The University of the State of New York

The State Education Department
State Review Officer
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No. 13-173

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, Neha Dewan, Esq., of counsel

DLA Piper LLP, attorneys for respondents, Colleen M. Carey, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center For Learning and Development (Cooke) for the 2012-13 school year. The parents cross-appeal the IHO's failure to address issues raised in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On February 7, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Parent. Ex. D at pp. 1, 14-15). Finding that the student remained eligible for special education programs and related services as a student with an intellectual disability, the February 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school with the services of a full-time health paraprofessional (group service), special transportation, and the following related services: four 45-minute sessions per week of individual speech-language therapy; two 45-minute sessions per week of individual physical therapy (PT); two 45-minute sessions per week of individual

occupational therapy (OT); and one 45-minute session per week of counseling in a small group (id. at pp. 1, 9-11, 14-15, 17).[1, 2] In addition, the February 2012 CSE developed a transition plan with a coordinated set of transition activities, which included, in relevant part, the student's participation in a work study program, vocational training to aid in job preparedness, and work study to develop on-the-job skills (id. at pp. 3, 11-13).[3]

On April 23, 2012, the parents signed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year beginning September 2012 (see Parent Ex. K at pp. 1-2).[4] On June 14, 2012, the parents signed an enrollment contract with Cooke for the student's attendance during summer 2012 (see Parent Ex. H at pp. 1-2).

By final notice of recommendation (FNR) dated June 29, 2012, the district summarized the special education and related services recommended in the February 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 6).

In a letter dated July 13, 2012, the parents advised the district that they visited the assigned public school site on July 10, 2012 (see Dist. Ex. 5 at p. 1). Based upon the visit, the parents indicated that the assigned public school site was not appropriate for the student because the public school included "work at a job site approximately four days per week—the majority of her time at school" (id.). The parents further indicated that this "schedule" was not appropriate, since the student demonstrated the ability to make academic progress in a small group or individualized setting (id.). Additionally, the parents noted that the grouping of students in the classroom to complete assignments would not provide sufficient "individualized support to the student or opportunities for cooperative learning" (id.). The parents also noted that many of the students in the observed classroom were nonverbal, and thus, the student would not have a suitable peer group to assist in the development of her language skills (id.). According to the parents, the assigned public school site did not offer direct instruction in social skills, and they observed no evidence of an extracurricular program to otherwise address these skills (id. at pp. 1-2). The parents further indicated that the "core instruction" was taught in a "self-contained classroom," which would limit the student's independence and social growth achieved over the past year and that students who required paraprofessionals could not take part in travel training (id. at p. 2). As a result, the parents further indicated that they were reenrolling the student at Cooke for the 2012-13 school year, and

[1] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

[2] A parents' concern noted in the February 2012 IEP indicated that the student needed a "para[professional]" in a "community school;" the February 2012 CSE considered, and rejected, a special class placement in a community school (Parent Ex. D at pp. 2, 15).

[3] According to the February 2012 IEP, the student enjoyed working in a nursing home, and upon graduation, wanted to complete a course in the medical field (see Parent Ex. D at p. 3). In addition, the February 2012 IEP noted that the student would participate in "on-the-job training as a nursing aid" (id.).

[4] 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).

would seek tuition reimbursement and door-to-door transportation from the district (id.). Finally, the parents indicated that they remained "willing" to visit any public school site (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated February 12, 2013, the parents alleged that the district failed to offer the student a free appropriate education (FAPE) for the 2012-13 school year, and specifically asserted that the district failed to provide the student with an "appropriate placement" that would "meet the needs outlined in [the student's] IEP" (see Dist. Ex. 1 at p. 1). The parents indicated that they rejected the assigned public school site based upon two visits, which occurred on July 10, and October 4, 2012 (id.). In addition to repeating as allegations, the information they relayed to the district about the assigned public school site in their July 13, 2012 letter, the parents also alleged that the jobsite schedule would "thwart[]" the student's academic progress and that the "12:1:1 teaching ratio" would not provide the student with "enough support on job sites" (id.; compare Dist. Ex. 1 at pp. 2-3, with Dist. Ex. 5 at pp. 1-2).

In addition, the parents alleged that the "'tiered system'" used at the assigned public school site to group students for instruction would not provide the student with sufficient "individualized support or opportunities for cooperative learning" (Dist. Ex. 1 at p. 2). The parents also noted that they did not observe students traveling to "different rooms for gym and art," and the "limited internship possibilities combined with the unchallenging and undifferentiated classroom work" left the student with "very few opportunities for growth and achievement" at the assigned public school site (id.). In addition to the "academic inadequacies of the [assigned public school site]," the parents asserted that the nearly "three-hour" round-trip commute to the assigned public school site would not allow the student sufficient time to participate in extracurricular activities to "foster her emotional and social growth" (id.).

Regarding the student's unilateral placement at Cooke, the parents indicated that the student made significant academic progress, demonstrated leadership skills, improved her personal organization skills, and had begun to "express more interest" in interactions with peers as a result of attending Cooke for the past two years (Dist. Ex. 1 at pp. 3-4). The parents asserted that Cooke would continue to provide the student with the instruction and individual attention necessary to address her unique learning needs, and that equitable considerations weighed in favor of their requested relief (id. at p. 4). As relief, the parents requested direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year, as well as the provision of round-trip transportation (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

On April 8, 2013, the parties proceeded to an impartial hearing which concluded on June 11, 2013 after three days of proceedings (see Tr. pp. 1-359). In a decision dated August 9, 2013, the IHO initially addressed and then denied the district's motion to dismiss the parents' due process complaint notice (see IHO Decision at pp. 12-14).[5] Next, the IHO found that the district failed to

[5] The Second Circuit has determined that an exhaustive analysis by the IHO is not mandated in every administrative proceeding and that in appropriate circumstances summary disposition procedures may be employed (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see Application of the Dep't of Educ., Appeal No. 10-014; Application of the Bd. of Educ., Appeal No. 05-007; Application of a Child Suspected of Having a Disability, Appeal No. 04-059; Application of a Child with a Disability, Appeal No. 04-018).

offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 14-18).

With regard to the conclusion that the district failed to offer the student a FAPE, the IHO ultimately found that the student's "proposed placement at [the assigned public school]" was not appropriate because at the impartial hearing the district did not address or present evidence regarding the parents' concerns in the due process complaint notice that the job site schedule would "thwart" the student's academic progress or that the "12:1:1 class ratio 'would not provide [the student] with enough support on job sites'" (IHO Decision at pp. 14-16). Similarly, the IHO found that the district did not address or present evidence at the impartial hearing related to the parents' testimony regarding the nature of the group internships or that the student "might have a tendency to 'wander' at the job sites unless accompanied by a paraprofessional" (id. at p. 14). The IHO found that both of these concerns were "entirely rational and well-founded," and the district's responses to these concerns in its closing brief were not persuasive (id. at pp. 14-15). Finally, the IHO found that the district did not present evidence at the impartial hearing to demonstrate "how the 12:1:1 class would function at the job site or how the job site training would be integrated" with the student's academic instruction, "how small group instruction would be provided at the job site," or "how many hours" the visits to the job sites lasted or who provided instruction at the job sites (id. at p. 15).

Turning to the appropriateness of the unilateral placement, the IHO found that the evidence supported a conclusion that Cooke was appropriate (see IHO Decision at pp. 16-17). The IHO concluded that the student received instruction in a small, structured setting and that the student made academic and social progress at Cooke (id. at p. 16). The IHO also noted that the student's classmates were verbal, the presence of an occupational therapist and a speech-language pathologist in the classroom eliminated the need for disruptive pull-outs, and the students were "accompanied to job sites by community inclusion assistance, who serve[d] small groups of 3 [to] 4 children," which indicated that the students received individual attention and direction at the job sites (id. at pp. 16-17). Based upon the evidence, the IHO concluded that Cooke provided instruction specifically designed to meet the student's unique needs, and thus, was reasonably calculated to enable the student to receive educational benefits (id. at p. 17).

