The University of the State of New York

The State Education Department
State Review Officer
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No. 14-041

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

Appearances:
Law Offices of Lauren A. Baum, PC, attorney for petitioner, Lauren A. Baum, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which reduced the amount of the student's special education services for the 2013-14 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to provide an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The CSE convened on May 10, 2013, to formulate the student's individualized education program (IEP) for the 2013-14 school year (see generally Dist. Exs. 1; 2). The parent disagreed with the recommendations contained in the May 2013 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2013-14 school year and, as a result, notified the district of his intent to continue the student's 25 hours per week of 1:1 special education teacher support services (SETSS) and seek funding/reimbursement (Parent Exs. I; J).[1] In an amended due process complaint notice dated September 18, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year, and requested funding for related services, 25 hours per week of in-school, and five hours per week of "after-school" SETSS on a 12-month basis and funding for the tuition to the private parochial school currently attended by the student (see Parent Ex. G).[2]

An impartial hearing convened on December 12, 2013 and concluded after one day of proceedings (Tr. pp. 6-246).[3] In a decision dated January 31, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, that 10 hours of SETSS per week was appropriate for the student, and that equitable considerations weighed in favor of the parent's request for reimbursement of SETSS and related services on a 12-month basis (IHO Decision at pp. 12-13).[4] As relief, the IHO ordered the district to fund the cost of the student's

[1]The hearing record refers to the student's 1:1 school-age educational support services as both SETSS and "SEIT" support. However, the Education Law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [§ 4410(8)(a)]" (Educ. Law § 4410[1][k]). For consistency, I will refer to the school-age educational support services as "SETSS" to avoid confusion in this decision.

[2]According to the hearing record, the parent withdrew "any other request" except for 25 hours per week of SETSS and related services for. the extended school year (Tr. p. 184; IHO Decision at p. 3).

[3]A pendency hearing was held on July 25, 2013, and two prehearing conferences were held on August 8, 2013, and October 25, 2013. The pagination for the transcript of the first hearing dates (July 25 and August 8) was consecutive (see Tr. pp. 1-12); however, the transcript from the October 25, 2013 prehearing conference began at page one, and the December 12, 2013 hearing transcript followed consecutively (see Tr. pp. 1-246). To avoid confusion, and for the purposes of this decision, any reference to transcript pages 6-246 will refer to the December 12, 2013 hearing transcript.

[4] The parent requested 25 hours of SETSS services; and while the IHO found the type of services to be appropriate, the IHO awarded 10 hours of SETSS, finding that "having a provider with [the student] for five hours a day is overly restrictive" (IHO Decision at pp. 12-13).

SETSS and related services on a 12-month basis for the 2013-14 school year (IHO Decision at p. 13).[5]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parent's answer thereto is also presumed and will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in finding the May 2013 CSE was properly composed;

2. Whether the IHO failed to conclude that the student's IEP was predetermined;

3. Whether the IHO erred in finding that the May 2013 CSE relied on sufficient evaluative information to develop the 2013-14 IEP;

4. Whether the IHO erred in finding that the failure to conduct a functional behavioral assessment (FBA) and produce a behavioral intervention plan (BIP) at the May 2013 CSE meeting did not rise to the level of a denial of a FAPE;

5. Whether the IHO erred in finding that the May 2013 IEP annual goals were adequate;

6. Whether the IHO erred in finding that the ICT services with a 1:1 paraprofessional was appropriate and would have provided an appropriate peer group;

7. Whether the IHO erred in finding that the May 2013 CSE's failure to recommend 12-month services denied the student a FAPE and;

8. Whether the IHO erred in finding that the assigned school could not implement the May 2013 IEP.

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. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d

[5] An Order on Pendency dated July 31, 2012 reflects the recommendations from the student's February 2011 IEP, and formed the basis for the parent's request for relief here (compare Parent Ex. B, with Parent Exs. C; G).

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], [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

In the January 31, 2014 decision, the IHO found that that the district denied the student a FAPE for the 2013-14 school year and, accordingly, ordered the district to fund 10 hours per week of SETSS and the student's related services for the 12-month school year (IHO Decision at pp. 12-13). In doing so, however, the IHO rejected a number of procedural claims asserted by the parents. Regarding the composition of the May 2013 CSE, the IHO found that the required CSE team members were present and that the team was properly composed (id. at p. 8). She further determined that the removal of SETSS and "change in program" was not predetermined, in that the CSE had discussed other program options and its ultimate recommendations were supported by the hearing record (id. at pp. 5, 9-10). The IHO also found that although the May 2013 CSE

committed a procedural error by not conducting an FBA or developing a BIP at the time of the May 2013 CSE meeting, this did not rise to the level of a denial of a FAPE (id. at pp. 8-9). According to the IHO, although failure to discuss the annual goals at the May 2013 CSE meeting was a procedural error, it did not rise to the level of a denial of a FAPE because the school psychologist had sufficient input from the CSE to develop the goals (id. at p. 8). The IHO concluded that the district had met its burden with respect to its development of an appropriate IEP for the student; specifically, that the district had sufficient "reason and rationale" to remove SETSS from the student's program, that a 1:1 paraprofessional could have provided the student with the reinforcement and prompting he required, and that the CSE had "justification" for recommending an ICT "class," which would have provided the student with appropriate peers (id. at pp. 5, 8-10, 12).

However, in finding a denial of FAPE by the district, the IHO determined that the student required a 12-month school year, noting the student's emotional difficulties and testimony regarding his social and play skills, and determined that the district denied the student a FAPE by recommending a 10-month program (IHO Decision at p. 10). Similarly, the IHO found that the assigned public school did not have an available seat and that it was inappropriate for the student (id. at pp. 10-12).

In this instance, with the exception of the IHO's findings regarding the student's need for services on a 12-month basis and issues related to the assigned public school, I adopt the IHO's conclusions as my own. Specifically, regarding the parties' dispute concerning the composition of the May 2013 CSE, a review of the hearing record supports the IHO's finding that the CSE was properly composed, as it included the student's father, the SETSS provider who worked with the student on a daily basis, a district school psychologist who also served as the district representative, a regular education teacher from the private parochial school, a speech-language provider, an additional parent member who also served as an interpreter, and for the latter portion of the meeting, a district special education teacher (IHO Decision at p. 8; Tr. pp. 30-31; Dist. Exs. 1 at p. 17; 2 at p. 1). The hearing record also supports the IHO's determination that the May 2013 CSE did not predetermine its recommendation; rather, the CSE discussed and considered other placements—including a general education setting with related services and a 12:1+1 special class—determined that those placements would not meet the student's needs, and made changes to the student's then-current special education program (IHO Decision at pp. 5, 9-10; Tr. pp. 35-37, 55-62; Dist. Exs. 1 at p. 15; 2). [6]

Regarding the parent's assertions about the lack of an FBA and BIP, the hearing record shows—consistent with the IHO's decision—that while the May 2013 CSE had not conducted an FBA, the school psychologist had obtained information about the student's behaviors during a classroom observation, from discussion with the student's classroom teacher, and from the student's service providers (IHO Decision at pp. 8-9; Tr. pp. 28-30, 40-41; Dist. Exs. 2; 4). I further note that the CSE determined that the focus should be on improving the student's ability to attend to academic tasks, reducing his anxiety in new situations, and improving socialization skills with peers (Tr. pp. 40-42; see Dist. Ex. 1 at pp. 1-3). To address those needs, the May 2013 IEP

[6] Although the IHO did not address whether the parent was given meaningful opportunity to participate in the May 2013 CSE meeting, the hearing record reflects the parent's participation (see Dist. Exs. 1 at p. 17; 2).

provided the student with 1:1 paraprofessional services, speech-language therapy to improve pragmatic language skills, counseling, cues and prompts to help him attend to tasks, verbal and physical cues to help him initiate and maintain appropriate interactions with peers, and when anxious, redirection and cues to take a breath and count to five (Dist. Ex. 1 at pp. 2-3, 9-10). I note that although not available at the May 2013 CSE meeting, the school psychologist testified that that the district had developed a BIP for the student (Tr. pp. 39-44). Therefore, as the IEP incorporated input from a classroom observation and the student's service providers, identified the student's interfering behaviors; and as the parent did not specify how the failure by the district to prepare an FBA or produce an appropriate BIP at the time of the CSE meeting deprived the student of educational benefit, I agree with the IHO that these procedural violations did not rise to the level of a denial of a FAPE in this instance (IHO Decision at pp. 8-9; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]; R.E., 694 F.3d at 190-91; A.C., 553 F.3d at 172-73).

A. May 2013 IEP

1. Evaluative Information

In her decision, the IHO accurately recounted the evaluative information May 2013 CSE considered, but did not conclude whether that information was sufficient (IHO Decision at p. 8). On appeal, the parent asserts the IHO erred in her "conclusion" regarding the sufficiency and appropriateness of the evaluative information considered by the CSE. A review of the hearing record supports a finding that the May 2013 CSE had sufficient evaluative information upon which to develop an IEP.

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The district school psychologist testified that she conducted the April 2013 classroom observation and psychoeducational evaluation of the student, and sent those reports along with SETSS, occupational therapy (OT) and physical therapy (PT) progress reports to the parent prior to the May 2013 CSE meeting (Tr. pp. 21, 30, 50; see Dist. Exs. 3-4). Notes from the CSE meeting indicated that the CSE reviewed the psychoeducational evaluation and classroom observation reports, and the school psychologist testified that the student's related service reports were also reviewed at the CSE meeting (Tr. pp. 50-53; Dist. Ex. 2 at p. 1). Information contained in those

reports described the student's cognitive, academic, social/emotional, and motor skills and needs, as well as performance in the classroom (see Dist. Exs. 3-4; Parent Exs. K-L). The student's SETSS teacher, classroom teacher, and speech therapist also attended the May 2013 CSE meeting, and in addition to the school psychologist, provided information about the student that was reflected in the May 2013 IEP and CSE meeting minutes (see Dist. Exs. 1 at pp. 1-3; 2). A review of the May 2013 IEP demonstrates that the present levels of performance and individual needs sections of the IEP—including the student's current academic, social/emotional, and health and physical development—were consistent with the evaluative information available to the May 2013 CSE (compare Dist. Ex. 1, with Dist. Exs. 3-5 and Parent Exs. K-L).

Although the IHO did not specifically address the parent's claim concerning the adequacy of the evaluative materials the May 2013 CSE relied upon, the district asserts, and I agree, that the CSE reviewed appropriate evaluations, adequate to prepare the May 2013 IEP, and address the student's individual needs (compare Dist. Ex. 1, with Dist. Exs. 3-5 and Parent Exs. K-L).

2. Annual Goals

In the decision, the IHO found that the failure to discuss the annual goals at the May 2013 CSE meeting was "a procedural error" that did not rise to the level of a denial of a FAPE, and the hearing record does not contain sufficient evidence upon which to conclude that such a procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, especially as here the parent did not raise any concerns about the annual goals in correspondence to the district after the CSE meeting, or in testimony during the impartial hearing (Tr. pp. 38-39, 186-92; Parent Exs. I; J; 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720; see Matrejek, 471 F. Supp. 2d at 419). A review of the IHO's decision does not show that she made a specific finding regarding the adequacy of the May 2013 annual goals (see IHO Decision at p. 8). However, on appeal the parent asserts that the IHO erred in concluding that the May 2013 IEP annual goals were adequate. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). A review of the May 2013 IEP shows that it included approximately 17 annual goals that addressed the student's identified academic, motor, speech-language, and social/emotional needs (compare Dist. Ex. 1 at pp. 1-3, with Dist. Ex. 1 at pp. 4-8). Additionally, the annual goals included evaluative criteria (e.g. 8 out of 10 times, 3 out of 5 times with 80 percent accuracy), evaluation procedures (e.g. teacher observation/checklist, informal and classroom assessments), and schedules to measure progress (1 time per quarter) (Dist. Ex. 1 at pp. 4-8). Based on the above, I find the recommended annual goals recommended by the May 2013 CSE were appropriate.

3. ICT and 1:1 Paraprofessional Services

Contrary to the parent's assertions, the hearing record supports the IHO's finding that the district had sufficient reason to remove SETSS from the student's program, that ICT, 1:1 paraprofessional and related services met the student's needs, and that an ICT "class" would have provided the student with appropriate peers (IHO Decision at pp. 5, 8-10, 12).

The district school psychologist testified that the rationale for recommending ICT and full-time 1:1 paraprofessional services for the student was that "much of the information presented by the SETSS provider and the classroom teacher indicated that [the student] does well when he's around typically developing youngsters" (Tr. p. 35). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class providing ICT services "shall minimally include a special education teacher and a general education teacher," and each such class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]). The school psychologist stated that the CSE wanted to keep the student in a program with typically developing students, yet understood that he needed modifications and accommodations (Tr. pp. 35-36). To the school psychologist, ICT services were the "best of both worlds" in that the program included typically developing role models and the benefit of the special education teacher to modify, adjust, and provide small group instruction as needed (Tr. p. 36; see Tr. pp. 46-47). Additionally, the 1:1 full time paraprofessional services provided the student with support to initiate interactions with peers, stay on task, and engage in activities throughout the day (id.).

In conjunction with the ICT services, the May 2013 CSE also recommended the following strategies to address the student's management needs: adult support using cues and prompts to attend to tasks and to engage with peers, and visual supports to address language delays (Dist. Ex. 1 at p. 3). The May 2013 CSE further addressed the student's needs by recommending related services consisting of two 30-minute individual sessions each of OT and PT per week, two 30-minute individual sessions and two 30-minute group sessions of speech-language therapy per week, and one 30-minute individual counseling session per week (id. at pp. 9-10).

In this case, given the May 2013 CSE's obligation to balance the IDEA's requirement to place the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]), a review of the evidence in the hearing record supports a finding that the recommended ICT services—together with the related services, full-time 1:1 paraprofessional and management needs—recommended by the May 2013 CSE was supported by the evaluative information and was reasonably calculated to enable the student to receive educational benefits for the 2013-14 school year.

4. 12-month Services

In this case, the IHO found that a 10-month program was not appropriate for the student, and would not provide the student with a FAPE (IHO Decision at p. 10). Twelve-month special service and/or program means a special education service and/or program provided on a year-round basis, for students determined to be in accordance with sections 200.6(k)(1) and

200.16(i)(3)(v) of this Part whose disabilities require a structured learning environment of up to 12 months duration to prevent substantial regression (8 NYCRR 200.1[eee]; see 8NYCRR 200.1[aaa]; see also 8 NYCRR 200.6 [k][i][v]). While the IHO indicated that there was some testimony regarding the student regressing after breaks from school, her finding that the student required services on a 12-month basis was in part due to her concern that it was "too drastic to completely discontinue his services during the summer" (IHO Decision at p. 10).[7] The school psychologist testified that a discussion about 12-month services did not come up at the May 2013 CSE meeting, and she was aware that the student was previously in a 10-month program (Tr. p. 37). She further testified that the "key question is whether or not the child is expected to have significant regression" (Tr. pp. 37-38). Although according to the school psychologist after a weekend the student exhibited an increase in behavioral difficulties because of copying inappropriate behaviors at home, a review of the information available to the May 2013 CSE does not indicate that the student would experience substantial regression due to a lack of special education services on a 12-month basis (see Tr. pp. 38, 190-91; Dist. Exs. 3-4; Parent Exs. K-L). Rather than 12-month special education services, the school psychologist recommended that the student be exposed to typically developing peers who would provide him with good role models in a setting such as a summer camp (Tr. p. 38). The school psychologist further testified that because the student had "made a lot of progress," the expectation was that the student would "pick right back up in September" (Tr. pp. 37-38; see Parent Exs. K-L).

The IHO also appeared to base her determination that the student required 12-month services on the student's need for direction and support to engage in play or social interactions, and due to emotional issues related to a death in the family, suggesting that the student receive "outside counseling" (IHO Decision at pp. 10, 12). While it may be true the student would benefit from additional counseling services, the determination the CSE is required to make is whether the student would exhibit substantial regression without services on a 12-month basis, and as discussed above, the hearing record lacks evidence to that effect. Additionally, I note that the psychoeducational evaluation report recommended counseling for the student to "help build [the student's] socialization skills;" services the May 2013 CSE provided to address his social/emotional needs (compare Dist. Ex. 1 at p. 9, with Dist. Ex. 3 at p. 4). Therefore, a review of the evidence in the hearing record supports the district's assertion that the recommended 10-month ICT services—together with the related services and 1:1 paraprofessional services—addressed the student's needs, and the IHO's conclusion that the district denied the student a FAPE because of a lack of 12-month services must be reversed.

B. Challenges to the Assigned Public School Site

Contrary to the IHO's findings, the district argues that the assigned public school site had an ICT classroom available for the student to attend during the 2013-14 school year and could properly implement the May 2013 IEP. For reasons explained more fully below, the IHO's findings must be reversed.

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

[7] The parent contends that while the student attended the parochial school, he received SETSS on a 12-month basis (Parent Ex. G at p. 5).

recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding that "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'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding 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"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; 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"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the determination of the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]; 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]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).[8]

In view of the foregoing, the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year based, in part, upon its failure to provide sufficient evidence regarding the assigned school site or whether the assigned school could have implemented the student's IEP cannot stand, because a retrospective analysis of how the district would have implemented the student's May 2013 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 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site—which the student never attended—and instead chose to enroll the student in a nonpublic school of his choosing (see Parent Exs. G; I; J). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative.

[8] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determinations that the district did not offer the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether 25 hours per week of SETSS instruction with related services was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 31, 2014 is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2013-14 school year and ordered the district to fund 10 hours per week of SETSS and related services on a 12-month basis.

Dated: **Albany, New York**
January 12, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER