The University of the State of New York

The State Education Department
State Review Officer
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No. 15-056

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

**Appearances:**
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, Gregory Cangiano and Linda Goldman, Esqs., of counsel

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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Bay Ridge Preparatory School (Bay Ridge) 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**

With regard to the student's educational history, the hearing record reflects that the student attended Bay Ridge for the 2012-13 and 2013-14 school years at district expense pursuant to unappealed IHO decisions (Parent Ex. B; see Tr. p. 111; Parent Ex. A at pp. 1, 6, 8).

On February 4, 2014, the CSE convened to conduct the student's annual review and develop an IEP for the 2014-15 school year (Parent Ex. C; see Tr. pp. 38-39). Finding that the student remained eligible for special education and related services as a student with autism, the February

2014 CSE recommended integrated co-teaching (ICT) services to be provided in a general education classroom in a community school, as well as speech-language therapy and counseling (Parent Ex. C at pp. 7, 10). The February 2014 CSE also recommended supports to address the student's management needs, annual goals, and testing accommodations (Parent Ex. C at pp. 1-8). During the February 2014 CSE meeting, the parent indicated that the student required "a very small class size" in a "small school" with access to typically developing peers (id. at pp. 1-2, 10-11).

In a "school location letter" dated July 8, 2014, the district notified the parent of the specific public school site to which it had assigned the student to attend (Parent Ex. D at p. 1). In response, the parent contacted the principal of the assigned school by letter dated July 16, 2014, to confirm that the school could accommodate the student as he would be entering seventh grade during the 2014-15 school year and the school's website indicated that the school was limited to kindergarten through fifth grade (Parent Ex. E at p. 1). Additionally, the parent expressed concerns with the potential size of the assigned school and the classroom in which the student would be placed (id. at pp. 1-2). On or about July 31, 2014, the district sent the parent a second school location letter indicating a different public school site assignment (Parent Ex. F).[1] The parent contacted the principal of the second assigned school by letter dated August 5, 2014, in an effort to ascertain information about the school, apprise the principal of the student's needs, and express her concerns about the student's placement in a larger school and larger classroom settings than he had previously experienced (Parent Ex. G). By letters dated August 16, 2014, the parent notified the district that she was rejecting the recommended program because she was unable to obtain information regarding the "school, [the student's] classes, the class profile, the class sizes [and] as well as if [the student] will be in a co-teaching class environment for all his classes." (Parent Exs. I at p. 1; J at p. 1). The parent further indicated that based on publicly available information, she could "only conclude that the recommended placement is a noisy, over stimulating anxiety-producing environment for my son and cannot address his needs appropriately" and asserted that the student would experience anxiety and inappropriate behaviors in a school as large as the assigned school (Parent Exs. I at pp. 1-2; J at pp. 1-2).

**A. Due Process Complaint Notice**

By due process complaint notice dated August 22, 2014, the parent alleged that the district denied the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (Parent Ex. A at p. 12). More specifically, the parent argued that the program recommended by the February 2014 CSE failed to consider the full range of services and that she was denied an opportunity to meaningfully participate in the development of the February 2014 IEP because the CSE was using "a computer program that limited [it] to choices in a 'drop down' menu" (id. at p. 9). Accordingly, the parent asserted that the February 2014 CSE was unable to fashion an individualized program that would meet the unique needs of the student (id.). In addition, the parent alleged that the recommendations made by the February 2014 CSE would not provide the student with adequate support and that a "full sized integrated co-teaching environment is not appropriate for [the student], and it . . . will not provide the level of small group instruction that he requires" (id. at p. 12). Finally, the parent indicated that both the size of the second assigned public

[1] While the second school location letter was also dated July 8, 2014, the envelope in which the letter was sent to the parent was post-marked July 31, 2014 (Parent Ex. F at p. 2; see Tr. pp. 100-01).

school site and the size of a classroom providing ICT services would be too large and overstimulating for the student (id. at pp. 11-12).

With regard to the appropriateness of the unilateral placement, the parent argued that the student attended Bay Ridge during the 2012-13 and 2013-14 school years and had made progress (Parent Ex. A at pp. 6, 8). Additionally, the parent alleged that Bay Ridge provided the student with appropriate special education supports and a small school and classroom setting (id. at pp. 2-3, 12). Finally, the parent asserted that she attempted to contact the district to obtain information regarding the assigned public school site (id. at p. 11). For relief, the parent requested that the district pay for the student's tuition at Bay Ridge pursuant to the pendency (stay put) provision of the IDEA and direct funding for the costs of the student's tuition for the 2014-15 school year (id. at 13).

### B. Impartial Hearing Officer Decision

On October 30, 2014, a hearing was held to address the student's placement during the pendency of the due process proceedings (Tr. pp. 12-19). The parties agreed that the student's pendency placement was Bay Ridge at district expense pursuant to a prior unappealed IHO decision, which agreement was memorialized in an interim order dated November 5, 2014 (Interim IHO Decision at p. 2; Tr. p. 16; Parent Ex. B). On March 27, 2015, an impartial hearing convened on the merits and concluded after one day of testimony (Tr. pp. 20-166). In a decision dated April 24, 2015, the IHO found that the district provided the student with a FAPE (IHO Decision at pp. 2-6). Specifically, the IHO determined that the February 2014 IEP was crafted to meet the student's individual needs as described by the student's teachers and provided support, including speech-language therapy, counseling, small group instruction, and an on-site nurse, for the student's management needs (id. at p. 5). Additionally, the IHO found that the recommendation for ICT services was in accord with the student's "academic achievement levels" (id.). With regard to the parent's assigned school claims, the IHO found that the parent's argument that the school would not be able to implement the February 2014 IEP was speculative and the district was not required to present evidence that the IEP would be followed as, absent evidence to the contrary, it was presumed that the district would implement the IEP (id. at p. 6). Having found that the district offered the student a FAPE, the IHO denied the parent's request for reimbursement of the costs of the student's tuition for the 2014-15 school year (id.).

## IV. Appeal for State-Level Review

The parent appeals and seeks to overturn the IHO's determination that the district offered the student a FAPE for the 2014-15 school year. With regard to the February 2014 CSE meeting, the parent contends that the recommended program was based on what was available in the public school system as opposed to the individual needs of the student. In addition, the parent alleges that the February 2014 CSE transcribed the annual goals onto the February 2014 IEP after the CSE meeting, thereby denying the parent the opportunity to participate in the development of the IEP. Moreover, the parent argues that the February 2014 IEP failed to address the student's need for small group instruction or transitional and social skills supports, and discontinued the related services of physical therapy and occupational therapy without proper evaluation. In addition, the parent contends that the IHO erred by limiting the scope of the impartial hearing to issues regarding the assigned public school site and the district did not establish that the recommendation for ICT

services was reasonably calculated to meet the student's needs. Finally, the parent alleges that the district failed to offer the student an appropriate public school placement that could implement the February 2014 IEP.

With regard to the unilateral placement, the parent alleges that Bay Ridge provides the student with an appropriate program, including individualized attention in small structured classes, and access to typically developing peers. Furthermore, the parent contends that the student made progress at Bay Ridge. The parent also asserts that equitable considerations do not preclude her request for reimbursement, as she cooperated with the district and provided the district with notice of her concerns, and requests reimbursement for the costs of the student's tuition at Bay Ridge for the 2014-15 school year.

In an answer, the district responds to the parent's petition, variously admitting and denying the allegations raised by the parent, asserts that the IHO did not improperly limit the scope of the impartial hearing, contends that certain of the parent's claims were not raised in her due process complaint notice and are not properly before me, and argues that the IHO correctly determined that the district offered the student a FAPE for the 2014-15 school year. The district further argues that the parent failed to establish that Bay Ridge was appropriate to meet the student's needs and the IHO's decision denying tuition reimbursement should be upheld.

**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]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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]). 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 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).

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]).

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 Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the 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][i][b]). Here, since the parent asserts for the first time on appeal that the district discontinued the student's physical and occupational therapies without the proper evaluations, that the district failed to provide transitional supports for the student, and that the February 2014 CSE transcribed the annual goals for the student after the CSE meeting, these allegations are outside the permissible scope of review and will not be considered.

The parent also alleges that the IHO improperly limited the scope of the impartial hearing to issues related to the district recommended "placement." More specifically, the parent argues that the IHO refused to allow the parties to provide direct testimony or to cross-examine witnesses regarding the appropriateness of the recommended ICT services. An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). After examining the hearing record and in light of the broad discretion granted to IHOs in conducting an impartial hearing, I find that the IHO did not improperly restrict the scope or content area of the impartial hearing. Rather, the IHO provided the parent, as well as the district, with an opportunity to present testimony and cross-examine witnesses consistent with the requirements of due process (see, e.g., Tr. pp. 36-93, 97-165). In particular, contrary to the parent's assertions on appeal, the hearing record reflects that while the IHO initially indicated that the crux of the parent's case was "whether you gave her a school or not," the IHO acknowledged that the parent's due process complaint included a concern that "the ICT program doesn't give small group instruction" and noted that the district's witness "already explained why he did ICT" (Tr. pp. 57-61; see Tr. p. 56). Furthermore, the parent's advocate cross-examined the district's witness regarding his familiarity with ICT services and their appropriateness to meet the student's needs (Tr. pp. 61-62, 73-81; see Tr. pp. 87-89). In addition, the parent was asked on direct examination why she objected to the recommendation for ICT

services and was not restricted from answering by the IHO (Tr. pp. 97-99).[2]

**B. February 2014 IEP—Integrated Co-Teaching Services**

On appeal, the parent argues that the IHO erred in determining that a program consisting of ICT services was appropriate for the student and asserts that the recommended ICT services were not reasonably calculated to enable the student to receive educational benefit. The district responds and argues that while the student exhibited some academic and social difficulties, the February 2014 IEP addressed those needs, and in light of the student's overall strengths, the recommendation for ICT services in a general education setting was appropriate. As explained more fully below, a review of the evidence in the hearing record supports the district's contentions.

Although the sufficiency of the description of the student's present levels of performance and needs in the February 2014 IEP is not disputed, a discussion thereof provides context for the issue to be resolved; namely, whether ICT services in a general education classroom—together with related services, annual goals, and strategies to address the student's management needs—were appropriate to meet the student's needs.

According to the evidence in the hearing record, in reaching the decision to recommend ICT services in a general education setting, the February 2014 CSE relied upon and considered a 2012 psychological evaluation and input from the parent and the student's teachers from Bay Ridge (Tr. pp. 40-43). The February 2014 IEP describes the student's intellectual and academic functioning, determined by administration of the Wechsler Intelligence Scale for Children—Fourth Edition and the Woodcock-Johnson III Tests of Achievement (Parent Ex. C at p. 1). Specifically, the student obtained a full scale IQ of 89 (low average), as well as scores in the low average range in the areas of perceptual reasoning and working memory; and scores in the average range in verbal comprehension and processing speed (id.). The student's academic functioning was described as in the low average range in broad math, reading fluency, and math fluency; while he performed in the average range in broad reading, writing, reading comprehension, math reasoning, and calculation (id.). Finally, the February 2014 IEP indicates that the student's skills were in the high average range for decoding and spelling (id.).

The February 2014 IEP indicates that the student's academic needs and the recommendations for related services and placement were "thoroughly discussed" with the parent at the CSE meeting (Parent Ex. C at p. 2). The February 2014 IEP reflects that the parent's input was frequently elicited, and that a detailed discussion took place as to the appropriateness of the recommended program, taking into account the verbal reports provided during the meeting, as well as the parent's desire for the student to be placed with typically developing peers (id.).[3]

[2] To the extent the parent claims the IHO improperly excluded testimony regarding the implementation of the student's IEP at the assigned public school site, her advocate did not object at the time to the district being precluded from calling witnesses not available on the date scheduled for the impartial hearing (Tr. pp. 33-34). In any event, the district is not obligated to present witnesses for the sole purpose of being cross-examined by the parent, and the parent's implementation claims are speculative for reasons discussed further below.

[3] The parent's claim on appeal that the CSE based its recommendation on the programs available in the district rather than the student's needs is unsupported by citation to the hearing record. Furthermore, while the parent claimed in her due process complaint notice that the district's options regarding program recommendations were restricted by a "drop

At the time of the February 2014 CSE meeting, the student was in a sixth grade class at Bay Ridge, and was reportedly functioning on a fourth grade level in mathematics and reading comprehension; however, his decoding skills were closer to the sixth grade level (Parent Ex. C at p. 1). During the February 2014 CSE meeting, the student's classroom teachers reported on how they modified the curriculum and instruction for the student (Tr. p. 43). In addition, the district representative testified that the management needs contained in the February 2014 IEP were provided to the CSE by the student's teachers from Bay Ridge (id.).

The February 2014 IEP indicates that the student reportedly had difficulty with organization and accessing his verbal "fund of knowledge"; as his receptive language skills were higher than his expressive language skills (Parent Ex. C at p. 1). Further, the student benefitted from graphic organizers, visual cues, and feedback (id.). The parent reported and the IEP reflected that the student needed to be with typically developing peers but also required consistency, social support, development of self-advocacy skills, and would withdraw, have outbursts, and be confused in a large and overwhelming school environment (id.). With respect to the student's social development, the February 2014 IEP describes the student as wanting to be socially involved and included, and that he was "doing well" modulating his emotions and not "shutting down" as often, and was participating in an extracurricular activity (id. at p. 2). The February 2014 IEP indicates that the student needed to focus on frustration tolerance, decreasing anxiety, and transitions (id.).

Turning to the February 2014 CSE's recommendation, State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In a classroom in which students are receiving ICT services, the number of students with disabilities may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]). The district representative who attended the February 2014 CSE meeting testified that the provision of ICT services would allow the student to remain in the general education environment, while receiving support from a special education teacher throughout the day (Tr. pp. 76-77).

According to the district representative, the February 2014 CSE also considered special education teacher support services (SETSS), but was rejected because the CSE determined that it would not offer the student enough support (Tr. pp. 56, 73; Parent Ex. C at p. 11). Additionally, the district representative stated that the February 2014 CSE considered a 12:1+1 special class placement, which was rejected because it would be too restrictive (Tr. p. 56; Parent Ex. C at p. 11). The district representative testified that a combination of SETSS, ICT services, and a 12:1+1 special class would be too confusing for the student, due to his executive functioning issues and difficulties with transitions (Tr. pp. 79-80; Parent Ex. C at p. 2).

In conjunction with the recommended ICT services, the February 2014 IEP recommends numerous management strategies, including help with facilitating conversation in groups, turn taking, organization, small group instruction when necessary, use of smart board, clarification of

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down menu" (Parent Ex. A at p. 9), no documentary or testimonial evidence was presented in support of this contention.

instructions, scaffolding, graphic organizers, multi-sensory approach, praise, repetition, frequent teacher check-ins, directions broken down, and grouping with students with similar academic needs (Parent Ex. C at p. 2). In addition, the February 2014 IEP provides 27 measurable annual goals in the areas of reading, mathematics, writing, communication, and counseling (id. at pp. 3-6). The district representative who attended the February 2014 CSE meeting testified that the annual goals were developed based on verbal reports from the student's teachers regarding his strengths and weaknesses (Tr. p. 48). Specifically, in order to address the student's needs in the area of reading comprehension, the February 2014 IEP contains goals for the student to summarize, make inferences, identify main characters and themes, make predictions, and answer inferential questions (Parent Ex. C at pp. 3-4). The February 2014 IEP also includes goals to address the student's deficits in the area of mathematics such as selecting the appropriate computational method for problem solving, solving equations involving fractions, and analyzing tables to draw inferences (id. at p. 4). The student's writing skills were addressed through goals and strategies including organizing his written work, drafting and revising a three to five paragraph essay, incorporating persuasive language, and improving overall expressive written and spoken language (id. at pp. 4-5). In the area of communication, the February 2014 IEP provided the student with one individual and two group sessions of speech-language therapy per week, and included goals related to the use of language for social situations, expressing feelings and views, and understanding and using figurative language (id. at pp. 5-7). Due to his needs in the area of socialization, the February 2014 IEP provided one individual and one group session of counseling per week, and features goals for the student to demonstrate less anxiety and frustration, take turns during conversations, and increase self-esteem and self-advocacy (id. at pp. 6-7). The IEP also provided testing accommodations including breaks, revised test format and directions, extended time, and separate location outside of a general education setting in a group of no more than 12 students (id. at p. 8).

The parent testified that she had expressed her concerns at the February 2014 CSE meeting about whether the student could function in a large school and classroom (Tr. p. 98). The parent also expressed concern about the amount of support the student would receive, the student's ability to transition between classes, the effect of loud noises on the student, and the student's distractibility (id.). The hearing record contains letters dated October 2014 from a private psychologist, the student's physician, and a Bay Ridge school psychologist describing the student's anxiety and need for a small school setting (Parent Exs. L; M; N). However, these letters were not available to the February 2014 CSE and as discussed above, the February 2014 IEP identified and addressed the student's needs related to anxiety by providing supports and services including individualized attention, encouragement and praise, frequent check-ins with the teacher, transitional supports; annual goals to employ relaxation techniques and reduce anxiety; and group and individual counseling services (Parent Ex. C at pp. 1-2, 6-7).

Contrary to the parent's allegations, the weight of the evidence in the hearing record does not support a finding that the student would not receive educational benefits and progress in an ICT setting. In particular, a review of the evidence in the hearing record supports the IHO's finding that the February 2014 IEP was "carefully crafted" to meet the student's individual needs with input from the student's Bay Ridge teachers, and that the recommended program was in accord with his academic achievement levels (IHO Decision at p. 5). In light of the foregoing, I find that the February 2014 CSE's decision to recommend ICT services in a general education setting—together with annual goals, related services, and strategies to address the student's management

needs—was reasonably calculated to enable the student to receive educational benefit and offered the student a FAPE.

**C. Challenges to the Assigned Public School Site**

On appeal, the parent asserts that the district failed to present any evidence that the second assigned public school site could have implemented the February 2014 IEP's recommendation for small group instruction or that the student would be appropriately functionally grouped and, in addition, that the school and class size would be too large for the student.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has explained that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3). However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 2015 WL 4256024, at *6-*7 [2d Cir. July 15, 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 2015 WL 4256024, at *7; see M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of

implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claims regarding the assigned public school site. It is undisputed that the parent rejected the district recommended program and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. I; J). The only indication in the hearing record regarding the assigned public school site's purported inability to implement the February 2014 IEP comes from the parent's testimony regarding a telephone conversation she had with the assistant principal of the assigned school (Tr. pp. 101-08). While the parent testified that the assistant principal did not affirmatively indicate that the assigned school could meet the student's needs (Tr. pp. 104-05, 107-08), the parent also testified that the assistant principal responded to her questions regarding how the school would attempt to accommodate the student's needs and that she was not sure if the assistant principal had seen the IEP (Tr. pp. 103-05). Furthermore, the parent did not testify that the assistant principal affirmatively indicated that the assigned school was incapable of implementing the student's IEP. This testimony provides support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. Accordingly, the parent's claims based on her conversation with the assistant principal regarding the environment at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school's would not implement the student's IEP]).

With regard to functional grouping, the parent points to no evidence that the district would not have adhered to its obligation to group the student with students of similar needs (8 NYCRR 200.6[a][3]), the IEP specifically requires that the student be "functionally grouped with students with a similar academic profile" (Parent Ex. C at p. 2), and the hearing record contains no evidence that the parent obtained any information regarding any specific classroom into which the student may have been placed, or the functional abilities of the students in any such class. A number of courts have noted the speculative nature of grouping claims when a student never attends the assigned public school site, and the parent presents no argument for departing from this authority (M.C., 2015 WL 4464102, at *7; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Similarly, parental concerns regarding school or class size have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 2015 WL 4256024, at *7).[4] Accordingly, as the February 2014 IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site, the functional grouping within the classroom, or the effect of the school or class size on the student's ability to learn would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's

[4] These claims were not raised as challenges to the IEP except to the extent addressed above.

program at the assigned public school site or to refute the parent's claims related thereto (M.O., 2015 WL 4256024, at *7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

**VII. Conclusion**

In summary, a review of the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2014-15 school year. Moreover, the parent's arguments pertaining to the assigned public school site are speculative and need not be entertained on appeal. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether Bay Ridge was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**July 30, 2015**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**