The University of the State of New York

The State Education Department
State Review Officer
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No. 14-142

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:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 a decision of an impartial hearing officer (IHO) which denied her request for the costs of her son's tuition at Birch Family Services (Birch) and 10 hours of home-based applied behavior analysis (ABA) therapy per week for the 2014-15 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

During the 2013-14 school year, the student was classified as a preschool student with a disability and attended a 10:1+3 special class at a district public school (Tr. pp. 65-66, 128, 204; Dist. Exs. 9 at pp. 1, 14; 10 at pp. 1, 11).

On March 12 and March 19, 2014, the CSE convened to formulate the student's IEP for the 2014-2015 school year (see generally Dist. Ex. 7; Parent Ex. F).[1] Although the March 12, 2014

[1] The hearing record includes two IEPs for the student's 2014-15 school year dated March 12 and March 19, 2014 (see generally Dist. Ex. 7; Parent Ex. F). Upon review, they appear to be substantively identical with the exception of the section entitled "Other Options Considered" (compare Dist. Ex. 7 at p. 11, with Parent Ex. F at pp. 12-13). The March 19, 2014 IEP includes the consideration of a State approved nonpublic school (Dist. Ex. 7 at p. 11). For purposes of this decision, reference to the March 2014 IEP shall mean the superseding March 19, 2014 IEP, unless otherwise stated.

IEP indicated a placement recommendation of a 12:1+1 special class at a specialized school (Parent Ex. F at pp. 7, 11), the parent testified that, at the March 12, 2014 CSE meeting, the district verbally recommended a community school, indicating it was the least restrictive environment (LRE) for the student (Tr. pp. 88-90). The parent requested an opportunity to visit to such a community school, which the district arranged for the same day (Tr. pp. 81-82). After the site visit, the parent expressed her objections regarding the community school placement and the CSE convened again on March 19, 2014 (Tr. pp. 81, 91). Finding the student eligible for special education as a student with autism, the March 2014 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school (Dist. Ex. 7 at pp. 1, 6, 7, 9). In addition, the March 2014 CSE recommended weekly related services consisting of two 30-minute sessions of individual occupational therapy (OT), one 30-minute session of small group (2:1) physical therapy (PT), two 30-minute sessions of small group (2:1) speech-language therapy, and one 30-minute session of individual speech-language therapy (id.). The March 2014 IEP also included supports for the student's management needs, 10 annual goals, and testing accommodations (Dist. Ex. 7 at pp. 2, 3-5, 7-8).

By letter to the district dated May 5, 2014, the parent stated her objections to a community school placement and her reasons for rejecting the same (see Parent Ex. H at p. 1). The parent then stated that she was "outraged" at the recommendation for a specialized school in the March 2014 IEP given representations from the district that such a placement would not sufficiently challenge the student (id. at p. 2). The parent summarized her attempts to obtain information from the district regarding which public school site the district would assign the student to attend for the 2014-15 school year and the district's response that such information would be sent by letter in May or June 2014 (id.). She expressed concern that if she was not "happy with [the student's] placement," she would not have time to find a "seat for him in a different program" (id.). Finally, the parent notified the district of her intent to request an impartial hearing "to ensure that [her] son goes to a suitable program that c[ould] challenge and motivate him to learn and overcome his current obstacles" (id. at p. 3).

A. Due Process Complaint Notice

In an undated due process complaint notice, which the hearing record indicates was filed on or around May 22, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year and requested that the IHO order the district to fund the costs of the student's tuition at Birch, as well as ten hours of home-based ABA therapy per week (see Parent Ex. A at pp. 1-2; see also Tr. pp. 45-46, 148). Initially, the parent restated her objections to the community school recommendation (Parent Ex. A at pp 1-2). The parent alleged that the district informed her that the next LRE for the student was a district specialized school but that a specialized school was not appropriate because the student "would be one of the highest functioning children there" and that "he might not be challenged enough" (id.) The parent asserted that, after she declined the community school, the recommendation was changed to a placement in the specialized school and that "[n]o other option was offered" (id. at p. 2). She alleged that it was "not fair to send [the student] to a program where he would not be challenged or motivated to learn" (id.). The parent contended that, when she requested to visit the proposed specialized public school site, she was told to wait (id.). The parent further asserted that Birch was an appropriate unilateral placement for the student and that home-based ABA therapy would allow the student to "succeed in learning skills for his life" (id.).

B. Facts Post-Dating the Due Process Complaint Notice

During May 2014, the hearing record shows that the parent sought a possible unilateral placement for the student at Birch (Tr. pp. 118-19, 183-84). By letter dated June 2, 2014, Birch advised the parent that, based on her recent tour of its facilities and the information the she provided about the student, "the TEACCH classroom of 6:1[+]2 would be a good fit" for the student (Parent Ex. J).[2] However, the letter also indicated that "in order to secure [the student's] placement" for the 2014-15 school year, Birch required "the approval of the Department of Education" in the form of "[]non public school funding[] or a Nickerson letter" (id.).[3]

By final notice of recommendation (FNR) dated June 13, 2014, the district summarized the 12:1+1 special class placement in a specialized school with related services recommended in the March 2014 IEP and identified the particular public school site to which it assigned the student to attend for the 2014-15 school year (Dist. Ex. 8).

After the receiving the FNR, the parent wrote to the principal of the assigned public school site, by letter dated July 1, 2014, recounting her attempts to visit the school and posing several questions regarding the program (Parent Ex. K at pp. 1-2). The principal responded to the parent's letter and provided the requested information about the assigned public school site (see Parent Ex. L).[4]

C. Impartial Hearing Officer Decision

On June 5, 2014, an impartial hearing convened and concluded on July 9, 2014 after two days of proceedings (see Tr. pp. 1-240). In a decision dated August 18, 2014, the IHO found that the district offered the student a FAPE for the 2014-15 school year and denied the parent's request for the costs of the student's tuition at Birch and for home-based ABA therapy (IHO Decision at pp. 7, 10).[5]

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[2] The evidence in the hearing record shows that "TEACCH" stands for the Treatment and Education of Autistic and Related Communication-Handicapped Children (see Parent Ex. C at p. 7).

[3] A "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (id.; R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

[4] The evidence in the hearing record shows that the parent followed up with an additional letter requesting more information about the assigned public school site (see Parent Ex. M). While not included in the hearing record, according to the parent's petition, which sets forth the purported content of the communication, the principal of the assigned public school site responded to the parent's second inquiry in great detail (see Parent Ex. M; Pet. at pp. 8-10).

[5] Initially, during the impartial hearing, the IHO denied the district's motion to dismiss the parent's due process complaint notice on the ground that it was not ripe for review (Tr. pp. 18-19; see generally Dist. Ex. 11).

Specifically, the IHO found that the parent's due process complaint notice did not challenge as inappropriate the March 2014 IEP (IHO Decision at p. 8). Therefore, although the parent offered testimony during the impartial hearing that the proposed 12:1+1 special class ratio was inappropriate, the IHO did not find this as a basis for a denial of FAPE because it was outside the scope issues that were the subject of the impartial hearing (id.). As to the community school, the IHO determined that the parent's claims relating to the public school site she visited were speculative and, further, that there was no evidence that the particular public school site could not implement the IEP (id. at p. 9). As to the specialized school, the IHO found that, because the parent's due process complaint notice was filed prior to the parent's receipt of the FNR, the parent failed to raise specific claims about the ability of the particular school to implement the student's IEP (id.). In any event, the IHO concluded that "the general statement that [the district representative] informed the parent that a [specialized school] placement would be inappropriate for the student d[id] not establish that the IEP could not be implemented at the school or that the school could not meet the student's special education needs" (id. at p. 10).

The IHO further found that the parent did not satisfy her burden to demonstrate that Birch was an appropriate unilateral placement for the student or that the student required ABA therapy at home (IHO Decision at pp. 10-11). Moreover, the IHO observed that the student was not enrolled at Birch or accepted into its program at the time of the impartial hearing (id. at p. 11). The IHO did find that, had her determinations differed, there was no equitable reason to deny the parent relief (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2014-15 school year. In the petition, the parent incorporated emails allegedly between herself and the district. Initially, the parent claims that the IHO fell asleep twice during the hearing. In addition, the parent alleges that the IHO improperly allocated the burden of proof at the impartial hearing, finding for the district and denying the parent's request for relief, notwithstanding that the district did not present testimonial evidence at the impartial hearing. The parent indicates that, given the allegations in the due process complaint notice and the lack of evidence presented by the district, the IHO should have concluded that a district specialized school was inappropriate and that the student needed ABA therapy. The parent argues that the IHO erred in determining that the district offered the student a FAPE, emphasizing that the district had previously stated that a specialized school placement was inappropriate for the student.

The district answered the parent's notice of petition and petition denying the substantive allegations of the parent's complaint and asserting that the IHO's findings were correct in fact and law. The district objects to the parent's petition to the extent that it improperly included the text of purported emails in the body of the petition. The district also asserts that the parent raised issues in the petition that she failed to raise in the due process complaint notice, including assertions relating to the appropriateness of the recommended 12:1+1 special class and the ability of the public school site identified in the FNR to implement the student's IEP.

The parent subsequently submitted a letter, dated October 27, 2014 that included allegations regarding implementation of the March 2014 IEP at the assigned public school site. However, to the extent it was intended as such, this letter shall not be deemed a reply and will not be considered because, in accordance with State regulation, "[n]o pleading other than the petition

or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by the respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). The parent's letter does not address any procedural defenses raised by the district; rather, the parent raises new claims that allegedly accrued subsequent to the development of the March 2014 IEP and subsequent to the impartial hearing conducted in this case. Accordingly, the issues raised in the letter cannot be considered.[6]

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 v. T.A., 129 S. Ct. 2484, 2491 [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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

[6] Although I encourage the parties to reconvene to discuss the allegations raised in the parent's letter, the parent is not precluded from raising any claims arising from the allegations contained in the October 27, 2014 letter in a separate proceeding.

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, 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. Dep't 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. Preliminary Matters

As an initial matter, the parent claims in her petition that the IHO fell asleep twice during the hearing. Based on upon a review of the transcript of the impartial hearing there is no evidence that sufficiently supports the parent's allegation. To the contrary, the available evidence shows that the IHO appeared to take an active role during the approximately five hours of proceedings (see Tr. pp. 18-239). The IHO addressed the objections raised by both the representative for the district and the parent advocate and was active in asking follow-up questions for purposes of clarifying the record and examining the witness (see Tr. pp. 183-224). Thus, even assuming that there was some kind of lapse on the IHO's part as the parent suggests, there was no evidence that the proceeding was so infirm as to require reversal of the IHO's decision.

With respect to the allegation that the IHO failed to properly allocate the burden of proof among the parties, review of the hearing record and the IHO's decision shows that the parent's assertions are without merit. As cited above, the burden of proof at an impartial hearing lies with the district, except that the parent must demonstrate the appropriateness of a unilateral placement. (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G., 2010 WL 3398256, at *7). In this case, the district carried its burden with the submission of documentary evidence, the IEP and evaluative reports, a burden that was not especially heavy in light of the parent's failure to raise certain challenges in the due process complaint notice (see IHO Decision at p. 9-10; see generally Dist. Exs. 3- 5; 7; Parent Ex. A). Furthermore, even if the IHO had erred in allocating the burden of proof, the harm would be only nominal insofar as the evidence weighed significantly in the district's favor regardless of which party had the burden and there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 2014 WL 3685943, at *6 [2d Cir. July 25, 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 F. App'x 2, 4, 2014 WL 53264 [2d Cir. 2014]). In any event, an independent examination of the hearing record reveals that the evidence favoring the district is sufficient to support the IHO's ultimate determination that the district offered the student a FAPE (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 336 [E.D.N.Y. June 13, 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]).

B. March 2014 CSE and IEP

To the extent that the parent's due process complaint notice may be read to include any claim relating to development or substance of the March 2014 IEP, the crux of the parent's assertion appears to lie with the March 2014 CSE's recommendation for a specialized school and the extent to which it considered other options when developing the IEP (see generally Parent Ex. A).

Turning first to the issue of predetermination, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W., 869 F. Supp.2d at 333-34; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Board of Educ. of Beacon City School Dist., 2013 WL 25959, at *18 [SDNY Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

In this case, the hearing record reflects that the CSE considered other placement options for the student and that the district afforded to the parent ample opportunity to participate in the development of the student's March 2014 IEP. The hearing record indicates that, during the March 12, 2014 CSE meeting, the CSE verbally recommended a 12:1+1 special class placement in a community school and afforded the parent an opportunity to observe an example of such a class that same day (see Tr. pp. 81, 88). When the parent objected to the community school recommendation, another CSE meeting was convened on March 19, 2014 and the CSE recommended a 12:1+1 special class placement in a specialized school (Dist. Ex. 7 at pp. 6, 9; see Tr. p. 92). The parent testified that the district explained to her that this was the next LRE for the student after her rejection of the community school (Tr. p. 92). The March 2014 IEP also sets forth that, although the student had many skills appropriate for a community school, a specialized school placement was recommended due to his deficits in communication, daily living skills, and adaptive behavior (Dist. Ex. 7 at p. 11). Moreover, the March 2014 IEP sets forth that the CSE also considered a State-approved nonpublic school but determined it to be too restrictive for the student (id.).

Based on the foregoing, the hearing record shows that the district maintained an open mind regarding the student's placement and the hearing record does not support the parent's allegation that the district was unwilling to consider other options for the student. Relatedly, although not a basis for overturning the IHO, it appears that in the process of choosing a placement for the student, the district initially took the position that a community school would constitute the student's LRE. Although the parent expressed her position that the community school was not appropriate, this did not relieve the district of its obligation to offer the student a FAPE in the LRE (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . ., the IDEA does not require school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the studetn's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]). The CSE is required to properly balance the IDEA's requirement of placing 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]; see also 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). Thus, while not a basis for overturning the IHO, given the question of LRE, as well as the parent's concerns expressed in her petition about the 12:1+1 special class, when it next convenes, the CSE should consider these alternatives and provide the parent, consistent with State regulations, a prior written notice explaining any action that it takes or refuses to take and the basis for that decision (see 34 CFR 300.503[a]; 8 NYCRR 200.5[a]).[7]

In that vein, as the evidence in the hearing record shows that the parent appropriately raised a question of methodology with the March 2014 CSE, as reflected in the IEP itself (Dist. Ex. 7 at p. 1), it was the district's obligation to explain in a prior written notice, the district's rationale underlying its determination not to limit the student to one particular instructional methodology on the student's IEP.[8] However, the parent's due process complaint notice mentions ABA therapy only as a request for relief in the form of home-based services (Parent Ex. A at p. 2). Nowhere in the due process complaint notice does the parent allege that the March 2014 IEP was defective

[7] While the parent raised concerns in her petition regarding the recommended 12:1+1 special class, as she did not include such a claim in her due process complaint notice, it is outside the scope of the impartial hearing and of my review (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see, e.g., R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]).

[8] Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see also K.L. v New York City Dep't of Educ., 2012 WL 4017822 at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 2013 WL 3814669 [2d Cir. July 24, 2013]), except where a particular methodology is required in order for a student to receive an educational benefit (see, e.g., R.E., 694 F.3d at 194 [suggesting that where evidence shows that a particular methodology is required for a student, the IEP should provide for such]).

because it failed to limit the instructional methodology to one that was preferred by the parent (see generally id.). Thus, while this is again not a proper basis for overturning the IHO, when the CSE next convenes, the district should include an explanation of any such decision about methodology in the prior written notice in the same manner as described above.

C. IEP Implementation

Initially, to the extent that the parent continues to argue that the public community school that she visited after the March 12, 2014 CSE meeting was inappropriate for the student, the hearing record supports the district's assertion that, since the student's March 2014 IEP recommended a specialized school, the district did not ultimately intend to assign the student to attend that particular school site and, therefore, the parent's claim in this regard is without merit. With respect to the assigned public school site actually identified in the FNR, the parent asserts that, although she was unable to visit the school prior to the impartial hearing, she was able to obtain information which led her to believe that a FAPE would not be provided to the student. The district asserts that the parent's allegations regarding the assigned public school site were premature since the parent filed her due process complaint notice in May 2014, prior to her receipt of the June 2014 FNR. In any event, the district argues that the parent's claims were speculative. Review of the timing of the relevant events, as well as the content of the parent's due process complaint notice, supports the district's position. As the district had not yet notified the parent of the assigned public school site at the time she filed her due process complaint notice, any claim related thereto was premature (see generally Dist. Ex. 8; Parent Ex. A).

Even if the claims were properly raised in this instance, similar to the reasons set forth in other State-level administrative decisions (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), the parents' assertions are without merit. The parent's claims in the due process complaint notice regarding the student's functioning level relative to other students in the (yet to be proposed) classroom (see Parent Ex. A at p. 2) turned on how the March 2014 IEP would or would not have been implemented, and, as it is undisputed that, at the time of the due process complaint notice (and the impartial hearing), the school year had yet to commence and the student had not yet attended the assigned school site, the parent cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L., 553 Fed. App'x at 9 [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. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL

6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).[9]

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's finding that the district offered the student a FAPE for the 2014-2015 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Birch was an appropriate unilateral placement or whether equitable considerations weigh in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 13, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] As noted above, it appears from the parent's October 2014 letter that the student is currently attending the recommended placement at the assigned public school site. To the extent the parent set forth new allegations regarding the implementation of the student's March 2014 IEP now that the student is actually attending the program, such allegations could form the basis of a complaint in the "later proceeding" contemplated by F.L. (553 Fed. App'x at 9).