With respect to equitable considerations, the IHO found that the parents cooperated fully with the district, and their execution of the Cooke enrollment contract prior to visiting the assigned public school site did not demonstrate "bad faith" (IHO Decision at p. 17). Finding that the parents had limited financial means, the IHO also concluded that they were entitled to direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year (id. at pp. 17-18).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2012-13 school year based upon the district's failure to demonstrate that the assigned public school site was appropriate. Specifically, the district argues that it had no obligation to establish that the assigned public school site would properly implement the student's February 2012 IEP because the parents rejected the assigned public school site, and moreover, the parents' claims were otherwise speculative. Alternatively, the district argues that the evidence supports a finding that the assigned public school site would have appropriately

implemented the student's February 2012 IEP, and the parents' expressed concerns were not supported by the evidence.

With respect to the IHO's finding that Cooke was an appropriate unilateral placement, the district argues that the hearing record did not contain sufficient evidence to support the conclusion that Cooke appropriately met the student's academic and social/emotional needs. The district also argues that the IHO erred in concluding that equitable considerations weighed in favor of the parents' requested relief because the parents did not truly consider enrolling the student in the assigned public school site, and failed to give the district the requisite notice regarding the student's enrollment at Cooke. Finally, the district asserts that the parents failed to establish that they were legally obligated to pay the costs of the student's tuition.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's findings that the assigned public school site was not an appropriate and that the district failed to offer the student a FAPE for the 2012-13 school year. The parents also generally assert that Cooke was an appropriate unilateral placement, equitable considerations weighed in favor of their requested relief, and the parents were entitled to direct payment of the costs of the student's tuition at Cooke. In a cross-appeal, the parents argue that the IHO failed to determine whether the 12:1+1 special class placement was appropriate and whether the health paraprofessional services—as a group service instead of individual paraprofessional services previously recommended for the student—was appropriate.

In an answer to the parents' cross-appeal, the district alleges that the issue regarding the appropriateness of the health paraprofessional services—as a group service—was not raised in the parents' due process complaint notice, and therefore, is outside the scope of permissible review on appeal. Alternatively, the district argues that the 12:1+1 special class placement and the health paraprofessional services, as a group service, recommended by the February 2012 CSE were appropriate.

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 Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. Specifically, the parents cross-appeal the IHO's failure to determine whether the 12:1+1 special class placement was appropriate and whether the health paraprofessional services, as a group service, was appropriate. However, as argued, in part, by the district, a review of the hearing record reveals that the parents raised these issues as a bases upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year for the first time in the cross-appeal, and thus, are outside the scope of review on appeal (see Tr. pp. 1-359; Dist. Exs. 1-7; Parent Exs. C-D; F-N; IHO Ex. I).

With respect to the allegations regarding the appropriateness of the 12:1+1 special class placement and the health paraprofessional services, as a group service, now raised in the parents' cross-appeal for the first time, 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; 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, I find that the parents' due process complaint notice cannot be reasonably read to include challenges to the appropriateness of the recommended 12:1+1 special class placement or the health paraprofessional services, as a group service, now asserted in the parents' cross-appeal as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-5). The hearing record demonstrates that the issues for resolution before the IHO included challenges to specific aspects of the assigned public school site, and the district's ability to implement the student's February 2012 IEP at the assigned public school site (see id.). 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 parents attempt to amend their due process complaint notice (see Tr. pp. 1-359; Dist. Exs. 1-8; Parent Exs. C-D; F-N; IHO Ex. I).

Moreover, 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; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the allegations raised in the parents' cross-appeal for the first time on appeal were initially raised—if at all during the impartial hearing—by the parents or by counsel for the parents on cross-examination of a district witnesses or during opening statements or closing briefs (see, e.g., Tr. pp. 22-53, 74-77, 82-84, 88-89, 92, 96, 115-16, 122-24, 135-40, 142, 147-52, 154).

Here, the district did not initially elicit testimony regarding these issues, and at the outset of the impartial hearing, requested that the IHO render a decision on its motion to dismiss the parents' due process complaint notice, which argued that all of the parents' allegations therein related to the assigned public school site and under recent decisional law, these allegations were speculative and not properly before the IHO (see Tr. pp. 5-8; Dist. Ex. 7 at pp. 1-7). At that time, the parties agreed to allow the IHO to reserve his decision on the motion to dismiss, and proceeded with opening statements (see Tr. pp. 8, 19-29). Prior to moving forward with testimonial evidence, however, the district asked the IHO to address issues noted in the parents' opening statement—and in particular, the statements regarding the district's failure to provide the student with one-to-one paraprofessional services—that were not raised in the parents' due process complaint notice (Tr. pp. 26, 29-32). Noting that the IHO did not conduct a prehearing conference, the district asserted that it was necessary to address these issues as it would affect the presentation of its case—noting

that based upon its interpretation of the parents' due process complaint notice, the district had not intended to call an "IEP witness"—and requested that the IHO make a finding as to whether the paraprofessional services was an issue to be determined at the impartial hearing (see Tr. pp. 29-31, 98-99; see also Tr. pp. 42-49 [objecting to the parents' submission of documentary evidence related to the paraprofessional services issue]). The IHO declined to issue a finding, and instead, instructed the parties to raise these arguments in closing briefs (see Tr. pp. 31-32, 53).

At the conclusion of the first day of the impartial hearing, the district requested a continuance for additional time within which to "properly respond" to what it perceived as the "new issue" of the paraprofessional services (Tr. pp. 98-99). On the second day of the impartial hearing, the district presented the district school psychologist who participated at the student's February 2012 CSE meeting to specifically address the paraprofessional services recommended in the February 2012 IEP (see Tr. pp. 110-22). During the cross-examination of the district school psychologist, the district specifically objected to questions related the 12:1+1 special class placement recommended in the February 2012 IEP as outside of the scope of the due process complaint notice (see Tr. pp. 135-38). In addition, a review of the hearing record demonstrates that the district repeatedly objected to any line of questioning that fell outside the scope of the due process complaint notice; therefore, I find that the district did not "open the door" to these issues under the holding of M.H.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, I decline to review these issues. 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]).[6]

Accordingly, the allegations in the parents' cross-appeal raised for the first time on appeal are outside the scope of my review, and therefore, these allegations will not be considered (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

[6] Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M., 2013 WL 1972144, at *6 n.2 [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]).

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).

B. Challenges to the Assigned Public School Site

Finding no challenges to the appropriateness of the February 2012 IEP, the district contends that the IHO erred in concluding that the district failed to offer the student a FAPE for the 2012-13 school year based upon the district's failure to demonstrate that the assigned public school site was appropriate. Specifically, the district argues that it had no obligation to establish that the assigned public school site would properly implement the student's February 2012 IEP because the parents rejected the assigned public school site, and moreover, the parents' claims were otherwise speculative.

Initially challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student has not attended the public school and taken the IEP services offered by the district. In these circumstances, 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. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; 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, 676-78 [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 Dep't 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]).[7]

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"]; 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, 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 March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669, at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273).

In this case, the district timely developed the student's 2012-13 IEP and offered it to the student. It is undisputed that the parent enrolled the student at Beacon prior to the time that the district became obligated to implement the March 2012 IEP and rejected the IEP before visiting the assigned school (Parent Exs. E; J). As the time for implementation of the student's IEP at the assigned public school site had not yet occurred when the parent rejected the district's offer, the parent's various challenges relating to the assigned school, including the public school site's ability

[7] 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., 584 F.3d at 420 [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

to provide the related services, were speculative claims. These were claims regarding the execution of the student's program and the district was not obligated to present retrospective evidence of the IEP's implementation to refute them (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273). Accordingly, there is no reason under these factual circumstances to disturb the IHO's rejection of the claims related to the assigned public school site.

Moreover, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. As more fully discussed below, the evidence shows that the 12:1+1 special class placement with a health paraprofessional as a group service at the assigned district public school site was capable of providing the student with appropriate support at the job site, the frequency of job site visits would not "thwart" the student's academic progress, and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297; Van Duyn, 502 F.3d at 822; see T.L. v. Dep't of Educ., 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D.N.Y. 2011]; Savoy v. Dist. of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. Dist. of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. Sch. Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D. Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

Notwithstanding the speculative nature of the parents' challenges to the public school as explained above, the district argues that the IHO erred in finding that the district failed to adequately respond to the parents' allegations concerning the student's onsite job training. Initially, the available evidence indicates that when questioned about the assigned public school site's obligation to adhere to the February 2012 IEP, the district school psychologist testified that, "[b]y law," the student's teacher at the assigned school "was responsible for the implementation of the IEP and that would include all the goals and transition activities" (Tr. pp. 164-65). The parent coordinator from the assigned school indicated that once a student enrolled in the public school site, the administrator and the unit coordinator reviewed the student's IEP and developed a class schedule based thereon (Tr. p. 93). Similarly, the parent coordinator testified that the administrator at the public school site was responsible for implementing that portion of a student's IEP that called for paraprofessional services (Tr. pp. 94-95).

Regarding the parents' concern regarding how the "12:1:1 class ratio" would function at the job site or how the job site training would be integrated with the student's academic instruction so as not to impede her academic progress, the district school psychologist testified that the amount of time a student spent at a jobsite depended upon that student's needs (Tr. p. 159). Specifically, she noted that a student may spend 60 percent of the time "in class," and the remaining 40 percent of that time developing vocational skills; similarly, the time apportioned between class and vocational skills could range from a "70/30 split" to an "80/20 split" (id.).

In testimony, the parent coordinator from the assigned public school site described how a student became involved in the vocational aspect of the assigned public school (see Tr. pp. 61-62). She testified that "new students" enrolling for the first time at the assigned public school would initially be placed in a classroom based upon their age (Tr. p. 63). Assessments would then administered to a new student to determine the student's "likes and dislikes"—noted, for example, in a Level I Vocational Assessment—and "[m]ore than likely, that first year, the student would be placed in a class that either would not go out to work or would be in the building" (Tr. pp. 62-63). For the next school year, however, the parent coordinator testified that the student's "likes and dislikes" would be incorporated into the student's IEP , as well as a student's interests after graduation, and the student would then be "placed in a program accordingly" (id.). She further testified that in addition to job sites outside of the school building, the public school site also offered "in-house programs such as clerical and maintenance," as well as recycling, mailroom, culinary arts, and "mouse squad," which she described as a computer program (Tr. p. 94). The parent coordinator also indicated that the assigned public school site used a "blueprints for learning" curriculum and that "instruction is differentiated for each student" (Tr. pp. 71-72). With respect to the job site training, the parent coordinator testified that the public school site offered approximately 10 to 12 different job sites and when a group of students attended the same job site, it was her understanding that each student was given "individual work" to do in the "same area" as the whole group (Tr. pp. 78-79, 87).

Thus, contrary to the IHO's determinations, the evidence in the hearing record does not support a conclusion that the district failed to present sufficient evidence regarding the vocational or academic program that the assigned public school site would have offered if the student had attended the assigned school. Moreover, many of the details determined by the IHO to have been lacking from the district's evidence, such as the frequency of the student's participation at a work site, were not specified in the student's February 2012 IEP. Such particularized details regarding the delivery of the vocational and academic aspects of the student's IEP that the student would have received at the assigned public school site are the epitome of speculation and, under these circumstances, the district was not required to present such evidence. Although I can appreciate the parents interest in the precise details of the daily delivery of the services under the IEP, no doubt driven their genuine concern for their daughter's well-being, at the same time some administrative flexibility must be accorded to the school district regarding the details of service delivery called for by the IEP.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Cooke was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated August 9, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2012-13 school year.

Dated: **Albany, New York**
November 29, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER