling, explicit instruction, multisensory approaches, and scaffolding (id.). Furthermore, to address the student's social/emotional needs, the May 2012 CSE recommended that the student receive one session of group counseling per week, and developed an annual goal related to the student's self-concept and confidence in academic and social situations (id. at pp. 9-10).

Based on the foregoing, the hearing record supports a finding that the 12:1+1 special class placement, in conjunction with the modifications and academic management strategies incorporated into the student's May 2012 IEP, was tailored to address the student's individual special education needs and was reasonably calculated to provide him with educational benefits.

C. Challenges to the Assigned Public School Site

Turning next to the district's cross-appeal, the district alleges that the IHO erred to the extent that he concluded that the parent's allegations with respect to whether the district could implement the May 2012 were not speculative in nature.

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 [S.D.N.Y. Oct. 16, 2012]; 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 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., 906 F. Supp. 2d at 273 [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate

regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see 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., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I 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]). 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]).

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 "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]).

In view of the forgoing, the IHO erred in concluding that the parent's assigned public school allegations were not speculative, because the parent cannot prevail on claims that the district would have failed to implement the May 2012 IEP at the public school site as a retrospective analysis of

how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186 [2d Cir. 2012]; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the May 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. E at pp. 1-2; K at pp. 1-2). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site.

VII. Conclusion

Having determined, as did the IHO, that the evidence in the hearing record demonstrates that the district sustained its burden to establish that if offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations support the parent's claim (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED THAT the IHO's decision dated July 30, 2013 is modified by reversing that portion which determined that the parent's allegations regarding the assigned public school were not speculative.

Dated: **Albany, New York**
November 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER