



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-223

**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  
XXXXXXXXXXXX**

### **Appearances:**

Susan Luger Associates, Inc., Special Education Advocates, attorneys for petitioner, Michelle Siegel, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 their request to be reimbursed for the costs of the student's tuition at the York Preparatory School (York Prep) for the 2011-12 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 student attended a nonpublic general education school from kindergarten through fifth grade, throughout which time he struggled with reading (Tr. pp. 297-98; see Dist. Ex. 5 at p. 2).<sup>1</sup> The hearing record reflects that, as the academics became more complex at the private

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<sup>1</sup> Around the time the student was in the third grade, he received Lindamood-Bell phonemic awareness instruction for approximately four months, math tutoring, and private occupational therapy (OT) to increase upper body strength (Tr. pp. 298, 345-46, 370; Dist. Exs. 5 at pp. 2-3; 7 at p. 1).

school, the student "started failing," whereupon the private school did not invite the student back to attend their middle school program because he was unable to work independently (Tr. p. 297-99). The parent enrolled the student in a nonpublic "special education school" for the sixth and seventh grades (Tr. pp. 301-02, 328; see Dist. Ex. 5 at p. 3). When the student was in the eighth grade, the parent enrolled him in York Prep with the addition of the school's Jump Start program option for the 2010-11 school year (see Tr. pp. 302, 320; see Dist. Ex. 5 at p. 3).<sup>2</sup> On or about February 16, 2011, the parent signed an enrollment contract for the student to attend York Prep with the Jump Start program, for the forthcoming 2011-12 school year (Parent Ex. C at pp. 1-4).

During the 2010-11 school year, the parent initially communicated with the district via a February 28, 2011 letter, in which she requested a free appropriate public education (FAPE) for the student because she believed he required special education services (Dist. Ex. 2). The parent further noted that such letter served as her "informed consent to initiate the evaluation process" for the student (id.). On May 9, 2011, the parent signed a written consent for the student's initial evaluation on a form provided by the district (Dist. Ex. 6).

On June 13, 2011, the CSE convened to conduct the student's initial review and to develop an IEP for the 2011-12 school year (Dist. Ex. 14 at pp. 1-2). Finding the student eligible for special education as a student with a learning disability, the June 2011 CSE recommended a general education classroom in a community school with direct special education teacher support services (SETSS) in a small group (8:1) for five periods per week in a separate location (id. at pp. 1, 20).<sup>3</sup> The June 2011 CSE recommended annual goals, support for the student's management needs, testing accommodations, and a coordinated set of transition activities to facilitate the student's movement to post-secondary school activities (id. at pp. 4, 9-19, 22-24; see also id. at pp. 25-30).

In a final notice of recommendation (FNR) dated July 6, 2011, the district summarized the SETSS recommended in the June 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 16).

By letter dated July 20, 2011, the parent informed the district that, in response to receiving the July 6, 2011 FNR, she attempted to contact the assigned public school site on multiple occasions to schedule a visit and was ultimately informed that there were no tours of the school available during the summer (Dist. Ex. 17). The parent indicated in her letter, that, before she could make a decision, she wanted to see the school and ask some questions about the program, and she requested the district's guidance in accomplishing this (id.). The parent indicated that she would enroll the student in an appropriate "program/placement" for the 2011-12 school year, if one was offered, but, otherwise, she intended to enroll the student in York Prep at public expense (id.).

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<sup>2</sup> The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> The student's eligibility for special education services as a student with a learning disability is not in dispute (Tr. pp. 31-32, 54; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

By letter dated August 16, 2011, the parent notified the district that she believed the district failed to offer the student an appropriate "program/placement" for the 2011-12 school year and that she intended to unilaterally place the student at York Prep at public expense (Parent Ex. A). The parent requested that the district "immediately" arrange for the student's transportation to York Prep (id.).

#### **A. Due Process Complaint Notice**

By due process complaint notice dated September 26, 2011, the parent alleged that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at p. 2). First, with regard to the composition of the June 2011 CSE, the parent claimed that, although required, no regular education teacher attended the meeting and that the individual listed as the special education teacher did not meet regulatory criteria (id. at p. 3). Next, the parent alleged that the 12 annual goals recommended by the CSE: were not realistically achievable in a general education setting; were not individualized; were not reasonably calculated to confer a benefit; did not meet the student's unique educational, social, and emotional needs; and were not prepared at the CSE meeting (id. at p. 2). The parent claimed that the June 2011 CSE's program recommendation was not appropriate, in that the student needed the support of a full-time special education program to make educational progress (id. at pp. 2, 3). The parent alleged that the June 2011 CSE developed an inappropriate transition plan for the student because the CSE failed to invite the student to participate in the planning conference and because the CSE did not draft the transition goals at the meeting, thereby denying parent the opportunity to offer input (id. at pp. 2-3). Relative to the assigned public school site, the parent alleged that the student did not receive a timely placement, that the parent was not allowed to visit the assigned public school site during the summer, and that the CSE failed to respond to the parent's letter regarding her unsuccessful attempts to visit the assigned school prior to the start of the 2011-12 school year (id. at p. 3).

With regard to the parent's unilateral placement of the student at York Prep, the parent asserted that York Prep with Jump Start addressed the student's needs (Dist. Ex. 1 at p. 4). The parent also asserted that equitable considerations weighed in favor of her request for relief, since she timely informed the district of her intention to seek tuition reimbursement (id. at p. 3). For relief, the parent requested that the IHO order the district to reimburse her for the cost of the student's tuition at York Prep for the 2011-12 school year (id. at p. 4). The parent also requested that the IHO order the district to provide transportation for the student to and from York Prep (id.).

#### **B. Impartial Hearing Officer Decision**

An impartial hearing was convened on January 25, 2012 and concluded on April 25, 2012 after five days of proceedings (Tr. pp. 1-670). In a decision dated October 23, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at p. 16).

First, with regard to the composition of the June 2011 CSE, the IHO recognized that a regular education teacher was a required member of the CSE (IHO Decision at pp. 11-12).

Nevertheless, the IHO found that the absence of a regular education teacher on the June 2011 CSE did not deny the student a FAPE because a representative from York Prep attended and participated fully at the CSE meeting and, therefore, the parent's right to participate in the development of the IEP was not seriously infringed (id. at pp. 12-13).<sup>4</sup> Next, the IHO found that the June 2011 CSE's recommendation for a general education placement with SETSS for the 2011-12 school year was appropriate because the student was a "qualified candidate for general education" (id. at p. 14).<sup>5</sup> In support of this conclusion, the IHO cited the student's present levels of performance, as described in the June 2011 IEP, including that the student's academic performance was overall in the average range and called for the student to be instructed to grade level, his behavior was age appropriate and called for fading teacher assistance through the use of a multi-sensory methodology and scaffolding, explicit instruction, and multisensory strategies, and he required individualized instruction by a master-level special education teacher to address his management needs (id. at pp. 14-15). The IHO noted that the recommended "general education class with an '8:1' staffing ratio" was smaller than the student's classroom at York Prep (id. at p. 14). The IHO also noted that the June 2011 CSE considered and rejected a general education placement without SETSS because the student "require[d] additional support to meet his academic needs" (id. at p. 15). With regard to the parents' allegations concerning the assigned public school site, the IHO determined that there was "evidence in the record that the IEP could have been . . . properly implemented by the [district]" (id.).

Having found that the district offered the student a FAPE for the 2011-12 school year, the IHO declined to determine whether York Prep was an appropriate unilateral placement for the student or whether equitable considerations weighed in favor of the parent's request for relief (IHO Decision at p. 16).<sup>6</sup>

#### **IV. Appeal for State-Level Review**

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2011-12 school year. As an initial matter, the parent asserts that the IHO's decision of October 23, 2012 was untimely under State regulations, issued nearly five

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<sup>4</sup> The IHO also rejected the parent's purported allegation that the composition of the June 2011 CSE was infirm due to the lack of a social worker (IHO Decision at p. 11). The parent, however, raised no such allegation in her due process complaint (see Dist. Ex. 1 at pp. 1-4). Nevertheless, the IHO's finding is correct because State regulations do not require that a social worker be a member of the CSE (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

<sup>5</sup> The parent alleges that the IHO misunderstood the recommendations of the June 2011 CSE because the IHO's decision stated that the CSE recommended SETSS for "50" periods per week, instead of the correct "5" periods per week (see Dist. Ex. 14 at p. 1). Contrary to the parent's allegation, it appears that this was likely a typographical error

<sup>6</sup> The IHO opined, however, that the hearing record "indicate[d] that there may have been no real intention [by the parent] to place the student in a public school for the 2011-12 school year" (IHO Decision at p. 16). In support of this statement, the IHO noted that the assigned public school was located approximately a half-hour from the student's residence, yet the parent did not take the opportunity to visit the school before notifying the district of her intention to unilaterally place the student at York for the 2011-12 school year (id.). Furthermore, the IHO noted that the student attended a different private school for the 2009-10 and 2010-11 school years and that the student had never attended a public school (id.).

months after the parties' submission of written closing summations on May 24, 2012. In addition, the parent alleges that the IHO's decision includes "glaring mistakes of fact" and "misstated testimony."

With regard to the June 2011 CSE, the parent argues that the absence of a regular education teacher constituted a procedural violation under the IDEA that impeded the parent's opportunity to participate in the development of the student's IEP. Specifically, the parent contends that State regulations require that the CSE include a regular education teacher from the district who is or will be responsible for implementing a portion of the student's IEP and that the IHO erred in basing his decision on the "assumption that a general education teacher from York Prep[] . . . should have attended." The parent further contends that the lack of a regular education teacher on the June 2011 CSE resulted in little to no discussion or explanation to the parent about the annual goals or other recommendations for the student. Next, the parent argues that the June 2011 IEP was "fatally flawed" because it "fail[ed] to mention the critically important fact that [the student] ha[d] been diagnosed with dyslexia." The parent also alleges that the IHO erred in finding that the June 2011 CSE's recommendation that the student attend a general education placement with SETSS was appropriate. The parent particularly argues that the IHO incorrectly described the record by stating that the CSE recommended SETSS for "50" periods per week, instead of the correct "5" periods per week, and by indicating that the placement recommended in the June 2011 IEP offered a smaller student-to-teacher ratio than the student's classroom at York Prep. Furthermore, the parent cites testimony of the district school psychologist that the June 2011 CSE disregarded the recommendations set forth in a private evaluation of the student.

With regard to the assigned public school site, the parent argues that the IHO erred in finding that the public school could implement the student's June 2011 IEP. Specifically, the parent argues that the assigned public school could not have implemented the five periods per week of pull-out SETSS, consisting of individualized instruction by a New York State certified master level special education teacher, as mandated in the June 2011 IEP.

Relative to the unilateral placement, the parent argues that York Prep with the Jump Start program was appropriate for the student for the 2011-12 school year because: (1) York Prep was an "inclusion program," that provide[d] special education to one third of the school's population; (2) the student received special education instruction through Jump Start and his academic subject teachers who were trained to address his educational needs; (3) York Prep's smaller class size allowed for 1:1 attention during class; (4) the student's English teacher employed specific programs to address student's reading comprehension and writing deficits; and (5) the student made significant progress. The parent also argues that equitable considerations weigh in favor of her request for relief in this case because she participated and cooperated with the CSE. Furthermore, the parent argues that she did attempt to visit the assigned public school site and that the IHO's "casual comment" to the contrary should be disregarded. Consequently, the parent requests an order reversing the IHO's decision in its entirety.

In an answer, the district responds to the parent's petition by admitting or denying the allegations raised and asserting that the IHO's decision should be affirmed in all respects. Initially, with regard to the timeliness of the IHO's decision, the district argues that the parent failed to demonstrate how, if at all, the delayed issuance resulted in any prejudice to the student

or parent. As to the composition of the CSE, the district argues that, to the extent that the regular education teacher's absence was a procedural violation of the IDEA, such violation did not impede the student's right to a FAPE, impede the parent's right to participate, or deprive the student of any educational benefits. Next, the district asserts that the parent's due process complaint notice did not contain any allegation regarding the CSE's alleged failure to specifically state that the student had received a diagnosis of dyslexia on the June 2011 IEP. In any event, the district argues that any claim relating to such an omission did not render the June 2011 IEP inappropriate. The district also argues that the general education placement with SETSS recommended by the June 2011 CSE was appropriate for the student because it constituted the student's least restrictive environment (LRE) and offered support for the student to work on his areas of need.<sup>7</sup> Finally, the district argues that, since the parent rejected the "offered placement" before visiting the assigned public school site, the parent's claims related to the assigned school were purely speculative. In any event, the district asserts that the IHO correctly found the evidence in the hearing record showed that the assigned school could have implemented the June 2011 IEP.

Relative to the unilateral placement, the district argues that York Prep was inappropriate because the Jump Start program was a minor component of the overall general education program at York Prep and that the student did not receive an appropriate amount of special education services. With regard to equitable considerations, the district argues that the parent failed to overcome the presumption that equitable considerations favored the district. In support of its argument, the district contends that the parent did not intend to send the student to a public school, as evidenced by: (1) testimony from the parent confirming that she wanted the student to remain at York Prep and that she was looking for financial aid from the district; (2) evidence that the student never attended a public school; and (3) the parent's execution of an enrollment contract with York Prep for the 2011-12 school year on February 16, 2011, several months prior to the June 2011 CSE meeting. The district also contends that the parent's 10-day notice letter to the district failed to specify any concerns with regard to the June 2011 IEP. Finally, the district argues that any award of tuition reimbursement in this case should not include reimbursement for a \$1,200 bookstore charge and other miscellaneous costs.

## **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

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<sup>7</sup> In further support of the June 2011 CSE's placement recommendation, the district also points out that the student's unilateral placement at York Prep was similar to the educational program recommended by the CSE, in that it also consisted of a general education program supplemented with special education services.

(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 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. Timeliness of the IHO's Decision**

The parent argues that the IHO's decision of October 23, 2012 was untimely and violated the parent's due process rights because the decision was issued five months after the submission of written summations by the parties on May 24, 2012. The parent argues that the IHO's

decision should have been issued within 14 days after the submission of the written summations. The district asserts that, even if the decision was late, the parent suffered no harm as a consequence.

State regulations provide that an 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]).<sup>8</sup> 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]). State regulations further provide that, in cases where extensions have been granted beyond the applicable timelines, the decision must be rendered and mailed no later than 14 days from the date that the IHO closes the record (8 NYCRR 200.5[j][5]). The date the record is closed shall be indicated in the IHO's decision (*id.*). A hearing record should be closed "when all post-hearing submissions are received by the IHO" ("Changes in the Impartial Hearing Reporting System," Office of Special Education Mem. [Aug. 2011], available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>; see Application of the Dep't of Educ., Appeal No. 11-150). An IHO may not grant an extension for any reason after the record close date (8 NYCRR 200.5[j][5][iii]).

In this case, on the final day of proceedings, April 25, 2012, the IHO indicated that the parties' post-hearing memoranda would be due on May 24, 2012 (Tr. p. 668). However, the IHO's decision indicates that the record was not closed until October 5, 2011 (IHO Decision at cover page). There is no explanation in the hearing record for this discrepancy. Notwithstanding this, the parent points to no suggestion that the IHO's delay in issuing a decision prejudiced the student's right to a FAPE (see M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at \*3 [S.D.N.Y. Mar. 27, 2014] [noting that a student's right to a FAPE is not prejudiced by a delay where the challenged IEP is ultimately deemed adequate and where parents the parents do not suggest "that they would have altered their decision" to remove the student from the public school and challenge the IEP had "the dispute been resolved more quickly"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*13 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 13-cv-01131 [S.D.N.Y. Mar. 26, 2014] [finding that, even if a tardy decision constituted a procedural violation, it did not result in the denial of a FAPE]). Therefore, while it is understandable that the parent desired a faster resolution of this matter, there is no reason to reverse the IHO's decision on the basis of delay, especially where the parent was agreeable to extensions throughout the impartial hearing and stated on the record that there would be "no harm to the student educationally or financially" at that time (Tr. pp. 119-20).

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<sup>8</sup> Although not relevant in the present case, I note that effective February 1, 2014, State regulations relating to procedures governing impartial hearings were amended (Notice of Adoption, Impartial Due Process Hearings for Special Education Matters, N.Y.S. Educ. Dep't, 45 N.Y. Reg. 17-19 (Jan. 29, 2014), 2014 NYREG Text 342252 [NS] [Jan. 29, 2014]). Specifically, sections 200.1, 200.5 and 200.16 were amended to address: certification and appointment of impartial hearing officers (IHOs); consolidation of multiple due process complaint notices for the same student; decisions of the IHO; the timeline for an IHO to render a decision; extensions of the timelines for an impartial hearing decision; the impartial hearing record; and withdrawal of due a process complaint notice ("Summary and Guidance on Regulations relating to Special Education Impartial Hearings," Office of Special Education Special Education Field Advisory [Feb. 2014], available at <http://www.p12.nysed.gov/specialed/publications/IHguidance-Feb2014memo.pdf>; see also 8 NYCRR 200.1[x], 200.5[j][3], [j][5], [j][6], 200.16[h][9]).

## B. June 2011 CSE Composition

Turning first to the composition of the June 2011 CSE, the parties do not dispute that a regular education teacher was not in attendance (see Answer ¶¶ 16, 41; see also Tr. pp. 68-69). The parent asserts, however, that the IHO erred in concluding that such a procedural violation did not rise to the level of a denial of a FAPE (see IHO Decision at pp. 11-13). The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). The Official Analysis of Comments to the federal regulations indicate that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]; see Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*17-\*18 [S.D.N.Y. Jan. 2, 2013]).<sup>9</sup>

In this case, the June 2011 CSE recommended a general education placement for the student (Dist. Ex. 14 at p. 1). Therefore, a regular education teacher was a required member of the CSE (20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). A review of the hearing record demonstrates that attendees at the June 2011 CSE meeting included the parent, an additional parent member, a district special education teacher (who also acted as the district representative), a district school psychologist, and a representative from York Prep (Dist. Exs. 14 at p. 2; 15 at p. 1).<sup>10</sup> The hearing record further reflects that the attendance page included with the June 2011 IEP meeting did not reflect any CSE's member's signature in the space provided to document the attendance of a regular education teacher (id.). Based on the foregoing, the absence of a regular education teacher at the June 2011 CSE meeting constitutes a procedural inadequacy.

However, the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 15, 2011 WL 2164009 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii];

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<sup>9</sup> The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

<sup>10</sup> The hearing record shows that the representative from York Prep was a psychologist who, at the time of the June 2011 CSE meeting, was the director of psychology at York Prep and later became the principal (Tr. pp. 327-38; Dist. Exs. 14 at p. 2; 15 at p. 1).

34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). A review of the hearing record indicates that the parent and also the representative from York Prep each expressed their views at the June 2011 CSE meeting and participated in the development of the student's IEP (Tr. pp. 310-13, 326-27; Dist. Ex. 15 at p. 3). Moreover, according to the school psychologist, although the parent required explanation of the difference between an IEP and an individualized educational services plan (IESP), she did not seem confused about SETSS (Tr. pp. 56-57). Furthermore, although a regular education teacher may have suggested methods or strategies to include in the June 2011 IEP to address the student's needs in the general education setting, in fact, the student's June 2011 IEP provided for "[c]ollaboration" between the student's special education and regular education teachers and "access" to the IEP for the purpose of training, learning, and sharing of strategies and skills to support the student's "educational progress" (Dist. Ex. 14 at p. 20). In addition, as discussed below, the June 2011 CSE developed an appropriate IEP, and there is also no evidence in the hearing record that the student suffered any loss of educational opportunity resulting from the procedural infirmity in this case. Accordingly, the hearing record does not provide a basis upon which to reverse the conclusion of the IHO that this procedural inadequacy did not result in a denial of a FAPE (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*7 [S.D.N.Y. Nov. 27, 2012] [concluding that, even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and no "reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*6-\*7 [S.D.N.Y. Sept. 29, 2012] [finding that, although required, the absence of an appropriate regular education teacher at the CSE meeting did not render the IEP inadequate]; see also S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*9 [S.D.N.Y. Nov. 9, 2011]); cf. Dirocco, 2013 WL 25959, at \*17-18 [finding that the absence of a regular education teacher at the CSE meeting did not result in the denial of a FAPE where the parents engaged in extensive dialogue with several CSE members regarding the proposed placement and expressed their dissatisfaction with the proposal]).

In addition, the facts of this case are distinguishable from those in at least one case, in which a district court found a denial of a FAPE based on the lack of participation on the CSE by a regular education teacher (see R.G. v. New York City Dep't of Educ., 2013 WL 5818541, at \*12-\*16 [E.D.N.Y. Oct. 25, 2013]. In R.G., the CSE recommended—over objections lodged by other CSE members and the parents—a special class without consideration of a mainstream placement (2013 WL 5818541, at \*13-\*14). Explaining that participation of a regular education teacher on the CSE is a "critical procedural mechanism to realizing the mainstreaming objectives articulated by the IDEA," the court found that the student was denied a FAPE because the regular education teacher was excluded from the CSE (id. at \*13, citing Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 860 [6th Cir. 2004] ["The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom"]). "While the presence of a regular education teacher at a CSE[] meeting does not guarantee a child will receive a mainstream placement, it does help to ensure that this option receives fair consideration" (J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 653 [S.D.N.Y. 2011]). The court in R.G. reasoned that the regular education teacher did not "have the opportunity to provide his or her views" about the student's needs and

"to persuade the other CSE members to consider a general education placement" (2013 WL 5818541, at \*13, \*15).

In contrast to R.G., the hearing "record in this case unambiguously demonstrates that a mainstream placement" not only received "fair consideration" but that the CSE actually recommended a general education setting for the student (2013 WL 5818541, at \*14; see Dist. Ex. 14 at pp. 1, 20-21). Thus, the LRE concerns expressed in R.G. do not exist in this case (2013 WL 5818541, at \*14-\*15). In addition, as further described below, a representative from York Prep, where the student was attending at the time, actually participated in the CSE meeting. In view of the foregoing, the hearing record does not provide a basis upon which to conclude that this procedural inadequacy, standing alone, impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

### **C. June 2011 IEP**

The parent challenges the substantive adequacy of the June 2011 IEP insofar as the CSE recommended a general education placement with SETSS for the student.

#### **1. Evaluative Information**

In this instance, although the sufficiency of the evaluative information available to the June 2011 CSE or the description of the student's present levels of performance in the IEP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—the appropriateness of the program recommendations set forth in the June 2011 IEP.<sup>11</sup>

Consistent with the school psychologist's testimony, review of the June 2011 IEP shows that the June 2011 CSE considered the May 9, 2011 social history and language survey reports, the May 27, 2011 classroom observation and the level one vocational assessment reports, a medical report "sent" to the district in March 2011, an April 2011 neuropsychological evaluation report provided by the parent, and the student's grades for the second semester from York Prep (Tr. p. 46; Dist. Exs. 5; 7-11).<sup>12</sup>

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<sup>11</sup> The parent does allege that the June 2011 IEP failed to set forth that the student was diagnosed with dyslexia. However, because the parents failed to raise this allegation in their due process complaint notice, it may not be raised now for the first time on appeal (R.E., 694 F.3d at 187 n.4 [2d Cir. 2012]). Moreover, although an IEP must "indicate the classification of the disability pursuant to" State regulations, there is no requirement that an IEP indicate each condition with which a student has been diagnosed (see 8 NYCRR 200.4[d][2][ii]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at \*13 [S.D.N.Y. Mar. 31, 2014]; see also 20 U.S.C. § 1414[d][1][A][ii][I] [the IDEA shall not be construed to require "that additional information be included in a child's IEP beyond what is explicitly required"]). In addition, as set forth in the body of this decision, the student's June 2011 IEP adequately specified the student's needs arising from his disability.

<sup>12</sup> The school psychologist also testified that the representative from York Prep also presented a verbal report card to the June 2011 CSE (Tr. p. 46).

Citing to the April 2011 neuropsychological evaluation report, the June 2011 IEP reported that, with respect to reading, writing, and math, the student performed at his grade level on tasks evaluated by the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) (Dist. Exs. 5 at pp. 15-17; 14 at pp. 3-4). Consistent with the April 2011 neuropsychological evaluation report, the June 2011 IEP indicated the student demonstrated verbal abilities in the superior range, nonverbal reasoning abilities in the high average range, and processing speed in the low average range (Dist. Exs. 5 at pp. 4-5, 7-8 15; 14 at pp. 3-4). Academically, the June 2011 IEP reported that the student performed in the average range on standardized tests, except that the student's math fluency fell within the low average range and the student's performance in spelling of sounds fell in the high average range (Dist. Exs. 5 at pp. 16-17; 14 at p. 3). According to the neuropsychological evaluation report and as reported in the June 2011 IEP, the student's reading comprehension and reading rate fell in the average range, but the evaluator indicated gaps both at the student's literal and inferential levels of comprehension (Dist. Exs. 5 at p. 8; 14 at p. 3). The June 2011 IEP indicated that, with respect to writing, the student was able to produce creative ideas but made errors in spelling, mechanics, and word usage (Dist. Exs. 5 at p. 9; 14 at p. 3). Despite scores in the average range, the student presented with relative weakness in word retrieval, sequential recall and phonological processing (Dist. Exs. 5 at pp. 7-8; 14 at p. 3). The June 2011 IEP noted the student demonstrated mild attention difficulties on tests of working memory and on tasks that required visual scanning (Dist. Exs. 5 at p. 8; 14 at p. 3). In reading, the student presented with difficulties in decoding and in spelling multi-syllabic words (*id.*). According to the neuropsychological evaluation report and as reported in the June 2011 IEP, the student was able to construct a coherent narrative with varied sentence structures; however, missing capitalization and punctuation were noted, in addition to errors in spelling and word usage (Dist. Exs. 5 at p. 9; 14 at p. 3).

The June 2011 IEP noted that, according to the York Prep representative who participated in the CSE meeting, the student presented with difficulty decoding and encoding multi-syllabic words (Dist. Exs. 14 at p. 3; 15 at p. 2). The June 2011 IEP also described information from the York Prep representative that the student's reading comprehension skills at the inferential level of comprehension were limited (*id.*). The IEP reported that, in writing, the student was able to organize a paragraph and use a topic sentence but he did not self-edit for syntax, spelling and punctuation and had difficulty writing more than one paragraph independently (*id.*). According to the June 2011 IEP, the parent reported to the CSE that the student printed all letters and used a computer for writing assignments (*id.*). For mathematics, the York Prep representative reported that the student made careless mistakes that he tended not to notice, sometimes mixed up concepts and procedures, and could have difficulty planning the steps needed for math problems (*id.*). The parent and the representative from York Prep also described the student as disorganized with his materials and indicated that he often forgot the materials that he needed (Dist. Exs. 14 at p. 3; 15 at pp. 1, 3).

Consistent with the parent's description of the student as reported in the May 2011 social history report, the student's self-description in the May 2011 level one vocational assessment report, and the social/emotional description of the student that the parent provided during the June 2011 CSE meeting, the June 2011 IEP indicated the student was well adjusted in school, did not present with behavior problems, and was social and cooperative (Dist. Exs. 7 at pp. 1, 3; 11; 14 at p. 6; 15 at p. 3; see Tr. p. 51). Consistent with evaluative information available to the June

2011 CSE, the IEP indicated that the student enjoyed basketball, music, photography, and video games (Dist. Exs. 7 at p. 3; 14 at p. 6; see Tr. p. 51). Consistent with the level one vocational assessment report, the June 2011 IEP reported the student's self-assessment to the effect that he learned best by watching an activity rather than only listening (Dist. Exs. 11; 14 at p. 6). Furthermore, per the level one vocational assessment report, the June 2011 IEP indicated that the student described himself as funny, smart, and open-minded, and that in the future he would like to be either a photographer or work in corporate music (Dist. Exs. 11; 14 at p. 6; see Tr. p. 51).

Consistent with information that the parent reported to the team during the CSE meeting, and with information taken from the student's March 2011 medical report, the June IEP reflected that the student was in excellent health and was of age appropriate physical development (Dist. Exs. 9; 14 at p. 7).

A CSE review rationale, consisting of notes taken by the district school psychologist during the June 2011 CSE meeting, reflected the CSE's discussion specific to the student during the meeting (Tr. p. 58; Dist. Ex. 15). Consistent with the June 2011 IEP, the rationale also reflected the parent's input during the CSE meeting about the student's history, handwriting, social/emotional cooperative nature, recreational preferences, and tendency to be disorganized and forgetful, notwithstanding that he was motivated to do well (Dist. Ex. 15 at pp. 2-3; see also Tr. pp. 38, 55-56; Dist. Exs. 14 at pp. 1-3, 6).

## **2. General Education Placement with SETSS**

As noted above, the June 2011 CSE recommended that the student attend a general education classroom in a public community school with direct SETSS in a small group (8:1) for five periods per week in a separate location (Tr. p. 54; Dist. Ex. 14 at p. 1). As an initial matter, I note that "SETSS" is not specifically identified State regulations describing the continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). However, the hearing record does indicate that the June 2011 CSE recommended SETSS for the student, which would consist of the services of a special education teacher in a group of no more than eight students for one period each day to work on those skills that he still needed to develop (Tr. pp. 21, 55; Dist. Ex. 14 at pp. 1, 20). This description is consistent with a view that SETSS in the instant case consists of a version of a resource room program provided as a pull-out service in a small group (see Application of the Dep't of Educ., Appeal No. 13-165; see also W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at \*2-\*3 [S.D.N.Y. Mar. 31, 2014] [finding that SETSS "entailed removing [the student] from her general education classroom for one period of forty minutes each day and placing her with a special education teacher and a group of six students to address areas that [the student] needed the most help in"] [internal quotation marks omitted; alteration omitted]; B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 (S.D.N.Y. 2010); Valtchev v. City of New York, 2009 WL 2850689, at \*2 [S.D.N.Y. Aug. 31, 2009] [noting in that particular case that a resource room was also referred to as pull-out SETSS and was described as a service whereby special education teachers provide assistance to students in their areas of weakness]).<sup>13</sup>

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<sup>13</sup> State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

The June 2011 IEP reflects that the CSE considered "general education only" as a placement for the student but rejected that option because the student required additional support to meet his academic needs (Dist. Ex. 14 at p. 21). The school psychologist testified that the CSE recommended SETSS so that the student could work on skills that he needed to develop, "in terms of reading, writing, . . . math[, and] organization" (Tr. p. 55). The recommendation that the student attend a general education classroom is consistent with the evaluative information before the June 2011 CSE, which, in large part, described the student: as functioning at grade level in most academic areas and socially well adjusted (Dist. Exs. 5 at pp. 15-17; 14 at pp. 3-4; 15 at p. 2). Furthermore, the level of support recommended through SETSS was consistent with the description of the student's areas of need in reading, writing, mathematics, organization (Dist. Exs. 5 at pp. 7-9, 15-17; 7 at pp. 1, 3; 11; 14 at pp. 3-4, 6; 15 at pp. 1-3). Although the parent asserts that the recommendation for a general education placement with SETSS was contrary to the recommendation in the neuropsychological evaluation that the student attend a small class (see Dist. Ex. 5 at p. 12), the evidence in the hearing record supports the June 2011 IEP as sufficiently supportive for the student. The district school psychologist testified that she "had another opinion" as compared to such a recommendation (Tr. p. 83). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [E.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*18 [S.D.N.Y. Sept. 16, 2013]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd, 487 Fed. App'x 619, 2012 WL 2615366 [2d Cir. July 6, 2012]).

In addition, the June 2011 CSE developed 12 annual goals that addressed the student's needs in areas including math, decoding/encoding, reading comprehension, writing, and executive function (Dist. Ex. 14 at pp. 9-19). The evidence in the hearing record confirms that the annual goals in the June 2011 IEP adequately addressed and properly aligned with the student's identified academic, social, and emotional needs identified in the present levels of performance section of the June 2011 IEP and consistent with the student's evaluation results, discussed above (Dist. Ex. 14 at pp. 3-8, 9-19; see also Tr. 51-53).<sup>14</sup> Furthermore, the parent testified that the representative from York Prep assisted the CSE with the development of the student's goals (Tr. pp. 356).

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<sup>14</sup> The parents' allegation that the CSE failed to develop appropriate goals in the June 2011 IEP for the 2011-12 school year was neither addressed by the IHO nor advanced on appeal by the parent. Under the circumstances of this case, the parents have effectively abandoned this claim by failing to identify it in any fashion or make any legal or factual argument as to how it would rise to the level of a denial of a FAPE (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]). In any event, as set forth above, the evidence in the hearing record shows that the annual goals in the June 2011 IEP were appropriate for the student. Furthermore, to the extent the parent continues to assert that, because the student's annual goals were not drafted at the June 2011 CSE meeting, she was deprived a meaningful opportunity to participate in the development of the student's IEP, such a claim has no merit (E.A.M., 2012 WL 4571794, at \* 8 [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

To further support the student's identified needs, the June 2011 CSE also recommended multiple academic management strategies including use of checklists and planner, graphic organizers, procedural reference card, a calculator, editing checklists, reminders to check work for careless mistakes, and break down the writing process (Dist. Ex. 14 at p. 4). The June 2011 CSE recommended test accommodations for time extended (1.5), exams administered in a separate location, answers recorded in any manner (including use of a keyboard), use of a calculator/abacus except where test measures computation, and directions read and re-read to student (*id.* at p. 22). Based on the student's relevant present levels of performance consistent with the student's evaluation results discussed above, the June 2011 CSE recommended that the student's instructor(s) and/or providers encourage development of the student's creativity, critical thinking, problem-solving skills, inferential and deductive reasoning, in all academic, social, and emotional areas (*id.* at p. 5). In addition and specific to his SETSS program, the June 2011 IEP indicated that the student needed individualized instruction provided by a State certified Master-level special education teacher that would adapt and modify grade-specific performance indicators of the State learning standards in order for the student to acquire grade curriculum skills (*id.*). The June 2011 IEP also contained a provision that the student's regular education teachers and the SETSS teacher must collaborate and have access to the student's IEP for training/learning/sharing of strategies/skills in order to assist the student in his educational progress (*id.* at p. 20).

Finally, the June 2011 CSE also developed a coordinated set of transition activities to facilitate the student's movement from school to post-secondary activities (Dist. Ex. 14 at pp. 23-24).<sup>15</sup> Specifically, the transition plan included in the June 2011 IEP listed long-term adult outcomes that reflected the student's plan to integrate into the community independently, attend a post-secondary institution for a Bachelor of Arts degree, live independently, and be competitively employed (*id.* at p. 23). Because the student expected to graduate from high school within four high school years with a Regents Diploma, transition activities geared towards the student's post-secondary school plans aligned to the May 2011 level-one vocational assessment with regard to instructional activities and community integration, and the June 2011 IEP indicated that the parent, the school, and the student would share responsibility for the student meeting his transition services goals and objectives (Dist. Exs. 11; 14 at p. 23). Based on the evidence, such long-term expectations appear to be appropriate for this student.

Based on all of the foregoing, the evidence contained in the hearing record shows that the district's recommended educational program, consisting of general education with SETSS for one period daily in a separate location, collaboration between the general education teacher and the SETSS teacher, and the additional accommodations and supports recommended by the June 2011 CSE, was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.<sup>16</sup> Indeed, the general education placement recommended by the CSE

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<sup>15</sup> The parent has also failed to challenge on appeal the appropriateness of the June 2011 IEP's transition plan and has therefore abandoned any such argument (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z.*, 2013 WL 1314992, at \*6-\*7, \*10). However, as set forth above, the hearing record supports the conclusion that the transition plan was appropriate for the student.

<sup>16</sup> In addition, the hearing record indicates that the general education program at York Prep (a "mainstream school") with Jump Start was similar to the placement recommended by the CSE in the June 2011 IEP and that

would further the objectives of the IDEA in that the student is educated in a mainstream environment to the maximum extent possible, while the additional SETSS would provide the student with additional support and allow the student to work with a special education teacher in a smaller group setting on his areas of need.

#### **D. Challenges to the Assigned Public School Site**

With regard to the assigned public school site, the parent argues that the IHO erred in finding that the public school could implement the student's June 2011 IEP. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that a parent's "[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 F.L. v. New York City Dep't of Educ., 2014 WL 53265, at \*6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L., 2014 WL 1301957, at \*12; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the adequacy of the student's services where the parent removed the student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL

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the student made "significant progress" at York Prep (Compare Dist. Ex. 14 at pp. 1, 20-22, with Tr. pp. 324, 370, 456-57, 465, 469, 490-91, 517-18).

4571794, at \*11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[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. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]), and, even more clearly, 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., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>17</sup>

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O., 2014 WL 1257924, at \*2). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286[S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate

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<sup>17</sup> The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP, and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

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., 2014 WL 53264, at \*6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing and under the circumstances of this case, I find that the parent cannot prevail on her claim that the district would have failed to implement the student's June 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing (see Dist. Ex. 16; Parent Ex. C at pp. 3-4). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (R.E., 694 F.3d at 186; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claim that the assigned public school site would not have properly implemented the June 2011 IEP.

## VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end, and there is no need to reach whether the student's unilateral placement at York Prep was an appropriate placement or whether equitable considerations would have supported an award of tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). In light of these determinations, I need not address the parties' remaining contentions.

**THE APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
April 22, 2014

  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**