The University of the State of New York

The State Education Department
State Review Officer
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No. 13-220

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

The Law Offices of Regina Skyer and Associates, L.L.P., attorneys for respondents, Jesse Cole Cutler, 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 Aaron School for the 2010-11 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

As further described below, this State-level administrative review is being conducted after an order of remand to the IHO issued by the United States District Court for the Southern District of New York and a subsequent decision by that IHO (see J.F.v. New York City Dep't of Educ., 2012 WL 5984915 [S.D.N.Y. Nov. 27, 2012], reconsideration denied, 2013 WL 1802983 [Apr. 24, 2013]). The factual background, including the student's educational history, was discussed in the prior decision relative to this appeal and, as such, need not be repeated again in detail, as the parties' familiarity with the facts therein is presumed (Application of the Dep't of Educ., Appeal

No. 11-125). Briefly, the student reportedly exhibits weaknesses in expressive, receptive, and pragmatic language skills, in addition to difficulties with sensory processing, fine motor skills, distractibility, and attention (Tr. pp. 23-24, 31-32, 353, 356; Dist. Exs. 3 at pp. 3-5; 4). He also exhibits average to superior cognitive abilities and age appropriate academic skills (Tr. pp. 21-22; see Tr. p. 28; Dist. Exs. 3 at p. 3; 15 at p. 6). On June 9, 2010, the CSE convened for the student's annual review and to develop his IEP for the 2010-11 school year (Dist. Ex. 3 at p. 1). The June 2010 CSE found the student to be eligible for special education and related services as a student with a speech or language impairment and recommended placement in a 12:1+1 special class in a community school combined with related services consisting of two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute session of individual speech-language therapy per week, one 30-minute session of individual occupational therapy (OT) per week, and one 30-minute session of OT per week in a group of two (id. at pp. 1, 13).[1]

In a letter dated August 10, 2010, the district summarized the recommendations of the June 2010 CSE and notified the parents of the particular public school site to which the student was assigned for the 2010-11 school year (Dist. Ex. 5). On September 13, 2010, the parents visited the assigned public school site (Tr. p. 219). By letter to the CSE dated September 30, 2010, the parents advised the district that they had visited a 12:1+1 classroom in the assigned school (the proposed class) and that, based on their observation of that classroom and discussion with the classroom teacher, the proposed class in the public school was not appropriate for the student due to the vast differences in social and emotional maturity found in a "mixed grade" class, the presence of students with "significant behavioral problems," and the insufficient structure and adult supervision provided during lunch and recess (Dist. Ex. 17 at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated January 27, 2011, the parents commenced an impartial hearing alleging, among other things, that the district denied the student a free appropriate public education (FAPE) during the 2010-11 school year (Dist. Ex. 1). Pertinent to this appeal, among the arguments asserted in the parents' due process complaint notice were arguments concerning the appropriateness of the particular school to which the district assigned the student (id. at pp. 6-7). Specifically, the parents identified concerns regarding the size of the assigned school building, the number of students present during lunch and recess, the number of supervising adults present during lunch and recess, the impact of the school and classroom settings on the student's sensory integration difficulties, the lack of a sensory gym, the presence of students with disruptive behaviors in the proposed class, the delivery model of related services, and the functional peer grouping in the proposed class for "instructional, speech/language, social/emotional and fine motor purposes" (id.). As relief, the parents requested tuition reimbursement for the student's tuition costs at the Aaron School for the 2010-11 school year (id. at p. 1).

[1] The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (Tr. pp. 4-5; Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

B. Impartial Hearing, Administrative Review, and Judicial Review

After an impartial hearing conducted over five hearing dates, the IHO concluded, in a decision dated August 23, 2011, that the district failed to offer the student a FAPE, that the Aaron School was appropriate, and that no equitable considerations barred reimbursement (Tr. pp. 1-423; Parent Ex. H; see Application of the Dep't of Educ., Appeal No. 11-125).[2] In his decision, the IHO made no findings concerning the parents' claims that the particular public school site to which the district had assigned the student and the proposed class were inappropriate (Parent Ex. H. at pp. 11-14). In an appeal from the IHO's decision, this SRO sustained the district's appeal and reversed the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year and the order that the district reimburse the parents for the costs of the student's attendance at the Aaron School (Application of the Dep't of Educ., Appeal No. 11-125). In the prior State-level review, I did not reach the merits of the parties dispute related to the assigned public school site (see id.).

The parents thereafter sought judicial review of the SRO decision in the United States District Court for the Southern District of New York (J.F., 2012 WL 5984915). In its November 27, 2012 decision, the Court considered and rejected the parents' procedural and substantive challenges to the June 2010 IEP (id. at *6-*8). However, with regard to the parents' challenges to the assigned school and the proposed class addressed by neither the IHO nor SRO, the Court determined that "a party's failure to cross-appeal an issue never reached by the IHO does not necessarily constitute a waiver of its right to pursue that issue" (id. at *9). Accordingly, because the IHO made no findings on those issues, the Court remanded the case to the IHO for a determination of whether the proposed class in the specific public school site to which the student was assigned would provide the student with "an environment reasonably calculated to enable the [student] to receive educational benefits" (id. at *8-*10).

The district moved for reconsideration arguing, among other things, that remand on the issue of the adequacy of the public school site or the proposed class "would be futile in light of the Second Circuit's decision in R.E. v. New York City Dep't of Educ. (694 F.3d 167 [2d Cir. 2012]), which limited the use of retrospective testimony in challenges to [IEPs] under the IDEA" (J.F., 2013 WL 1803983, at *1). The Court denied the district's motion, finding that "which prospective challenges to classroom placement are so 'speculative' (or so unrelated to the written plan) that they are foreclosed under R.E." was an open question, and stating that although "it is possible to read R.E.'s holding broadly enough to exclude all prospective challenges to a student's classroom placement, the Court declines to do so absent more explicit instruction from the Second Circuit" (id. at *2).[3] The Court specified that it "reads R.E. to hold that evidence of historical imperfection

[2] After the case was remanded to the IHO by the district court as described herein, the IHO entered four documents into the hearing record, one of which was his findings of fact and decision dated August 15, 2011, as Parent Ex. H (Tr. p. 430). For ease of reference, the IHO's original decision dated August 15, 2011 will be referred to as "Parent Ex. H", and the IHO's decision after remand, dated October 24, 2013, that is the subject of this appeal will be referred to as "IHO Decision."

[3] Since the District Court's decision denying reconsideration, the Second Circuit has issued two decisions that contain more explicit instruction on the question at hand. In K.L. v. New York City Dep't of Educ. (530 Fed. App'x 81 [2d Cir. 2013]), the Second Circuit rejected the argument that a particular school placement was inadequate and unsafe and reasoned 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" (id. at 87,

in a school's implementation of other students' IEPs is too speculative a basis to challenge the ability of a school to implement the IEP of a student who has never attended that school" and to "preclude parents from citing evidence about the proposed classroom placement that would not have been available at the time of filing the due process complaint" (id.). The Court further found that there was some evidence in the hearing record that could allow an administrative hearing officer to conclude that there were "nonspeculative problems with the placement classroom" such as, for example, the question of "which peers are appropriate classmates for a student" (id. at *3).

C. Impartial Hearing Officer Decision After Remand

The impartial hearing reconvened on September 19, 2013 for a single hearing date, at which the parties agreed to rest on the existing hearing record (Tr. pp. 424-32; see IHO Decision at p. 3).[4] In a decision dated October 24, 2013, the IHO determined that the proposed class was inappropriate for the student, and denied the student a FAPE, because other students in the class would not have had similar social/emotional and management needs, the chronological age range of students in the class exceeded 36-months, and two of the students in the class had significant behavioral issues that would have interfered with the student's instruction (IHO Decision at pp. 6-7). The IHO rejected the parents' objection to the proposed class on the basis of a lack of adequate supervision during lunch and recess periods, finding that the hearing record indicated that the students were adequately supervised during these periods (id. at p. 7 n.1). Relying on the reasoning set forth in his original findings of fact and decision (Parent Ex. H at pp. 14-15), the IHO found that the Aaron School was an appropriate unilateral placement for the student during the 2010-11 school year and that equitable considerations supported a reimbursement award, and ordered the district to reimburse the parents for the cost of the student's tuition at the Aaron School for that school year (IHO Decision at p. 7).

IV. Appeal for State Level Review

The district appeals, arguing that the IHO erred in finding that the district failed to offer the student a FAPE during the 2010-11 school year. Initially, the district contends that because the parents rejected the June 2010 IEP as well as the recommended public school site placement prior to the time the district became obligated to implement the IEP, the district was not required to demonstrate that it could have implemented the IEP at the assigned public school site and proposed class. In the alternative, the district contends that the public school site and proposed class were appropriate to meet the student's needs. Specifically, the district contends that the

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quoting R.E., 694 F.3d at 187). Similarly, in the recent case F.L. v. New York City Dep't of Educ. (2014 WL 53264 [2d Cir. Jan. 8, 2014]), the Second Circuit rejected a challenge to a recommended school placement, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy'" (id. at *6, quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

[4] The district did not appear at the reconvened hearing date, despite multiple attempts by the IHO to contact counsel for the district (Tr. pp. 426-27). The IHO stated that he had received an e-mail communication from counsel for the district indicating an intention to rest on the existing hearing record (Tr. p. 430).

student would have been suitably grouped for instructional, academic, and social/emotional purposes with other students having similar needs, that the age range in the classroom would not have been so inappropriate for the student as to rise to the level of a denial of a FAPE, and that the hearing record otherwise contained sufficient evidence that the student's IEP could have been implemented in the proposed class. In particular, the district asserts that although the students in the proposed class had varying ability levels, they functioned in a sufficiently similar manner that the student's needs could have been met in the classroom. The district further argues that the IHO improperly relied on testimony regarding interfering behaviors of students in the proposed class during prior school years in finding that the public school site was inappropriate to meet the student's needs. The district also asserts that, in any case, reimbursement for the costs of the student's tuition at the Aaron School is not appropriate because the parents' unilateral placement was not appropriate and equitable considerations favored the district.

In an answer, the parents respond to the district's allegations with admissions and denials, and seek to uphold the impartial hearing officer's decision in its entirety. Regarding issues related to the specific public school site to which the district assigned the student for the 2010-11 school year, the parents contend that the assigned class was inappropriate for the student because classroom paraprofessionals performed teaching duties, the teacher in the proposed class was not appropriately certified, the age range and functional grouping of the students in the proposed class for instructional, academic, and social/emotional purposes was inappropriate, only some of the academic management needs, supports, and services listed in the student's IEP were implemented in the assigned class, and the student's placement in the proposed class would be insufficiently structured for the student to receive educational benefits.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d

Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR

300.320[a][4]; 8 NYCRR 200.4[d][2][v]; 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. Assigned Public School Site

The district challenges the IHO's findings regarding the proposed classroom at the public school and the grouping of the students. 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 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., 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 at 2012 WL 5473485 [Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. 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 in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D.

Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, ___, 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. However, 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., 526 Fed. 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 Fed. 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 (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]). 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 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 "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"']). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,'

and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

In this instance the parents cannot prevail on their claims that the district would have failed to implement the June 2010 IEP at the public school site because a retrospective analysis of how the district would have executed the student's June 2010 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 186, 195; A.M., 2013 WL 4056216, at *13; R.C., 906 F. Supp. 2d at 273). The parents rejected the district's program by letter to the district dated August 20, 2010, in which they stated their intention to re-enroll the student at the Aaron School and seek tuition reimbursement from the district (Parent Ex. A). Under these circumstances, the district was not obligated to establish that the assigned public school site would have been able to implement the student's June 2010 IEP (see K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273).

The hearing record in this matter contains evidence demonstrating the speculative nature of the parents' functional grouping implementation claims. For example, the special education teacher in the proposed class testified that during the 2010-11 school year, two students in her class were moved to another 12:1+1 classroom in the public school site because the students were performing academically at a level more consistent with the students in the other classroom (Tr. pp. 115-17). This activity of altering the student grouping when the district receives the students in its classrooms is a function of the regulatory scheme established by the State with respect to classroom operation and the district must constantly balance its obligations with respect to all students, but this regulation is not designed to provide an individualized parental veto over the selection of the most appropriate peers for their own child (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). While I am not unsympathetic to what are clearly the concerns of loving parents, where, as here, the claim is based upon the parents' September 30, 2010 tour, I note that similar functional grouping arguments based upon similar facts involving a unilateral placement have been rejected as impermissibly speculative (R.B., 2013 WL 5438605 *17; N.K., 2013 WL 4436528 *9), and the parents grouping argument therefore fails.

Nonetheless, given the circumstances in this case, wherein the District Court ordered the IHO to consider the appropriateness of the assigned school, it is appropriate to proceed under the auspices of the Court's order to review the evidence in the hearing record in order to discuss what alternative findings may be offered, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site.[5] But to be clear,

[5] The parents' contentions regarding instruction performed by paraprofessionals and the certification of the special education teacher in the assigned class were not set forth in their due process complaint notice (see Dist. Ex. 1). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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]). To the extent the parents' answer can

as further explained below, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation, that is, deviated from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502-03 [S.D.N.Y. Aug. 19, 2011]).

1. Functional Grouping

As alternative findings, I note the parents contend that the age range and functional grouping of the students in the proposed class was inappropriate for instructional, academic, and social/emotional purposes. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6 [a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]).

Here, the hearing record reflects that the student's functional levels in reading and math were generally at the upper kindergarten level (Dist. Ex. 3 at p. 3). Testimony by the teacher in the proposed class indicated that there were 11 students in her 12:1+1 class at the beginning of the 2010-11 school year and that the students in her class were functioning from "early emergent" to

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be read to claim that there would be insufficient supervision during lunch and recess at the assigned school, the parent is precluded from making this argument, having failed to cross-appeal from the IHO's adverse finding that supervision during those periods would be appropriate (IHO Decision at p. 7, n.1; see 8 NYCRR 279.4[b]). 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]). The IDEA and State regulations define the scope and procedure of this review process. A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (J.F., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief"]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013] [holding that "issues that were decided by the IHO and not appealed or cross-appealed by the party against which they were decided are binding against that party, and on the SRO and this Court, as to that party"]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [holding that "parties must appeal (or cross-appeal) any adverse findings of the IHO to preserve those arguments"]; see also Parochial Bus. Sys. v. Bd. of Educ., 60 N.Y.2d 539, 545-47 [1983]).

early second grade levels in reading, and on an "early first" grade level in math (Tr. pp. 114-15). The teacher also testified that she grouped students into small groups containing one to four students according to their ability in reading and would instruct each reading group using texts appropriate to the ability levels of the students in the group (Tr. pp. 118-19). The teacher also testified that she used "mixed ability groups" for math because it was motivating and allowed for peer modeling and the opportunity for students to work together and help each other (Tr. p. 118). The teacher also testified that she differentiated instruction based on each student's age and ability levels (Tr. p. 123). The teacher further testified that she had reviewed the student's IEP and stated that the annual goals and short-term objectives contained therein could be addressed in her classroom and that many of the same goals and objectives were already being implemented for other students in the classroom (Tr. pp. 129, 135-37). Lastly, she testified that given that at the time of the CSE meeting the student had instructional levels at the "end of kindergarten" and because the curriculum in the class was "based on the [first] grade reading, writing, and math curricul[a]", the student would "fit right in academically" with other students in the classroom (Tr. p. 138). The teacher also testified that after having reviewed the student's IEP—which included a review of the student's needs and abilities—she was "confident that he could have also received a meaningful education" in her class and that she had seen "academic growth" in students with similar needs in her class (Tr. pp. 138-139).

With regard to grouping for social/emotional purposes, the parents argue that the student's social/emotional needs were dissimilar from those of the other students in the proposed class. The IHO held, without citing to any evidence in the hearing record to support this conclusion, that the varied classifications of the students in the proposed class "indicate[d] that they had different levels of social development and management needs" (IHO Decision at p. 6). While evidence of a student's disability classification category is certainly relevant to determining whether a student is eligible for special education services, "it is not the classification per se that drives IDEA decisionmaking; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [emphasis in original]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996 [8th Cir. 2011] ["the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). Furthermore, the hearing record does not support the IHO's conclusion. Rather, the teacher of the proposed class testified that the students in her class "really thrive on structure," noting that some of them had "difficulty with change, or . . . unexpected changes in their environment" (Tr. pp. 122-23), similar to the manner in which the student was described as displaying "rigidity and frustration over a change in routine" in the June 2010 IEP and by a May 2010 Aaron School progress report (Dist. Exs. 3 at p. 3; 6 at p. 13). Similarly, to the extent other students in the proposed class were reported to be distractible and have difficulty remaining on task, the student reportedly required frequent sensory breaks to maintain his attention to task (Dist. Exs. 3 at pp. 3-4; 6 at p. 13). In any event, there is no indication in the hearing record that the teacher of the proposed class could not have addressed the behavioral needs of other students in the classroom without the student's instruction being negatively affected thereby. In particular, while the IHO and parents focus on the fact that other students who may have been in the proposed classroom if the student had attended the public school site had behavioral issues necessitating the provision of a 1:1 paraprofessional, the fact that the management needs of students in a classroom are not identical does not violate State regulations so long as the "environmental modifications, adaptations, or, human or material resources required to meet the needs of any one student in the group . . . do not consistently detract

from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][iv]). Although two private evaluators recommended that the student be placed in a classroom for students who did not exhibit "behavior issues" (Dist. Exs. 13 at p. 6; 15 at p. 6), neither evaluator indicated a reason for this recommendation or further explained what, in their view, was incorporated within the phrase "behavioral issues." The hearing record contains no indication that the students' paraprofessional services and behavioral needs "consistently detracted" from the opportunity of other students in the classroom to benefit from instruction. Although the parents asserted that the teacher of the proposed class informed them that there were "a lot of behavioral problems in the class" (Tr. p. 222), the teacher testified that while the main focus of the classroom the prior school year had been managing the students' behaviors, "the primary focus this year needed to be an academic push" (Tr. pp. 169-70). Furthermore, the student's mother testified that although she viewed certain interfering behaviors, none were of a level that she would characterize as "bad behaviors or difficult behaviors" (Tr. pp. 222-23). Again, while the parents were understandably concerned about the students with whom their child would be interacting on a daily basis, "IDEA affords the parents no right to participate in the selection of . . . their child's classmates" (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013]).

Regarding the age levels of the students in the proposed class, the student was six years old for most of the 2011-12 school year (Dist. Ex. 3 at p. 1). Initially, the parents raised no argument regarding the ages of the students in the proposed class in their due process complaint notice and it was accordingly inappropriate for the IHO to expand the scope of the issues to be addressed and the hearing and base his decision, in part, on the issue raised sua sponte by the IHO (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012]). In any event, according to the teacher of the proposed class, the students in the class "ranged from five to nine" in age, and that two of her students were five year-olds and only one was nine years old (Tr. p. 114-115). Although it appears that the age range in the classroom exceeded 36-months during the 2010-11 school year, there is nothing in the hearing record suggesting that this age range had a negative effect on the classroom. Regardless, an age range outside of 36 months does not rise to the level of a denial of a FAPE where, as here, the students are appropriately grouped within the class for instructional purposes (see M.P.G., 2010 WL 3398256, at *10-*11 [noting that the student was not denied a FAPE when the hearing record showed that the student was suitably grouped for instructional purposes]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 290-92 [S.D.N.Y. 2010] [holding the district did not fail to offer a FAPE where the age range within a student's proposed class exceeded 36 months because the student could have been functionally grouped with other similarly-age students within the class who had sufficiently similar instructional needs and abilities in both reading and math]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]).

Based on the above, the hearing record does not support a finding that the student would have been inappropriately grouped had he attended the assigned school to such an extent that he would not have received a FAPE due to a material or substantial deviation from the student's IEP (A.P., 370 Fed. App'x at 205; Van Duyn, 502 F.3d at 822; see D.D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03). The IHO's determination to the contrary must therefore be reversed.

2. Academic Management Needs, Supports, and Services

Turning to the next issue, the parents contend that only some of the academic management needs, supports, and services listed in the student's IEP were implemented in the proposed class. Again, I note that the hearing record in this matter contains evidence demonstrating the speculative nature of the parents' implementation claims relating to management needs. For example, the special education teacher in the proposed class testified that her classroom did not have adaptive seating at the time of her testimony, but that if a student required it, she would consult with other school staff to accommodate the recommendation and "make sure that the student has what he needs" (Tr. pp. 134-35). Similarly, the teacher testified that during the 2010-11 school year she consulted with an occupational therapist and reorganized her classroom, by adding a sensory area among other changes, in order to better address the sensory needs of the students that did attend school in her classroom (Tr. pp. 160-61). The parents do not assert that the proposed class could not have implemented the accommodations and modifications needed to address the student's management needs, such that their claim, even if true, does not rise to the level of a denial of a FAPE where, as here, the student never attended the public school site and the district was not called upon to implement the June 2010 IEP.

The June 2010 IEP lists the student's academic management needs as visual and verbal prompts, sensory tools and breaks, redirection, repetition, adaptive seating, and enhanced auditory input (Dist. Ex. 3 at p. 3). The student's IEP contains a notation that the student "may exhibit self-stimulatory behaviors" and lists the student's social-emotional management needs as sensory breaks, adaptations to his seat, frequent teacher check-ins, teacher modeling of language, use of role play, use of humor during times of inflexibility, preferential seating between active participants to increase his level of arousal, and verbal and visual cues to help him maintain focus and attention (id. at p. 4). The teacher of the proposed class testified that she already utilized many of these academic and social-emotional management needs in her classroom including, among other things, movement breaks, quiet breaks, use of sensory tools, visual prompts, sequencing, redirection and repetition (compare Dist. Ex. 3 at pp.3-4, with Tr. pp. 132-35). She further testified that many of the student's management needs, sensory needs, and behavior concerns would be met by the structure of the school day, the "set-up" of the classroom, and the classroom paraprofessionals (Tr. p. 131-35). After reviewing the academic management needs listed in the student's IEP, the teacher in the proposed classroom testified that she believed she could accommodate those needs in her class (Tr. p. 133).

Based on the above, the available evidence in the hearing record supports an alternative finding that the student's management needs would have been appropriately addressed in the proposed classroom had he attended the assigned public school site.

VII. Conclusion

In light of my determinations above on the issues remanded to the IHO for consideration by the District Court, and having determined that the evidence in the hearing record demonstrates that the district established that it offered the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Aaron School was appropriate or whether equitable considerations

support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated October 24, 2013 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to reimburse the parents for the costs of the student's attendance at the Aaron School.

Dated: **Albany, New York**
January 24, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER