The University of the State of New York

The State Education Department
State Review Officer
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No. 13-206

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, Brian J. Remels, Esq., of counsel

Kinzler Law Group, PLLC, attorneys for respondents, Ben Kinzler, 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') son and ordered it to reimburse the parents for their son's tuition costs at the Special Torah Education Program (STEP) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 34 CFR 300.507[a]; 300.508[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 March 21, 2012, a CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 2 at pp. 1, 9).[1] Finding the student eligible for special education as a student with multiple disabilities, the March 2012 CSE recommended a 12-month school year in a 12:1+4

[1] At the time of the March 2012 CSE meeting, the student was attending STEP (see Tr. pp. 596, 607). The Commissioner of Education has not approved STEP as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

special class placement in a specialized school (id. at pp. 1, 6-7).[2, 3] The March 2012 CSE also recommended the following related services to be provided in a separate location: four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of group (2:1) speech-language therapy; two 60-minute sessions per week of individual physical therapy (PT); five 60-minute sessions per week of individual occupational therapy (OT); and two 30-minute sessions per week of individual counseling (id. at pp. 6-7). The March 2012 CSE further recommended a full time health/ambulation paraprofessional, as well as a transportation paraprofessional for a portion of the school day, both of which were identified in the IEP as group services (id. at p. 7).. The March 2012 IEP also included a transition plan and eight annual goals and approximately 21 short-term objectives to target the student's receptive and expressive language, attention and focus, social, reading, math, fine and gross-motor, graphomotor, visual-perceptual, visual motor, and oral-motor skills (id. at pp. 3-6, 8).

By "Notice of Recommended Deferred Placement," dated March 22, 2012, the district recommended that the provision of services under the March 2012 IEP be deferred, the start of the 12-month 2012-13 school year (Parent. Ex. G). On March 24, 2012 the parents indicated that they agreed with the recommendation to defer (id.).

In a final notice of recommendation (FNR) dated June 7, 2012, the district summarized the special education and related services recommended in the March 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. E). The parents signed and dated the FNR on June 14, 2012 and checked a box on the form indicating that the student would "continue to be enrolled at a private . . . school at [the parents'] expense," and that the parents "agreed with the [r]elated [s]ervices" recommended on the student's IEP and understood that the district would contact the student's school to "arrange for these services" (id.).

In a letter dated June 28, 2012, the district informed the parents that it wished to amend the student's IEP to indicate placement in a non-public school (NPS) "summer program for 2012" (Dist. Ex. 5).[4] The parents signed and dated this letter on June 28, 2012 indicating their agreement with the recommendation and, further, that a formal CSE meeting was not necessary to effectuate this change (id.). On the same day, the parents executed a release that "release[d] and discharged" the district from "any and all liability, claims, and/or rights of action" arising from the student's placement in the summer program (Dist. Ex. 6).

By letter dated September 24, 2012, the parents notified the district that they did not believe the public school site identified in the FNR was an "appropriate placement" for the student (Parent Ex. F at p. 1). The parents further indicated that, when they signed and returned the FNR, they

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

[3] The IEP identified the student-to-staff ratio of the special class as "12:1+(3:1)" (Dist. Ex. 2 at p. 6). The district school psychologist who attended the March 2012 CSE meeting testified that the CSE recommended a 12:1+4 special class and that the (3+1) phraseology came about as the result of the computer system used by the district (Tr. pp. 164-67).

[4] By e-mail dated March 13, 2012 a State-approved NPS summer program informed the parents that the NPS accepted the student for attendance at the program from July 3, 2012 until August 13, 2012 (Dist Ex. 7).

believed that they were rejecting "the proposed school placement" but not the related services identified on the student's March 2012 IEP (id.). The parents additionally contended that they did not intend to agree that they would be responsible for the costs of the student's tuition at STEP (id.). The parents also notified the district of their intentions to place the student at STEP for the 2012-13 school year and to seek public funding for the costs of the student's tuition (id.). Finally, the parents stated that, if the district did not "immediately" provide related service authorizations (RSAs) relative to the provision of the related services recommended in the student's March 2012 IEP, they would request a hearing to compel the district to provide the RSAs and/or reimburse the parents for the costs of the related services (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated December 18, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1-2). Specifically, the parents alleged that the March 2012 IEP was procedurally and substantively invalid and that the recommended 12:1+4 special class was too large to meet the student's "need for support and individualized attention" (id. at p. 2).

Regarding the assigned public school site, the parents alleged that the school setting was too large, which the parents contended would be difficult for the student to navigate due to his social and emotional delays (Parent Ex. A at p. 2). The parents additionally alleged the public school site would not provide the "constant personal supervision and attention" that the student required (id.). The parents also contended that the student was lower functioning, as well as significantly smaller in height and weight than the other students in the proposed classroom, "making [him] an attractive target for abuse and bullying," which the parents argued would, in turn, make "interaction and socialization with the other children in the class . . . most unlikely" (id.).

The parents contended that the student made great progress at STEP, where he had been enrolled for a "number of years," and asserted that removing the student and placing him in a public school would likely result in "significant adjustment issues" and "significant regression in all areas of development" (Parent Ex. A at p. 2). As relief, the parents requested reimbursement for the costs of the student's tuition and related services at STEP and requested an "immediate" pendency hearing to determine the student's current educational placement (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

On April 12, 2013, an impartial hearing convened and concluded on August 23, 2013, after six days of proceedings, (Tr. pp. 1-796).[5] By decision dated September 24, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, that STEP was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 7-17).

[5] The first day of hearing on April 12, 2013 was devoted to the parents' request for a determination of the student's pendency placement (see Tr. pp. 3-57). Although the IHO indicated that he would render a decision on this issue, no decision was contained in the hearing record (see Tr. p. 57).

With respect to the recommendations set forth in the March 2012 IEP, the IHO found that the class size of 12:1+4 did "not seem all that different" from the 8:1+1 and 6:1+1 classrooms, which the student attended at STEP (IHO Decision at p. 9). The IHO also found that the "related services recommended by the IEP and provided at STEP appear[ed] similar" but noted that the March 2012 IEP did not recommend vision therapy, which the student received at STEP (id. at pp. 9-10). The IHO concluded that it "seems . . . that a 12-1[+]4 program, as recommended in the IEP, with related services might have been able to meet [the student's] needs" (id. at p. 14). However, the IHO also noted that the student's dietary needs, consisting of a kosher diet, a sensitivity to dairy products, and a need for supervision due to the student's desire for but inability to consume hard foods due to low muscle control, were "certainly . . . not addressed in the IEP" (id. at pp. 11, 14). The IHO determined that the district was legally prohibited from retroactively explaining how it would have managed these dietary needs following the CSE meeting (id. at p. 11).

The IHO next considered the ability of the assigned public school site to implement the student's March 2012 IEP. Initially, the IHO held that information gleaned by the parents during their visit to the assigned public school site was not relevant, since the parents "rejected the program before the start of the school year and in fact did not visit it until the third month of school" (IHO Decision at p. 9). Nonetheless, the IHO found that moving the student from STEP to the assigned public school would have been "ill advised" and not "educationally appropriate" (id. at p. 14). The IHO also found that the assigned public school site had the "potential to cause regression and to diminish the services" the student had been receiving at STEP (id.). The IHO further found that the student "might well have had serious problems functioning in such a large school facility" (id.). Regarding the student's safety at the assigned public school site, the IHO observed that the parents offered "[n]o documentary evidence" in support of this argument but took "judicial notice" of two publicly available documents from the websites of the New York State Education Department and the district containing survey information and evaluation scores (id. at p. 10). The IHO found that the evidence did "not support the contention that the location . . . was an unsafe one for most students" but that it "might well have been devastating" for this "fragile and weak" student (id. at pp. 11, 14). The IHO also found that it was "not clear that [the student's] dietary needs would have been adequately addressed" at the assigned public school site (id. at pp. 11, 14).

The IHO next found that STEP was an appropriate unilateral placement for the student because it: (1) offered specialized instruction to meet the student's needs, including small group instruction; (2) employed certified special education teachers; (3) provided the student with a health paraprofessional; and (4) provided the student with numerous related services including vision therapy (IHO Decision at p. 14). Finally, the IHO found that equitable circumstances weighed in favor of the parents' request for relief (id. at p. 15). The IHO noted that, although the parents did not visit the assigned public school site until November 2012 (five months after the date the FNR was issued), they visited the school "a number of times before" and "believed it would be harmful" for the student (id.). Given this, the IHO found that he could not say the parents were uncooperative (id.). Consequently, the IHO ordered the district to pay the costs of the student's tuition at STEP for the 2012-13 school year reduced by seven percent, the portion of the school year attributable to "prayer and religious instruction" at STEP (id. at p. 17). The IHO additionally ordered the district to reimburse the parents for the full cost of related services provided by STEP (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parents' request for relief. The district does not appeal from the IHO's determination that STEP was an appropriate unilateral placement for the student for the 2012-13 school year.[6]

The district initially asserts that the IHO erred in basing his decision on claims not raised in the parents' due process complaint notice, including issues concerning the student's dietary restrictions and need for vision therapy. In the alternative, the district argues that the March 2012 IEP addressed the student's dietary needs and that the student did not require vision therapy in order to receive a FAPE. The district interpreted the IHO's decision as failing to address the issue of whether a 12:1+4 special class was appropriate and therefore asserts that an educational placement in a 12:1+4 special class called for in the March 2012 IEP was appropriate, given the student's academic, social/emotional, and physical deficits.

Regarding the assigned public school site, the district argues that the IHO's findings were speculative as a matter of law. In the alternative, the district contends that the evidence in the hearing record contradicts the IHO's finding that the assigned public school site would have been unsafe for the student. Specifically, the district argues that the IHO mischaracterized survey results of the student body at the assigned school in order to arrive at his conclusion.

With respect to equitable considerations, the district avers that the parents never seriously considered sending the student to a public school, as supported by evidence that the parents rejected the FNR and signed an enrollment contract with STEP before visiting the assigned public school site. The district also argues that the parents did not provide the district with timely notice of the March 2012 IEP's alleged deficiencies. Finally, the district contends that the tuition charged by STEP is excessive.

In an answer, the parents argue that the IHO's decision should be upheld in its entirety. Specifically, the parents contend that the IHO correctly determined that the assigned public school site could not implement the student's IEP and raise several contentions in support of this argument. The parents also argue that the IHO's finding that the district did not conduct evaluations of the student prior to the March 2012 CSE meeting should be upheld. The parents additionally contend that they provided the district with adequate notice of their disagreement with the March 2012 IEP. Finally, the parents claim that the district denied the student a FAPE by failing to design a program that addressed the student's anxiety and dietary needs.

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

[6] An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]), accordingly there is no need to further address whether STEP was an appropriate educational placement for the student.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at

192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Prior to addressing the merits of the instant matter, I must determination which issues are properly before me on appeal. An independent review of the hearing record reflects that the IHO exceeded his jurisdiction by addressing several issues not included in the parent's due process complaint notice, namely: (1) the student's need for vision therapy; (2) the CSE's consideration of

the student's dietary needs; and (3) the assigned school's capability of managing the student's dietary needs (compare IHO Decision at pp. 9-11, 14, with Parent Ex. A).

The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended with the IHO's permission at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; 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.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parents' due process complaint notice cannot be reasonably read to assert that the March 2012 CSE failed to recommend vision therapy or address the student's dietary needs or that the assigned public school site was incapable of managing the student's dietary needs (see Parent Ex. A at pp. 1-3). Further, the hearing record does not reflect that the parents either requested or that the IHO authorized an amendment to the due process complaint notice to include these issues. 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 file an amended due process complaint notice, the parents could not pursue these issues and the IHO should not have rendered findings based upon them.[7]

[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 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., 2013 WL 4436528, at *5-*7; 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., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6), the issues that went beyond the due process complaint notice that were addressed sua sponte by the IHO in the decision were initially raised during the impartial hearing by the parents' attorney, not the district (see, e.g., Tr. pp. 140-41, 239-50). The district did not agree and strenuously objected to the parents' attempt to pursue questioning related to the student's dietary needs (Tr. p. 247; see generally Tr. pp. 239-50).

The parents argue that their general allegation that the March 2012 IEP contained "procedural and substantive errors" put the district on notice that the "entire IEP" was being challenged, thus preserving these claims for consideration on appeal (see Parent Ex. A at p. 2). This argument is contrary to the structure of the IDEA and has been consistently rejected by district courts in the Second Circuit (see, e.g., T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *15 [S.D.N.Y. Sept. 16, 2013] [explaining that the parent's "catch-all allegations in her due process complaint that the program and/or placement were 'inappropriate' did not preserve any of the plaintiff's specific claims"]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; see also R.E., 694 F.3d at 188 n.4 [noting that "[t]o permit [parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district"]). Based on the foregoing, the IHO exceeded his jurisdiction in making determinations related to the student's dietary needs and need for vision therapy.[8]

B. March 2012 IEP—12:1+4 Special Class Placement

The district asserts that the March 2012 CSE's recommendation for a 12:1+4 special class was appropriate given the student's academic, social/emotional, and physical deficits. The parents counter that a 12:1+4 special class was too large for the student. Consistent with the IHO's finding, the evidence in the hearing record indicates that the district recommended an appropriate placement that was reasonably calculated to provide educational benefits to the student.

The hearing record reflects that the attendees at the March 2012 CSE included: a district school psychologist (who also served as the district representative), a special education teacher/related service provider, and the parents (Dist. Ex. 2 at p. 12). Additionally, the following members participated by telephone: an additional parent member, STEP's curriculum supervisor, STEP's principal, a teacher from STEP, and the parents' special education advocate (id.). The March 2012 IEP reflected information contained in a February 2012 district psychoeducational evaluation report, a February 2012 district Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) report, and information provided by the STEP personnel (id. at pp. 1-2; see Dist. Ex. 8; Parent Ex. D).[9] The parents did not contest any aspect of the student's present levels of performance in their due process complaint notice and do not make any such argument on appeal, however a brief discussion of the student's needs identified therein will provide context regarding the educational placement recommended in the IEP.

Administration of the Stanford-Binet Intelligence Scales-Fifth Edition to the student as part of the February 2012 psychoeducational evaluation yielded the following standard scores: full scale IQ 40; verbal IQ 43; and nonverbal IQ 42 (Dist. Ex. 2 at p. 2; see Parent Ex. D at p. 3). These

[8] Although the intent is unclear, to the extent that the IHO's discussion regarding the student's anxiety and need for shower facilities could be construed as findings of fact to support the conclusion that the district failed to offer the student a FAPE, these issues were also not contained in the parent's due process complaint notice and would also not be a proper basis for the foregoing reasons (see IHO Decision at pp. 11-12).

[9] Although the IHO remarked that the district did not conduct "new testing" prior to developing the student's IEP, a review of the evidence reveals that the IHO's conclusion is incorrect and that the district conducted the psychoeducational evaluation as well as the Vineland-II report in February 2012, one month prior to the March 2012 CSE meeting (see IHO Decision at p. 7; Dist. Ex. 8; Parent Ex. D). The psychoeducational evaluation report explicitly states that a Vineland "[s]urvey was completed by a social worker and [the student's] mother as part of the evaluation process" (Parent Ex. D at p. 1).

scores all fell below the first percentile, placing the student's cognitive abilities within the moderate to severe range (Dist. Ex. 2 at p. 1; see Parent Ex. D at p. 3). The IEP noted that these scores demonstrated improvement from the student's last evaluation, where he did not achieve a basal score and results were not generated (Dist. Ex. 2 at p. 1).[10] The parent's responses to the Vineland-II survey revealed low functioning in all surveyed categories, with many scores falling below the first percentile (see Dist. Ex. 8 at p. 2).

The March 2012 IEP offered a detailed description of the student's cognitive, reasoning, language, and visuospatial abilities, as well as his strengths and weaknesses relative to memory, reading, and mathematics (Dist. Ex. 2 at p. 1). The student's mother noted improvement in the student's adaptive skills, but reported that these skills remained in the low range in all areas (id.; see Dist. Ex. 8 at pp. 2-3). The March 2012 IEP noted that the student was independent with toileting, capable of feeding himself, and aware of the function of money, clocks, and telephones, although he needed assistance telling time and operating a phone (Dist. Ex. 2 at p. 1). The March 2012 IEP further detailed the student's significant expressive and receptive language delays and his difficulty with speech intelligibility, noting, however, that he used basic words and gestures to communicate wants and needs (id.). The March 2012 IEP indicated that the student's reading and math skills were at a prekindergarten level and that, when writing, he used a correct pencil grip and traced letters (id. at pp. 2, 10). Although the student exhibited a fleeting attention span and required frequent prompts to stay interested in tasks, the March 2012 IEP indicated that he responded to simple directions and possessed functional knowledge of common items in his environment (id. at p. 2).

Regarding the student's social development, the March 2012 IEP noted that the student exhibited poor eye contact and avoidance behaviors that required constant prompting and firm limits (Dist. Ex. 2 at p. 2). Teacher reports reflected in the March 2012 IEP indicated that, at times, the student became "anxious and disruptive" and exhibited perseverative behavior (id.). Although the March 2012 IEP indicated that the student did not spontaneously engage with unfamiliar people, he appeared "much more related and reciprocal in his interactions with others" than in the past and showed a desire to please, as well as an affection towards familiar people (id.). Physically, the March 2012 IEP noted the student's delays in fine and gross-motor skills, his poor "posture/control/alignment," issues with balance and endurance, and his difficulty with motor sequencing and planning activities (id.). Additionally, the IEP indicated that the student needed assistance with dressing, feeding, toileting and sensory integration, such that he required a program that took his "physical limitations" into account (id.).

With regard to the disputed issue, the March 2012 CSE recommended a 12:1+4 special class placement in a specialized school, along with group transportation and health/ambulation paraprofessional services and related services (Dist. Ex. 2 at pp. 6-7). State regulations provide that students with "severe multiple disabilities, whose programs consist primarily of habilitation and treatment," shall receive special education in a classroom not exceeding 12 students (8 NYCRR 200.6[h][4][iii]). Further, in addition to the classroom teacher, State regulations provide that "the staff/student ratio shall be one staff person to three students" and that the additional staff "may be teachers, supplementary school personnel and/or related service providers" (id.).

[10] The district school psychologist clarified at the impartial hearing that "basal" referred to a base level score or the lowest result to which an evaluator may assign a score (Tr. pp. 162-63).

As discussed above, the March 2012 CSE determined that the student presented with significant cognitive, academic, language, social, physical and self-care delays, which are not in dispute (Dist. Ex. 2 at pp. 1-2; see Dist. Ex. 8; Parent Ex. D). The hearing record indicates that the student's cognitive and functional levels necessitated a program that focused "primarily [on] habilitation and treatment" (8 NYCRR 200.6[h][4][iii]; see Dist. Exs. 2 at pp. 1-2; 8 at pp. 3-4; 9; Parent Ex. D at pp. 1-3). Specifically, the February 2012 psychoeducational evaluation report indicated that the student exhibited "low adaptive functioning in all areas of communication, daily living skills[,] and socialization" (Parent Ex. D at p. 1). Further, the Vineland-II report noted that the student's "day-to-day living skills [we]re a weakness for [the student] relative to his skills in . . . other areas" (Dist. Ex. 8 at p. 4). According to the district school psychologist who attended the March 2012 CSE meeting, the student's deficits were "typical" of students with multiple disabilities who attended district 12:1+4 special classes (Tr. p. 92; see pp. 90-92). The March 2012 CSE considered an educational program consisting of home instruction but determined that the student could "benefit from being in a school environment" (Dist. Ex. 2 at p. 11).

In addition to the supports available within a 12:1+4 classroom setting, the March 2012 CSE also recommended that the student receive the services of a full time health/ambulation paraprofessional, as well as transportation paraprofessional services for a portion of the school day (Dist. Ex. 2 at p. 7). The March 2012 IEP indicated that the health/ambulation paraprofessional services were necessary because the student "falls often[,] has a special diet, walks with difficulty, and has hygiene/toileting issues," and that a transportation paraprofessional was required "to help [the student] on and off the bus[ ] because he falls, and because he gets too close to others" (id. at p. 5). The March 2012 CSE also recommended that the student receive speech-language therapy, PT, OT, and counseling to address the student's significant language, physical, and social/emotional needs (id. at pp. 6-7).

