The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-093

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, Alexander M. Fong, Esq., of counsel

Skyer & Associates, LLP, 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 Children's Academy for the 2013-14 school year. The 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 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 March 15, 2013, to formulate the student's individualized education program (IEP) for the 2013-14 school year (see generally Dist. Ex. 1). The parents disagreed with the recommendations contained in the March 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 their intent to unilaterally place the student at Children's Academy (see Parent Ex. I). In a due process complaint notice, dated October 22, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. H).

An impartial hearing convened on December 2, 2013 and concluded on February 4, 2014 after five days of proceedings (see Tr. pp. 1-322). In a decision dated May 20, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, that Children's Academy was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at p. 34). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Children's academy for the 2013-14 school year (id.).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this case:

1) whether the IHO erred in determining that the present levels of performance in the March 2013 IEP were not an accurate reflection of the student and were not sufficient to develop an appropriate IEP;

2) whether the IHO erred in determining that the annual goals in the March 2013 IEP were generic and unattainable and failed to address the student's needs;

3) whether the IHO erred in determining that the student required an assistive technology device to address his lack of verbal ability;

4) whether the IHO erred in determining that the 6:1+1 special class and related services in the March 2013 IEP were not appropriate to address the student's needs;

5) whether the IHO erred in determining that the particular public school site to which the district assigned the student was inappropriate for the student because of the size of the school and the functional grouping of the proposed classroom;

6) whether the IHO erred in determining that the Children's Academy was appropriate to address the student's needs; and

7) whether the IHO erred in determining that equitable considerations favored the parents' claim for tuition reimbursement.

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, 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. March 2013 IEP

1. Present Levels of Performance

Turning first to the issue of whether the present levels of performance were appropriate, the IHO determined that the March 2013 IEP failed to reflect the extent of the student's deficits (IHO Decision p. 26). Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The IHO did not specify what information he found lacking in the description of the student's needs in the May 2013 IEP. However, contrary to the IHO's determination, the evidence in the hearing record shows that the March 2013 CSE utilized information from the student's current evaluative data to develop the present levels of performance. For example, as specified by the December 2012 psychological report, the student's March 2013 IEP stated that the student's cognitive potential was difficult to assess (compare Dist. Ex. 1 at p. 1 with Dist. Ex. 5 at p. 7). Additionally, in accordance with the January 2013 preschool educational progress report and the January 2013 speech/language progress report, the March 2013 IEP indicated that the student was essentially non-verbal and required visual, physical and verbal cues to facilitate learning (compare Dist. Ex. 1 at p. 1, with Dist. Exs. 2 at p. 1; 4 at pp. 1-2). Similarly, the March 2013 IEP and the January 2013 preschool educational progress report indicated that the student: was unable to recite the alphabet; inconsistently identified his name in print; inconsistently identified some letters by pointing; inconsistently identified numbers; and showed interest in looking at books (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1). Further, the March 2013 IEP stated, as the January 2013 speech-language progress report indicated, that the student: was unable or inconsistent with his ability to participate in reciprocal verbalizations; did not use words spontaneously; and was unable to consistently respond to yes/no or wh- questions (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 2). In addition, analogous to supports provided by his preschool program, the student's March 2013 IEP recommended that a picture exchange communication system (PECS) be utilized throughout the school day (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 2). In regard to the student's physical development, the March 2013 IEP reflects the present level indicated in the January 2013 physical therapy (PT) and occupational therapy (OT) updates (see Dist. Exs. 3; 6). For example, the March 2013 IEP indicated that the student was able to ascend and descend stairs using non-alternating steps and that motor planning, body awareness, strength, and balance were areas of need (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at pp. 2-3). In addition, the student needed physical assistance with holding and using utensils for eating and writing (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 2). Finally, similar to the December 2012 psychological evaluation, the March 2013 IEP indicated that, although the student's social/emotional and play

skills were delayed, the student was socially expressive and sought attention from adults (compare Dist. Ex. 1 at p. 2 with Dist. Ex. 5 at p. 7).

2. Annual Goals

With regard to the annual goals, the IHO determined that the goals on the student's March 2013 IEP were "generic and unattainable" (IHO Decision at p. 26). In addition, the IHO found that the IEP included none of the self-help, locomotion, and visual motor goals reflected in the November 2012 OT progress report (id. at pp. 26-27). However, the record demonstrates that the annual goals and short-term objectives included in the March 2013 IEP were developed in accordance with the student's documented needs. For example, the January 2013 speech-language progress report noted that, although the student's receptive language skills were significantly delayed, he had shown progress and exhibited the ability to identify objects, object use, simple spatial and descriptive concepts, and was able to follow simple directions (Dist. Ex. 4 at p. 1). In addition, the January 2013 speech-language progress report stated that the student was non-verbal; however, he was able to use some gestures and vocalizations to communicate (id. at p. 2). The report also stated that the student was learning to use the PECS in order to facilitate verbal language (id.). Consistent with this description, the student's speech-language goals and objectives targeted these identified needs with respect to: following directions; receptively identifying body parts; responding to questions; identifying objects; imitating vocalizations; indicating his needs through gestures, voice output system, or vocalizations; improving oral motor skills; and improving play skills (see id. at p. 4).

Testimony indicates that the school psychologist did not know from where the fine motor goals on the student's March 2013 IEP were derived, that the goals did not reflect the student's limitations indicated on the November 2012 OT progress report, and may have been the same goals from the student's prior IEP (Tr. pp. 129-30).[1] The district avers on appeal that the omission of OT goals from the November 2012 OT progress report on the March 2013 IEP did not rise to level of a denial of a FAPE. The student's IEP from the 2012-13 school year was not included in the hearing record but, assuming for the sake of argument, that the student had already achieved some of the goals included in the IEP for the 2012-13 school year, such level of achievement "does not render the goals in the IEP per se inappropriate" (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [emphasis in the original], aff'd, 2014 WL 5463084 [2d Cir. Oct. 29, 2014]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. Aug. 9, 2013]; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]). Notwithstanding the lack of clarity in the hearing record regarding the source of the OT goals, a review of the November 2012 OT progress report and the IEP shows that the annual goals were not inconsistent with the student's needs. The November 2012 OT report stated that the student's utensil use and grasp in feeding and writing were "emergent" (Dist. Ex. 6 at p. 2). Therefore, the student's objectives related to fine motor abilities such as drawing, puzzles, feeding,

[1] The district exhibit list identified the date of the OT progress report as February 2013; however, February 2013 reflects the date on which the report was sent via facsimile transmission, not the date the report was prepared (see Dist. Ex. 6). The report stated that, at the time it was developed, the student was 49 months old, which would mean that the date the report's preparation was approximately November 2012 (id. at p. 1).

and using scissors were appropriate considering the student's overall functioning as described on the November 2012 OT progress report (compare Dist. Ex. 1 at pp. 7-8, with Dist. Ex. 6).

3. Special Factors—Assistive Technology

Turning to the IHO's determination that the March 2013 IEP failed to specify the student's need for assistive technology, one of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121). Under State regulations, an assistive technology device is defined as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a student with a disability" (8 NYCRR 200.1[e]; see also 34 CFR 300.5).

The check box response on the March 2013 IEP designated for identification of the student's need for assistive technology was checked "no" (Dist. Ex. 1 at p. 3). According to the December 2012 psychological evaluation report, the January 2013 educational progress report, and the January 2013 speech-language progress report, the student was using PECS to improve his communication (Dist. Exs. 2 at pp. 1, 2; 4 at pp. 1, 2; 5 at p. 2). Contrary to the suggestion in the school psychologist's testimony that PECS does not constitute an assistive technology device, guidance from the Office of Special Education states that an assistive technology device can range from "low technology" items like pencil grips, markers or paper stabilizers to "high technology" items such as voice synthesizers, Braille readers or voice activated computers ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 41, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Nevertheless, the student's need for a PECS was actually documented in several places on the March 2013 IEP (see Dist. Ex 1 at pp. 1, 2, 4, 6), including a statement in the management needs section that PECS "must be integrated into all routines throughout the school day" (id. at p. 2). Thus, the failure to correctly check the particular box in the IEP to indicate a recommendation for assistive technology did not rise to the level of a denial of a FAPE in this instance.

In addition to PECS, the January 2013 speech-language progress report stated that "[a]n enabling device with voice-output ha[d] been utilized with prompting to facilitate participation in group activities within the classroom" (Dist. Ex. 4 at p. 2). While such a device may have benefited the student, it was not documented in the materials before the CSE as necessary for the student to access educational benefit in the same manner as the PECS. Review of the annual goal that references a voice output goal does not reveal that the IEP was internally inconsistent because the relevant short-term objective was worded in the disjunctive, allowing different means by which the student could achieve the objective, including through us of a voice output system (id. at p. 4). Further there is no indication in the IEP that the reference to augmentative and alternative

communication (AAC) / verbalizations was intended to refer to a device, per se (id. at p. 6). For example, the school psychologist described an instance where a holding a picture and making an approximation of a verbalization would be consistent with the intent of the goal (Tr. p. 101).

Based on the foregoing, the evidence in the hearing record supports a finding that the March 2013 IEP properly recommended the use of PECS and the failure to recommend any additional assistive technology did not rise of the level of a denial of a FAPE.

4. 6:1+1 Special Class

With regard to the issue of whether the educational placement was appropriate, the IHO found that a 6:1+1 special class would not provide enough support for the student to benefit from instruction (IHO decision at p. 28). The district contends that the 6:1+1 special class was appropriate to address the student's highly intensive management needs and severe delays in communication. 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]).

The March 2013 IEP indicated that the student required a "[s]mall class environment with additional therapeutic support and a paraprofessional," use of PECS, as well as visual, physical, and verbal cues and frequent repetition and reinforcement (Dist. Ex. 1 at p. 2). The CSE also recommended a group paraprofessional for health and toileting needs (id. at p. 10). The district school psychologist testified that the CSE's recommendation for a 6:1+1 special class was appropriate for the student because the focus of such a class was "more basic developmental skills" and the student would get an appropriate "level of . . . individual attention" (Tr. p. 103). Review of the IEP indicates that the CSE considered and rejected as insufficiently supportive options in a general education setting or a community school (Dist. Ex. 1 at p. 15).

Here, consistent with the student's needs and State regulations, the March 2013 CSE appropriately recommended a 12-month school year program in a 6:1+1 special class in a specialized school together with a full-time group paraprofessional for health and toileting needs and related services to address the student's needs in the areas of academics, language, social/emotional functioning, and motor skills (see Dist. Ex. 1).

Further, while the IHO is correct that pull-out related service sessions must, by definition, reduce the amount of time a student receives classroom instruction (see IHO Decision at pp. 28-29), the hearing record does not indicate that the balance struck by the CSE between the student's need for classroom instruction and related services was inappropriate in this instance, particularly given the student's severe deficits in areas targeted by the recommended related services.

B. Challenges to the Assigned Public School Site

As to the parents claims relating to the assigned public school site, including that the school was too large and that student would not have been functionally grouped, for the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find the parents' challenges to be without merit. Because it is undisputed that the student did not attend the district's assigned

public school site (see Parent Exs. I; J), the parents cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014]; C.L.K., 2013 WL 6818376, at *13; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

Briefly, however, I note that, although the March 2013 IEP specified that the student should attend a small school (Dist. Ex. 1 at p. 2), often what is considered "small" in terms of school size is very much in the eye of the beholder who opts to use such imprecise terms. Thus, the question of whether the assigned public school site of 96 students (or, for that matter, the co-located school of up to 500 students) (see Tr. pp. 39, 50) constituted a school too large for the student is subjective and subject to different interpretations.

Moreover, as to functional grouping of the proposed classroom at the assigned public school site, State regulations require that in special classes, student must be suitably grouped for instructional purposes with other students having similar individual needs 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 200.1[ww][3][i]-[ii], 200.6[a][3], [h][2], [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]). Thus, as the district argues, the appropriateness of a particular special class grouping requires an assessment, not of the students' disability classifications or diagnoses, but of their functional levels.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determinations that the district failed to 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 Children's Academy 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 SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 20, 2014 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2013-14 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER