The University of the State of New York

The State Education Department
State Review Officer
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No. 23-129

Application of a STUDENT WITH A DISABILITY, by her 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 Martin Marks, attorneys for petitioner, by Martin Marks, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

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 daughter's tuition costs at the Cooke School (Cooke) for the 2021-22 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

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the CSE convened on March 4, 2021 and formulated an IEP for the student with a projected implementation date of March 18, 2021 (see generally Dist. Ex. 2). By letter dated June 17, 2021, the parent disagreed with the March 2021 IEP and, therefore, notified the district of her intent to unilaterally place the student at Cooke (see Parent Ex. D). The district summarized the March 2021 CSE's recommendations and notified the parent of the particular public school to which it assigned the student to attend for the 2021-22 school year via a prior written notice dated June 18, 2021 (see Dist. Ex. 3). In a due process complaint notice, dated February 2, 2023, the parent

alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Dist. Ex. 1).

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). After a prehearing conference on March 8, 2023, an impartial hearing took place on May 5, 2023 (Tr. pp. 1-41). In a decision dated May 18, 2023, the IHO determined that the district offered the student a FAPE for the 2021-22 school year; the IHO also held that Cooke was an appropriate unilateral placement for the student and that equitable considerations would have weighed in favor of the parent's request for an award of tuition reimbursement had the IHO not found that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 4, 23-28). The IHO denied the parent's request for direct funding of the student's tuition costs at Cooke for the 2021-22 school year (id. at p. 30).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto are also presumed and, therefore, the specific allegations and arguments will not be recited here.[1] The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO improperly shifted the burden of proof from the district to the parent when determining that the student was provided with a FAPE for the 2021-22 school year;

2. Whether the IHO erred in determining that the CSE was properly constituted;

3. Whether the IHO incorrectly determined that the CSE used sufficient evaluative information in creating the March 2021 IEP;

4. Whether the IHO erred in determining that the 8:1+1 special class placement was appropriate; and

5. Whether the IHO erred in determining that the parent's allegations about the assigned public school site were speculative.

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.

[1] Although the district served and filed a document labeled "Verified Answer and Cross-Appeal," review of the document as a whole fails to show that it contains a cross-appeal in that it does not identify any precise rulings, failures to rule, or refusals to rule of the IHO of which the district seeks review (see 8 NYCRR 279.8[c][2]); accordingly, for purposes of this decision, the pleading will be referenced as the district's answer.

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). 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 Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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).

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]), 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]).[2]

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).

VI. Discussion

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached certain conclusions on the claims raised by the parent relating to the 2021-22 school year. In particular, I find that the following of the IHO's determinations were well-reasoned and supported by the evidence in the hearing record: that the CSE was properly constituted; that the CSE had sufficient evaluative material to create the March 2021 IEP; that the recommendation for an 8:1+1 special class was appropriate; and that there was no nonspeculative allegations concerning the assigned public school site's capacity to implement

[2] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

the IEP (see IHO Decision at pp. 7-8, 9-13, 17-18).[3] As to these issues, the IHO accurately recounted the relevant facts of the case and set forth the proper legal standards to determine whether the district offered the student a FAPE for the 2021-22 school year that met her individual and unique needs, and applied those standards to the facts as presented in this proceeding. Review of the IHO's decision shows that, for these issues, the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (see generally IHO Decision). 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 not a sufficient basis presented on appeal to modify these determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO described above are hereby adopted.

I will, however, briefly address several of the parent's contentions that the IHO improperly shifted the burden of proof to the parent and inappropriately relied on certain evidence and/or assumed facts that were not in evidence in the district's favor.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In his decision, the IHO correctly stated that the district bore the burden of proof to show that it offered a FAPE, echoing his statements during the prehearing conference (IHO Decision at pp. 6, 23; Tr. p. 6). In his analysis of whether the district offered the student a FAPE, the IHO noted that the district did not call any witnesses but submitted "six documents for admission to the record and plan[ned] to rest on the documents" and further acknowledged that "[t]he [district] was not conceding that it failed to provide [the s]tudent with a FAPE for the S[chool] Y[ear] at issue" (IHO Decision at p. 3). The parent seems to argue that the district could not have met its burden of proof without testimonial evidence. To be sure, the district's bare presentation of its case is not encouraged and, in some instances, could result in a finding that the district failed to meet its

[3] The parent does not appeal from the IHO's findings that the CSE: did not engage in predetermination and allowed the parent the opportunity to participate in the creation of the March 2021 IEP; identified the student's present levels of performance using the appropriate evaluative information; created appropriate annual goals for the student; did not violate the IDEA by not including a transition plan in the March 2021 IEP; did not err in not discussing assistive technology during the CSE process; and appropriately addressed the student's management needs in the March 2021 IEP (see IHO Decision at pp. 8-9, 14-15, 16-17, 18-19, 21-22, 22-23). Further, the district does not cross-appeal from the IHO's finding that Cooke was an appropriate unilateral placement for the student or that the equitable considerations would have weighed in favor of the parent's request for relief (see id. at pp. 23-28). Therefore, the IHO's findings regarding: predetermination, parental participation, present levels of performance, annual goals, a transition plan, assistive technology, management needs, appropriateness of the unilateral placement, and equitable considerations are final and binding and will not be further addressed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

burden of proof; however, under the specific circumstances of this case and given the nature of the claims pursued by the parent on appeal, the district's evidence was sufficient to establish that it offered the student a FAPE for the 2021-22 school year.

Ideally, if a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the district did offer a social history update and psychoeducational evaluation from March 2019, a progress report from February 2020, the March 2021 IEP, and the June 2021 prior written notice and school location letter (Dist. Exs. 2-6). This evidence was sufficient for the IHO to address the particular issues raised by the parent. A review of the IHO's decision shows that the available evidence in the hearing record led the IHO to find that the IEP adequately addressed the student's needs and that there was no contrary evidence that would rebut that conclusion (i.e., evidence that the student required the specific class ratio preferred by the parent); accordingly, the actual analysis of the relevant evidence by the IHO did not represent a shift of the burden of persuasion to the parent to demonstrate the IEP's substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). The decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3).

To assess the broad claim in the due process complaint notice that "[t]he IEP 'team' was not properly constituted" in that, "upon information and belief, the team did not have the required members and, if those individuals were present in name/title, they did not possess the required knowledge, training, or independence to properly formulate a legal IEP" (Dist. Ex. 1 at pp. 2-3), the IHO correctly considered the CSE attendance page to identify which individuals attended the meeting, considered other evidence in the hearing record to confirm the individual who attended as the district representative was a school psychologist, and noted the overall composition of the CSE satisfied the requirement that individuals on the committee be knowledgeable about the continuum (IHO Decision at pp. 7-8, citing Dist. Ex. 2 at p. 28, and Parent Ex. P ¶ 8).[4] On appeal,

[4] The IDEA and federal and State regulations require that a CSE include, among others, "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" and " an individual who can interpret the instructional implications of evaluation results" (8 NYCRR 200.3[a][1][v]-[vi]; see 20 U.S.C. § 1414[d][1][B][iv]-[v]; 34 CFR 300.321[a][4]-[5]). Both the district representative and the individual capable of interpreting evaluation results may also serve in other roles on the CSE (8 NYCRR 200.3[a][1][v]-[vi]; see 20 U.S.C. § 1414[d][1][B][iv]-[v]; 34 CFR 300.321[a][4]-[5]).

the parent does not allege that, contrary to the IHO's finding, a school psychologist did not attend the meeting or that the district members of the committee lacked knowledge of the continuum. Instead, the parent focuses on the IHO's reliance on the documentary evidence to reach his conclusions without the benefit of testimonial evidence. However, even assuming that a school psychologist was not present or that the district representative was incapable of adequately fulfilling the criteria to serve on the CSE, the parent's argument is technical in nature and she does not otherwise allege with any particularity under these facts how such a deficit significantly impeded her ability to participate in the development of the student's educational program or deprived the student 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]). Absent some argument for how these purported deficiencies in the composition of the CSE harmed the student or the parent's ability to participate in the March 2021 CSE meeting, the hearing record does not support a finding of a denial of a FAPE on this basis (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

Regarding evaluative information, the IEP reported a comment from the student's English language arts (ELA) teacher that assessment of the student's reading comprehension at a second grade level may not have been accurate as the student performed at that level when text was read aloud and that formal assessment might be different (Dist. Ex. 2 at pp. 1-2). The IHO acknowledged this statement but found that, even if there was a lack of formal assessment, the IEP identified the student's needs and the parent did not advance any argument regarding how such an inadequacy would overcome evidence that the CSE had sufficient information to develop the IEP (IHO Decision at p. 13). The parent alleges that the IHO improperly held the parent accountable for not showing how the lack of information could lead to an inappropriate result when it was the district's responsibility to evaluate the student and the district's burden to prove that its evaluations were sufficient. Overall, the evidence in the hearing record supports the IHO's finding as the CSE had before it results of several formal assessments of the student's cognitive and academic skills (see Dist. Ex. 5), as well as less formal descriptions of the student's needs in the classroom (see Dist. Ex. 4). Specific to reading comprehension, the psychoeducational evaluation included administration of the Woodcock-Johnson Tests of Academic Achievement-IV (W-J IV) which revealed that the student performed in the very low range and below grade expectancy in reading comprehension as she was unable to understand a written passage and complete the passage with a single word, identify words missing from text, or use semantic and syntactic clues in written text (Dist. Ex. 5 at p. 8). In addition, the February 2020 Cooke progress report indicated that the student benefited from graphic organizers and to "stop and think" in order to improve her reading comprehension, was able to demonstrate comprehension by answering yes and no questions and by identifying details within text, was able to define content related words through use of graphic organizers, and benefitted from explicit instruction, modeling, visual cues, and using sentence starters (Dist. Ex. 4 at p. 4). Thus, despite the ELA teacher's stated concern about the accuracy of the reported reading comprehension grade level, the CSE had other information about this area of the student's needs available to it and the IEP incorporated several strategies that would have supported the student performance in school as supports for the student's management needs (Dist. Ex. 2 at p. 6). Accordingly, there is no reason to disturb the IHO's conclusion that the evaluative information before the CSE was sufficient.

With respect to the 8:1+1 special class, while the parent challenges the IHO's assessment of the testimony of parent witnesses regarding the student's class size at Cooke compared to the special class recommended in the IEP and alleges that the IHO incorrectly stated the student's class

size at Cooke, the IHO's determination that the recommended 8:1+1 special class offered the student with a FAPE was ultimately based on the IHO's determination that the student exhibited intensive management needs and required a significant degree of individualized attention and intervention, thereby meeting the criteria for an 8:1+1 special class placement under State regulation (IHO Decision at pp. 20-21; see 8 NYCRR 200.6[h][4][ii][b]).[5] The parent has not alleged any basis for finding error in this conclusion. As such, I decline to disturb the IHO's determination that the March 2021 CSE's recommended 8:1+1 special class placement was appropriate for the student.

As a final matter, regarding the assigned public school site, the IHO was correct to find that the parent's allegations that the school could not implement the IEP were "based on impermissible speculation" (IHO Decision at p. 18; see R.E., 694 F.3d at 195 [explaining that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement"]). In the due process complaint notice, the parent broadly alleged that the district "could not implement the IEP at the recommended placement" (Dist. Ex. 1 at p. 3). The IHO gave the parent much leeway and considered the school's capacity to implement the IEP based on concerns that the parent described in testimony about the behaviors of other students in the school (IHO Decision at p. 17). In particular, as noted by the IHO, the parent's concerns about possible behaviors of other students were not based on any fist hand knowledge of the school, but more a concern about district schools in general (Tr. p. 36; see IHO Decision at p. 17). Accordingly, the parent's allegations were based solely on her unsubstantiated belief that the assigned public school site would not be able to implement the IEP and, therefore, were not actionable, and the district did not have the burden to present evidence about the assigned school site's capacity to implement every aspect of the March 2021 IEP (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a

[5] Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2021-22 school year.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 18, 2023

STEVEN KROLAK
STATE REVIEW OFFICER