Based on the foregoing evidence, the March 2012 CSE's recommendation for a 12:1+4 special class placement, together with the supportive services of a paraprofessional and a substantial amount of related services, was tailored to address the student's individual special education needs and there is no reason to conclude that it was not reasonably calculated to enable him to recieve educational benefits in the LRE.[11]

C. Challenges to the Assigned Public School Site

Initially, the IHO acknowledged that the parents' visit to the assigned public school site, after they rejected the March 2012 IEP, was not relevant to whether the district offered the student a FAPE (IHO Decision at p. 9). Nonetheless, the IHO went forward to consider whether the assigned school was "one where the [district] could have implemented" the March 2012 IEP appropriately (id.). Thus, the IHO based his decision that the district failed to offer the student a FAPE, in part, on the parents' concerns regarding the particular public school site to which the district assigned the student to attend during the 2012-13 school year. On appeal, the district

[11] I can appreciate that the parents feel the student is doing well at STEP and should continue in that private setting as a result of his successes there; however, rather than just offer an nonpublic school setting (even an ideal one), the CSE is obligated to find that the student cannot be educated in the public school before recommending placement in a nonpublic school setting (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006]).

contends that the IHO erred in reaching the parents' contentions about the assigned public school site, since the student was unilaterally placed by the parents and he did not attend the assigned school. Alternatively, the district asserts that, even if the IHO properly addressed these issues, the hearing record does not support his findings. As set forth in greater detail below, neither the law nor the facts of this case support the IHO's conclusions.

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 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., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014] [noting that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a (FAPE) 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; 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 at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 F. App'x 81, 87, 2013 WL 3814669 [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, 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), 526 F. App'x 135, 141, 2013 WL 2158587 [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., 530 F. App'x at 87 [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 [the] 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., 2013 WL 4834856, at *5 [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing and under the circumstances of this case, the IHO erred in determining that the March 2012 IEP was inappropriate for the student, in part, based upon a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned public school site (K.L., 530 F. App'x at 87; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the March 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to maintain the student's enrollment at STEP (see Dist. Ex. 4; Parent Ex. F). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing, while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington School Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]). However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above, and it would be inequitable to allow the parents to challenge the IEP services through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's March 2012 IEP at the assigned public school site when the parents rejected it and unilaterally placed the student. Accordingly, the IHO's findings relating to the appropriateness of the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

However, even if an assessment of how the district might have successfully or unsuccessfully implemented the student's March 2012 IEP was proper, the IHO's conclusions are

unsupported by the available evidence in the hearing record. The IHO concluded that, although the evidence did not support a conclusion that the assigned public school site "was an unsafe one for most students," in considering the student's small height and weight, the student's health and safety was at risk (IHO Decision at p. 14). The hearing record reveals that the assigned school would have implemented the recommendation in the March 2012 IEP for full-time health/ambulation paraprofessional services in addition to part-time transportation paraprofessional services (Tr. pp. 186, 198; see Dist. Ex. 2 at p. 7). Specifically, the assistant principal testified that a paraprofessional would accompany the student as he walked in the school throughout the day and would prevent him from sustaining injuries (Tr. p. 198). Furthermore, the assistant principal testified that no bullying or otherwise violent incidents involving special education students had ever occurred at the school and that a dean was consistently positioned in the school hallways during the day (Tr. pp. 165, 259). Further a finding that the student would be unsafe at the assigned school in spite of the paraprofessional services recommended in the March 2012 IEP is not warranted based upon any of the the evidence in the hearing record.

Based on the above, the evidence in the hearing record does not support the conclusion that, had the student enrolled in the assigned public school, the district would have denied the student a FAPE by deviating from the student's March 2012 IEP in a material or substantial way. The parents' claims regarding the assigned public school site were speculative, and in the alternative, the IHO's findings relating to potential events at the assigned public school site are unsupported and must be reversed.

VII. Conclusion

In summary, the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year must be reversed for the reasons described above. It is, therefore, unnecessary to reach the remaining issue of whether equitable considerations support the parents' request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

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

Dated: **Albany, New York**
January 16, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER