The University of the State of New York

The State Education Department
State Review Officer
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No. 14-152

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Pelham Union Free School District

Appearances:
Mayerson & Associates, attorneys for petitioners, Tracey Spencer Walsh, Esq., of counsel

Keane & Beane PC, attorneys for respondent, Stephanie M. Roebuck, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Children's Academy for the 2013-14 school year. The appeal must be dismissed.

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]).[1]

III. Facts and Procedural History

The parties' familiarity with the underlying facts in the hearing record in this case is presumed. The student's medical history is significant for serious medical conditions related to a prenatal stroke (Tr. pp. 1132-33, 1137; Parent Ex. G at p. 1). The student has received diagnoses of static encephalopathy and attention deficit hyperactivity disorder (ADHD) (Tr. pp. 28, 1132-33, 1137, 1424; Parent Exs. G at p. 1; R at p. 1; V at p. 1). Moreover, the student exhibits deficits in his cognitive, academic, expressive and receptive language, fluency, attention, working memory, fine and gross motor, executive functioning, pragmatic language, and social skills (see Tr. pp. 63-70, 390-93, 653-55, 667-77, 808-09, 1124, 1137-38; see generally Dist. Exs. 13; 14; 15; Parent Exs. G; R- V). The student transitioned into the district for the 2010-11 school year from a hospital day program and, subsequently, received special education services from the district at all times prior to the events described below (Tr. pp. 22-29).[2]

On June 19, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Parent Ex. C at p. 1). Finding the student eligible for special education and related services as a student with multiple disabilities, the June 2013 CSE recommended an 8:1+1 special class placement with the following related services: one 30-minute session of small group (5:1) counseling; three 30-minute sessions of individual speech-language therapy; one 30-minute session of small group (5:1) speech-language therapy; two 30-minute sessions of individual occupational therapy (OT); one 30-minute session of small group (3:1) OT; and two 30-minute sessions of small group physical therapy (PT) (id. at pp. 13).[3, 4] These related services were to be provided on a six-day cycle (id. at p. 13). In addition, the June 2013 IEP included supports for the student's management needs and 27 annual goals (id. at pp. 9-12).

In a letter dated August 19, 2013, the parents rejected the district's offered placement and indicated their intention to remove the student from the public school and unilaterally place the

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] The hearing record shows that, based upon his age, the student should have been in second grade when he transitioned into the school district; however, he repeated first grade in the district's academic communication experiential (ACE) program (Tr. pp. 21, 28).

[3] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[4] The June 2013 also found the student eligible for services on a 12-month basis and prescribed two 30-minute sessions of speech-language therapy, OT, and PT per week for July and August of 2013 (Parent Ex. C at pp. 1, 14).

student at the Children's Academy at public expense (see Parent Ex. D at pp. 1-2).[5] The parents also articulated their concerns with the June 2013 IEP; namely, that: it did not provide the student with an "intensive speech and language curriculum"; its related services would frequently pull the student out of the classroom; and the student did not make progress during the prior school year (id. at p. 1). The parents further objected to the district's alleged refusal to allow an educational consultant to conduct a classroom observation of the student in his then-current setting in the public school (id.). In a "follow-up" letter dated August 22, 2013, the parents requested that the district provide transportation for the student to attend the Children's Academy (Parent Ex. E).

In a due process complaint notice, dated September 9, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. A at pp. 1-11).

A. Impartial Hearing Officer Decision

Following a prehearing conference held on October 23, 2013, an impartial hearing convened on December 9, 2013 and concluded on May 30, 2014 after nine days of proceedings (see Tr. pp. 1-1817). In a decision dated August 27, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year and denied the parents' requested relief (IHO Decision at pp. 21, 26).

First, regarding the 2012-13 school year, the IHO found that the student did not receive all of the related service sessions recommended in his IEP for this school year (IHO Decision at p. 16). Nevertheless, the IHO found "no evidence" that the district's failure to fully implement these related services "rose to the level" of a denial of FAPE (id.).

Next, the IHO addressed the parents' contention pertaining to the district's alleged refusal to allow an educational consultant to observe the student in his classroom setting (IHO Decision at pp. 17-19). First, after reviewing interpretative guidance issued by the Department of Education's Office of Special Education Programs (OSEP), the IHO found that neither the parents nor the educational consultant possessed a right under the IDEA to observe the student in a particular classroom setting (id. at pp. 17-18). As for the parents' argument that the educational consultant's proposed visitation constituted a request for an independent educational evaluation (IEE), the IHO found that this claim was not contained in the parents' due process complaint notice (id. at pp. 18-19). In any event, the IHO opined that "the observation was . . . related to the preparation of an expert witness for [purposes of] testimony" (id. at p. 19).

Regarding the process by which the June 2013 IEP was developed, the IHO found no merit in the parents' argument that the June 2013 CSE's placement recommendation was predetermined (IHO Decision at p. 23). The IHO found that the parents and their educational consultant were afforded participation in the CSE meeting and, further, that the parents did not object to the CSE's placement recommendation during the meeting (id.).

[5] The Commissioner of Education has not approved the Children's Academy as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

As for the parent's challenges to the June 2013 IEP, the IHO found that it recommended appropriate annual goals that addressed the student's major areas of need (IHO Decision at pp. 19-20). The IHO rejected the parents' argument that the goals reflected a "low expectation" for the student, citing the testimony of the student's teacher during the 2012-13 school year as well as the educational consultant's contradictory testimony that the goals were too difficult (id. at p. 20). While the IHO recognized that the goals "may not have been perfect," he did not find that these deficiencies resulted in a denial of FAPE to the student (id.).

The IHO next addressed the parents' claims regarding the June 2013 CSE's consideration of special factors (IHO Decision at pp. 20-22). The IHO found that, although an April 2013 administration of the Behavior Assessment System for Children, Second Edition (BASC-2) indicated that the student was "at-risk for conduct problems and . . . clinically significant for hyperactivity and attention problems," the June 2013 IEP addressed the student's behavioral needs, thus rendering a functional behavioral analysis (FBA) or a behavioral intervention plan (BIP) unnecessary (id. at p. 22 [internal quotations omitted]). Further, although the parents reported an increase in interfering behaviors at home, the IHO found that there was no evidence that this behavior occurred at school (id.). The IHO also observed that the Children's Academy did not develop an FBA or BIP for the student during the 2013-14 school year (id.).

The IHO additionally found that the student made sufficient progress during the 2012-13 school year such that it was not unreasonable for the June 2013 CSE to recommend the same program for the 2013-14 school year (IHO Decision at pp. 23-24). The IHO identified several areas where the student made measurable progress during the 2012-13 school year (see id.). The IHO further found that the June 2013 CSE recommended sufficient 1:1 instruction for the student (id. at p. 25).

Turning to the parents' contention that the district should have issued prior written notice after the June 2013 CSE changed the student's classification to "multiple disabilities," the IHO found that this was a procedural violation but that it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (IHO Decision at pp. 22-23).

Finally, addressing the parent's claims pertaining to the assigned public school site, the IHO found that, contrary to the parents' claims, the student was able to navigate stairs and did not require the use of an elevator (IHO Decision at p. 15). The IHO also rejected the parents' contention that the assigned public school would be unable to implement the related services identified in the June 2013 IEP (id. at p. 16). Additionally, with regard to the grouping in the assigned public school classroom, the IHO found the parent's argument without merit (id. at pp. 16-17). Specifically, the parent argued that a peer who was in the student's classroom for the prior school year presented with behavioral needs that would distract the student (id. at p. 17). The IHO dismissed this argument as there was no evidence presented at the impartial hearing that this peer affected the student's ability to focus and receive instruction in the classroom (id.). Accordingly, the IHO denied the parents' requested relief (id. at p. 26).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district implemented the student's IEP during the 2012-13 school year and that the June 2013 IEP offered the student a FAPE for the 2013-14 school year. Specifically, the parents argue that the IHO erred by improperly admitting retrospective testimony and by rejecting the following claims advanced by the parents: the student's related services were not implemented during the 2012-13 school year; the June 2013 CSE predetermined the student's placement; the district improperly precluded an educational consultant from observing the student in his public school classroom; the district erred by recommending the "same" program the student attended during the 2012-13 school year because the student did not make progress during the 2012-13 school year; and the June 2013 CSE failed to address the student's behavioral needs insofar as it should have conducted an FBA and developed a BIP for the student. The parents additionally posit that the Children's Academy was an appropriate unilateral placement for the student and that equitable considerations do not affect or preclude an award of tuition reimbursement.

In an answer, the district denies the parents' material assertions and contends that it offered the student a FAPE for the 2013-14 school year. As such, the district requests that the IHO's decision be upheld in its entirety.

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. Scope of Review

At the outset, it is necessary to identify which claims are properly presented on appeal. First, I note that the parents' amended due process complaint notice enumerates a large number of claims (see Parent Ex. A at pp. 1-11). The IHO failed to address many of these claims (see IHO Decision at pp. 1-26); however; they were not advanced on appeal and neither party is requesting that the claims be remanded to the IHO. Therefore, only those allegations which the IHO addressed and which the parents seek review are set forth and discussed in this decision.[6]

Second, as the IHO properly found, the issue of whether the district's refusal to allow the parent's educational consultant to conduct a classroom observation of the student constituted a request for an IEE or resulted in a denial of FAPE was beyond the scope of the impartial hearing as it was not identified in the due process complaint notice (see Parent Ex. A).[7] A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR

[6] I also note that the parents have not appealed the IHO's determination that the June 2013 IEP's annual goals were appropriate for the student. Accordingly, this determination has become final and binding on the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[7] Although this claim is not properly presented on appeal, I remind the district that the United States Department of Education has indicated that blanket prohibition that precludes private evaluators from conducting classroom observations would not be consistent with the IEE procedures under the IDEA (Parent Ex. F; Tr. pp. 122-28, 164-65; see 34 CFR 300.502[e]; Letter to Mamas, 42 IDELR 10 [OSEP 2004]; Letter to Wessels, 16 IDELR 735 [OSEP 1990]; see also Application of a Student with a Disability, Application No. 11-074).

300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]).

Similarly, the parent's due process complaint notice cannot be reasonably read to include the issues raised sua sponte by the IHO regarding the district's implementation of the student's IEP during the 2012-13 school year, the provision of prior written notice to the student following the June 2013 CSE meeting, or the extent to which the June 2013 IEP offered 1:1 instruction (see IHO Decision at pp. 16, 22-23, 25).[8] A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice. It is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]). Therefore, for these reasons, the above claims were not identified as issues the parent sought to resolve through the impartial hearing process and the IHO's findings on these issues must be annulled.[9]

B. June 2013 IEP

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly held that the district sustained its burden to establish that the June 2013 CSE developed an appropriate IEP for the student for the 2013-14 school year (see IHO Decision at pp. 12-25). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice, and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2013-14 school year, applying that standard to the facts at hand (id. at pp. 1-25). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that

[8] Regarding the parents' implementation claim, although the due process complaint notice requested an award of compensatory education for "any and all educational services [the student] [wa]s entitled to but did not receive," it also, in several places, explicitly confined the parents' challenges to the June 2013 IEP and its application to the 2013-14 school year (see Parent Ex. A at pp. 2, 4, 6 10). Therefore, the parents' argument that the due process complaint notice could be reasonably read to include these claims, when they said they were not asserting them, is not reasonable and without merit (see Tr. pp. 1262-63, 1281-83, 1801-04).

[9] Additionally, the district did not raise these issues in the first instance at the impartial hearing "in support of an affirmative, substantive argument" (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; see also M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).

he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify these particular determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, except where specifically indicated in this decision, the findings and conclusions of the IHO are hereby adopted. In particular, the findings and conclusions of the IHO with respect to the following findings are adopted without further discussion: the extent to which the June 2013 IEP addressed the student's behavioral needs and that an FBA and BIP were unnecessary, the June 2013 CSE's lack of predetermination, and the extent to which the student made progress during the 2012-13 school year thus supporting the June 2013 CSE's recommendation that the student attend this program for the 2013-14 school year (IHO Decision at pp. 20-25).[10, 11]

C. Assigned Public School Site

To the extent that the IHO based his decision on considerations relating to the assigned public school site, in this instance, similar to 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), the parents' assertions are without merit. The parents' claims regarding the functional grouping of the students in the proposed classroom (see Parent Ex. A at pp. 8-9) turn on how the June 2013 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. D), the parents cannot prevail on such 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

[10] The IHO's conclusions that the June 2013 IEP adequately addressed the student's behavior needs and that neither an FBA nor a BIP were required in order to offer the student a FAPE have been adopted. But even assuming for the sake of argument that the district failed to offer the student a FAPE and I were to consider the appropriateness of the Children's Academy, I would share the IHO's concern that the Children's Academy did not find an FBA or BIP necessary for the student for the 2013-14 school year, especially when the parents are complaining that the district failed to do the same (IHO Decision at p. 22; see Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 [6th Cir. 2003] [explaining that "a unilateral private placement cannot be regarded as 'proper under the Act' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient"]; Gagliardo, 489 F.3d at 112 [holding that "[s]ubject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement"]). However, because I have found in this case that neither an FBA nor a BIP were required, I would not use the Children's Academy's determination that these assessments were unnecessary as basis for denying the parents' request for tuition reimbursement.

[11] With respect to the parents' contention on appeal that the IHO admitted retrospective testimony at the impartial hearing, a review of the hearing record decision does not indicate that the district elicited "retrospective testimony that the . . . district would have provided additional services beyond those listed in the IEP" (R.E., 694 F.3d at 186; see P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 140-41, 2013 WL 2158587 [2d Cir. May 21, 2013]). To the extent that the IHO relied on retrospective testimony regarding the assigned public school site to support his findings, this was improper under the circumstances of this case and is addressed below.

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]).[12]

VII. Conclusion

Having affirmed the IHO's conclusion that the district demonstrated it offered the student a FAPE for the 2013-14 school year, it is not necessary to reach the issue of whether the Children's Academy was appropriate for the student or whether equitable considerations weigh in favor of the parents' requested relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 4, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] Additionally, I adopt the IHO's well-founded conclusion regarding the student's ability to navigate stairs thus negating the need for an elevator within the assigned public school building (IHO Decision at p. 15).