The University of the State of New York

The State Education Department
State Review Officer
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No. 14-080

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, Jessica C. Darpino, Esq., of counsel

Susan Luger & Associates, LLC, special education advocates for respondent, Adriane Gavronsky, 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 establish that it could implement an appropriate educational program for respondent's (the parent's) son and ordered it to fund the costs of the student's tuition at the Cooke Center School (Cooke) for the 2013-14 school year. The parent cross-appeals from the IHO's determination that the educational program recommended by the district was appropriate.[1] The appeal must be sustained. The cross-appeal must be dismissed.

[1] As neither party appeals the IHO's finding that the parent was not entitled to reimbursement for a private neuropsychological evaluation, this determination is final and binding on both parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 Committee on Special Education (CSE) convened on July 15, 2013, to formulate the student's individualized education program (IEP) for the 2013-14 school year (see generally Parent Ex. C). The parent disagreed with the recommendations contained in the July 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 her intent to unilaterally place the student at Cooke (see Parent Ex. E at pp. 3-4). In a due process complaint notice, dated October 30, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A).

An impartial hearing convened on February 6, 2014, and concluded on March 26, 2014, after two days of proceedings (Tr. pp. 1-215). In a decision dated May 2, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for the district to fund the tuition at Cooke (IHO Decision at pp. 2-16). As relief, the IHO ordered the district to fund the cost of the student's tuition at Cooke for the 2013-14 school year (id. at pp. 15-16).

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 issues which must be resolved on appeal are the timeliness of the CSE's recommendation, the manner in which the student's behavioral needs were addressed, the recommended 6:1+1 special class placement with a 1:1 paraprofessional, and the assigned public school site.[2]

[2] I agree with the IHO that the district's failure to refer the student to the Central Based Support Team (CBST) did not deny the student a FAPE as the July 2013 CSE offered an appropriate program and placement (see IHO Decision at p. 13).

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 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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 this instance, the IHO correctly determined that the July 2013 IEP adequately addressed the student's interfering behaviors and that the CSE's recommendation for placement in a 6:1+1 special class with a 1:1 paraprofessional and related services was appropriate (IHO Decision at pp. 11-12). However, the IHO erred in finding that the district denied the student a FAPE on the basis that it did not establish the appropriateness of the assigned public school site (id. at pp. 13-14). Therefore, the IHO's decision must be reversed in part.

A. Timeliness of Placement Recommendation

As an initial matter, the parent asserts that because the July 2013 CSE recommended a 12-month program for the student, the district's failure to identify the specific public school site to which the student was assigned to attend prior to August 30, 2013, constituted a denial of a FAPE. However, as noted by the district, pursuant to State regulation a child with a disability is considered a preschool student with a disability "through the month of August of the school year in which the student first becomes eligible to attend school" (8 NYCRR 200.1[mm][2]; see Educ. Law § 3202). Accordingly, that the district did not inform the parent of the specific school site until shortly before the beginning of the 10-month 2013-14 school year did not constitute a violation of State law. Rather, prior to September 2013, the entity responsible for the student's educational programming was the Committee on Preschool Special Education (CPSE) (Educ. Law § 4410; 8 NYCRR 200.1[mm]; 200.16). The July 2013 IEP was to be implemented as of September 9, 2013, and the parent indicated that she received notification of the recommended public school site on or around September 2, 2013 (Tr. p. 152; Parent Exs. C at pp. 1, 7-8; D). Accordingly, the date by which the district notified the parent of the recommended school site was not in violation of State and federal regulations (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 193-94; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *9-*10 [S.D.N.Y. Mar. 3, 2015]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; M.P.G., 2010 WL 3398256, at *9-*10).

As reflected in the hearing record, the student received special education services during the 2012-13 school year pursuant to a CPSE IEP (Parent Ex. H at p. 4; Dist. Ex. 1 at p. 1; see Tr. pp. 132-34). However, as the CPSE IEP was not included in the hearing record, it is not clear whether the CPSE recommended the student receive services during summer 2013. In any event, this issue is not properly before me because the parent raised no claims relative to the CPSE IEP in her due process complaint notice (see Parent Ex. A). Accordingly, there is no basis in the hearing record on which to premise a conclusion that the district denied the student a FAPE by failing to recommend appropriate services for summer 2013.

B. Consideration of Special Factors—Interfering Behaviors

Turning next to the parties' contentions surrounding the appropriateness of the FBA and BIP, as explained more fully below, a review of the hearing record reveals that the July 2013 CSE properly considered the special factors related to the student's behaviors that impeded his learning.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or

her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i]; see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 25-26, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (id. at p. 25). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> shall include, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call

for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student:

> The [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals.

(8 NYCRR 200.22[b][4]).

Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/ formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The IHO noted that the April 2013 BIP did not conform to State regulations in that it failed to include a baseline measure of the targeted problem behavior, intervention strategies, and a schedule to measure the effectiveness of the interventions (IHO Decision at pp. 12-13). However, the IHO further indicated that this violation did not rise to the level of a denial of a FAPE because the BIP identified the student's interfering behaviors and the July 2013 IEP included strategies to address the behaviors including the assignment a 1:1 crisis management paraprofessional to the student (id. at p. 13). A review of the hearing record supports the IHO's determination.

The April 2013 FBA was conducted using information provided by the parent, school psychologist, and the student's then-current teacher as well as a review of the student's records and a classroom observation (Dist. Ex. 16; see Tr. pp. 67-69, 88-89).[3] The FBA identified attention seeking and "physical" behaviors including yelling, hitting, pushing, biting, and throwing objects as problem behaviors for the student (Dist. Ex. 16 at p. 1). It noted that the behaviors occurred in the classroom setting and varied in intensity (id.). The FBA indicated that unexpected changes in routine, being presented with a task or item he did not want/like, and participating in larger group settings served as triggers for the problem behaviors (id.). According to the FBA, the presumed purpose of the behaviors was to gain attention from staff members or to provide sensory stimulation, and the student gained both by engaging in the behaviors (id.). The FBA identified several interventions that had been attempted with the student including the assignment of a 1:1 paraprofessional; implementation of a behavior plan that provided reinforcement for "appropriate, alternate, and absence behaviors"; use of a calming area to assist the student with self-regulating; and use of planned ignoring/blocking activities where appropriate (id.). The FBA noted that the assignment of a 1:1 paraprofessional helped the student decrease problem behaviors, while helping him to focus on presented tasks (id.). The FBA suggested the following planned interventions: support of a paraprofessional; frequent, positive reinforcement for appropriate behavior; and speech-language therapy to expand the student's expressive language skills to appropriately reject items and gain the attention of others (id. at p. 2). Lastly, the FBA stated that the student's expected behavior changes included behaving appropriately in class for at least 70 percent of the school day (id.).

The resultant BIP indicated that the student's teachers/providers and paraprofessional would be responsible for implementing the BIP and that it would be reviewed with the parent every 10 weeks (Dist. Ex. 17). Consistent with the FBA, the BIP identified a target behavior of the student behaving appropriately in class for at least 70 percent of the school day including sitting in his seat as directed by the teacher and reinforced by the paraprofessional; interacting appropriately with others and refraining from engaging in physical behaviors toward adults or peers; using his words to accept or reject items rather than yelling out; and waiting his turn rather than grabbing objects from others (id.). The BIP indicated that teacher/provider and paraprofessional observation would be used to measure outcomes (id.). The IHO correctly found that the district's BIP did not conform with State regulations in that it did not include a baseline measure of the student's problem behaviors or identify intervention strategies to alter antecedents, teach alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behaviors or alternative behaviors (IHO Decision at pp. 12-13; see 8 NYCRR 200.22[b][4][i]-[iii]; Dist. Ex. 17).

The district's failure to prepare a BIP in conformity with State regulation does not, in and of itself, automatically render the IEP deficient, as the July 2013 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190). The present levels of performance in the July 2013 IEP identified the student's problem behaviors, noting that he engaged in yelling, throwing toys, hitting,

[3] The FBA and BIP were developed at the March and April 2013 CSE meetings (Tr. pp. 67-69).

and occasional biting (Parent Ex. C at p. 2). The IEP stated that the student engaged in these types of behaviors to avoid tasks, manage frustration, or gain access to a preferred toy, person, or activity (id.). However, the IEP also indicated that the student had learned replacement skills, such as verbal imitations and responses (id.). According to the IEP, the student had difficulty working in a group setting and also with unexpected changes in routine (id. at pp. 1-2). The IEP indicated that the student became easily frustrated and had difficulty expressing himself verbally, and that he needed to work on appropriately requesting and rejecting items from others (id. at p. 1). The IEP noted that in the student's then-current setting he received positive reinforcement every 30 seconds to 1 minute and that the student's attention seeking and aggressive behaviors had been reduced with the addition of a 1:1 paraprofessional and behavior plan (id. at pp. 1-2). The IEP further noted that the student continued to require these supports (id. at pp. 2-3). With respect to special factors, the IEP indicated that the student required a behavior intervention plan (id. at p. 3). The July 2013 IEP also included the provision of an individual crisis management paraprofessional on a full-time basis (id. at p. 8).

Accordingly, in this case, the July 2013 CSE's failure to comply fully with State regulations regarding the development of the BIP did not result in a failure to offer the student a FAPE for the 2013-14 school year as the July 2013 CSE otherwise addressed the student's problem behaviors.

C. 6:1+1 Special Class Placement with a 1:1 Paraprofessional

Turning to the issue of educational placement, the evidence in the hearing record supports the IHO's conclusion that the district's recommended 6:1+1 special class placement in a specialized school was appropriate (see IHO Decision at pp. 11-13). On appeal, the parent asserts that the recommended placement is inappropriate. The parent notes that in the course of developing the student's IEP for the 2013-14 school year, the CSE made several placement recommendations, with the final recommendation (July 15, 2013) of a 6:1+1 special class in a specialized school being the "most restrictive." The parent further asserts that with the exception of a parentally-obtained neuropsychological evaluation, the final recommendation was based on the same information considered by prior CSEs that resulted in different placement recommendations.

During the 2012-13 school year the student attended an 8:1+2 special class with a 1;1 paraprofessional (Dist. Ex. 1 at p. 1). Here, the hearing record shows that the CSE met on four occasions to develop the student's IEP for the 2013-14 school year: March 12, 2013, April 15, 2013, May 29, 2013 and July 15, 2013 (see Dist. Exs. 10-11; 15; 19; Parent Ex. C). The March 2013 CSE reportedly recommended that the student be placed in a 12:1+1 special class in a specialized school with a 1:1 paraprofessional, but the parent disagreed with the recommendation to place the student in a specialized school (Tr. pp. 44-45, 55-56, 161-62; Dist. Ex. 12). The parent requested that the CSE meeting be postponed so that she could consult with a special education "advisor" (Tr. pp. 161-62; Dist. Ex. 12). The CSE reconvened in April 2013, at which time it recommended the student for placement in an 8:1+1 special class in a community school with a 1:1 paraprofessional, with a specific program for students on the autism spectrum in mind (Tr. pp. 57-59; Dist. Ex. 15 at pp. 8, 10; see Parent Ex. L). However, based on the student's behavior and reliance on a 1:1 paraprofessional, he was found ineligible for the preferred 8:1+1 special class program (Tr. pp. 59-60). The CSE reconvened in May 2013 (Dist. Ex. 19). The student's then-current teacher reported improvement in the student's speech-language skills and behavior (Tr. pp. 65-66). Based on the student's progress and the parent's concern about placing the student in a

specialized school, the CSE recommended that the student be placed in a 12:1+1 special class in a community school with a 1:1 paraprofessional (Tr. pp. 70, 83; Dist. Ex. 19 at pp. 7, 9). The parent rejected the proposed placement, asserting that the 10-month program was not appropriate for the student and the proposed class and assigned school were too large (Parent Ex. E at p. 1; see Tr. p. 145). She requested a new CSE meeting to consider new data regarding the student's needs (Parent Ex. E at p. 1).

The CSE convened for a fourth time on July 15, 2013 (Parent Ex. C). Testimony of the school psychologist and the parent reflected the parent participated in the development of the student's July 2013 IEP (Tr. pp. 110, 145). According to the school psychologist, the July 2013 CSE reviewed multiple sources of evaluative information in the development of the student's IEP, including the student's previous IEPs and a neuropsychological evaluation obtained by the parent (see Tr. pp. 108-11; Dist. Exs. 1-5; 7-9; 19; Parent Ex. H). According to the evaluative information, the student demonstrated needs in the areas of academics, cognition, language processing, fine and gross motor skills, sensory regulation, and social/emotional/behavioral functioning (Tr. pp. 62-64, 108, 110-11; Dist. Exs. 1-5; 7-9; Parent Ex. H).[4]

The July 2013 IEP reflects that the CSE considered and rejected a placement providing integrated co-teaching (ICT) services because ICT services would not adequately address the student's needs (Parent Ex. C at p. 12).[5] Notably, the school psychologist testified that during the July 2013 CSE meeting the parent indicated the student required a small class (Tr. p. 110). The school psychologist testified that the CSE recommended a 6:1+1 special class placement with a 1:1 crisis management paraprofessional because the student required a small setting and responded well to 1:1 support (Tr. p. 113). She noted that the CSE believed that a 6:1+1 special class with a 1:1 paraprofessional would help the student focus and attend to his academic and social/emotional needs (id.). The school psychologist testified that the student had difficulty socializing with other students and at times became frustrated (Tr. p. 114). She reported that part of the reason the CSE recommended a 1:1 paraprofessional for the student was to alleviate the student's frustration (id.). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). Here the hearing record shows that the student had demonstrated progress during the 2012-13 school year in a 8:1+1 special class with a 1:1 paraprofessional and continued to require a small class setting.

In addition to a special class placement, the CSE recommended related services to assist the student. To address the student's sensory processing and speech-language deficits as well as delays in gross and fine motor skills, the CSE recommended three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy

[4] The July 2013 IEP indicated the student is eligible for special education and related services as a student with autism (Parent Ex. C at p. 1). The student's classification is not in dispute in this appeal.

[5] The July 2013 IEP notation that the July 2013 CSE considered and rejected a 12:1+1 special class in a specialized school as "too restrictive" appears to be a typographical error carried over from the May 2013 IEP (see Dist. Ex. 19 at p. 10; Parent Ex. C at p. 12).

in a small group, two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual occupational therapy (OT) (Parent Ex. C at pp. 7-8).

Because the July 2013 IEP addressed the student's continuing need for a small, special class placement and provided him with related services to address his speech-language, motor, and sensory weaknesses, the July 2013 CSE's recommended 6:1+1 special class, together with a 1:1 crisis management paraprofessional and related services, was reasonably calculated to enable the student to receive educational benefits and the district offered the student a FAPE for the 2013-14 school year.

D. Challenges to the Assigned Public School Site

With regard to the issue of whether the assigned school was appropriate, I find that the IHO erred in concluding that the district failed to meet its burden of proving the appropriateness of the assigned school with respect to implementation of the IEP and functional grouping for the following reasons described below (see IHO Decision at pp. 13-14). Accordingly, the IHO's conclusion on this issue 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 recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself, as "[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 186-88, 195; see R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 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"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that 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]).[6] Here, the parent rejected the program recommended by the July 2013 CSE and instead chose to enroll the student in a school of her choosing (Parent Ex. E at pp. 3-4). Accordingly, as the student never attended the assigned public

[6] The Second Circuit has also held that although 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 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 is required to implement the written IEP and parents are within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

school site pursuant to the July 2013 IEP, any conclusion that the district would not have implemented the student's IEP or that the student would not have been appropriately functionally grouped—based on the parent's observations during a visit to the assigned public school site—would necessarily be based on impermissible speculation (R.B., 589 Fed. App'x at 576; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]).

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered 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 Cooke was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 2, 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 directed the district to fund the costs of the student's attendance at Cooke for that school year.

Dated: **Albany, New York**
March 13, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER