



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-228

### **Application of the XXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Michael A. Cardozo, Esq., Corporation Counsel, and Courtenaye Jackson-Chase, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Mayerson & Associates, attorneys for respondents, Gary S. Mayerson, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to pay for the student's tuition costs at the Imagine Academy (Imagine) for the 2011-12 school year. The parents cross-appeal the IHO's failure to address issues raised in the due process complaint notice as additional bases upon which to conclude that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year. The appeal must be sustained. The cross-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**

In this case, the CSE convened on May 5, 2011 for the student's annual review and to develop an IEP for the 2011-12 school year (Parent Ex. C at pp. 1-2; see Dist. Ex. 11).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2011 CSE recommended a 12-month school year program in a

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<sup>1</sup> The hearing record contains duplicative exhibits (compare Dist. Exs. 2-5, with Parent Exs. H-K). For purposes of this decision, only Parent exhibits were cited in instances where both a Parent and District exhibit were identical. Pursuant to State regulation, it is the IHO's responsibility to exclude evidence that is irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

6:1+1 special class placement in a specialized school with the following related services: three 45-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual OT, five 30-minute sessions per week of individual physical therapy (PT), three 45-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual speech-language therapy, and the services of a full-time, 1:1 health paraprofessional (Parent Ex. C at pp. 1-2, 24).<sup>2,3</sup> In addition, the May 2011 CSE recommended adapted physical education, special education transportation (air conditioned, mini-van, and limited travel time), and participation in alternate assessments (*id.* at pp. 1, 7-9, 24). The May 2011 IEP also included a behavior intervention plan (BIP) to address the student's behaviors that interfered with learning, as well as 14 annual goals and approximately 44 corresponding short-term objectives targeting the student's deficits in readiness skills; expressive, receptive, and pragmatic language skills; oral motor skills; comprehension skills; mathematical sorting skills; visual perceptual skills; self-care skills; and motor skills (*id.* at pp. 4, 6, 10-21, 26).

On May 5, 2011, the parents paid a deposit to Imagine for the student's attendance during the 2011-12 school year (Parent Ex. O at p. 1; see Tr. pp. 151-54).<sup>4</sup>

In a final notice of recommendation (FNR) dated June 15, 2011, the district set forth the special education program and related services recommended for the student for the 2011-12 school year, and identified the particular public school the district assigned the student to attend (Parent Ex. D at p. 1; see Dist. Ex. 12).<sup>5</sup>

On August 18, 2011, the parents visited the assigned public school, and transmitted a handwritten letter via facsimile to the district rejecting the "recommended placement" (Parent Ex. D at pp. 2-3). In addition to indicating reasons for the rejection, the parents also notified the district of their intentions to place the student at Imagine, and to seek reimbursement for the costs of the student's tuition at Imagine for the 2011-12 school year (*id.* at p. 2).<sup>6</sup>

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<sup>2</sup>The student's eligibility for special education and related services as a student classified with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>3</sup> At the parents' request, the May 2011 IEP was later amended to identify a particular summer program for the student's attendance in July and August 2011 (see Parent Ex. C at p. 1; Tr. pp. 21-24, 31-32). In a letter dated March 15, 2011, the summer program had advised the district of the student's acceptance for the period of July 1 through August 11, 2011, pending approval (see Dist. Ex. 9). On June 1, 2011, the parents executed a letter accepting the recommended summer program identified in the May 2011 IEP (see Dist. Ex. 10).

<sup>4</sup> At the time of the impartial hearing, the student had continuously attended Imagine for approximately four years (Tr. pp. 133, 138-40, 149-51). The parents did not advise the district at the CSE meeting held on May 5, 2011, that they had paid a deposit to Imagine for the 2011-12 school year (Tr. pp. 153-55). The Commissioner of Education has not approved Imagine as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>5</sup> The hearing record contains two FNRs dated June 15, 2011 (see Dist. Ex. 12; Parent Ex. D at p. 1). Although the documents appear in different formats, both documents contain the same substantive information, except for the CSE contact person identified (compare Dist. Ex. 12, with Parent Ex. D at p. 1).

<sup>6</sup> For July and August 2011, the student did not attend the summer program identified in the May 2011 IEP, but instead, attended a residential summer camp selected by the parents (compare Parent Ex. C at p. 1, with Tr. pp. 154-56). The parents testified that the summer program identified on the May 2011 IEP did not "have a place" for the student (Tr. pp. 154-55).

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

By due process complaint notice dated April 21, 2012, the parents alleged that the district did not offer the student a FAPE for the 2011-12 school year (see Parent Ex. A at pp. 1-3). Specifically, the parents alleged that "[c]ertain" annual goals in the May 2011 IEP contained "vague, immeasurable language" and that the May 2011 IEP failed to include any annual goals related to the services of the recommended health paraprofessional (Parent Ex. A at pp. 1-2). In addition, the parents asserted that the May 2011 CSE failed to conduct a functional behavior assessment (FBA) prior to developing the BIP (id. at p. 2). In addition, the parents contended that the assigned school was not appropriate for the student based upon disturbances in the hallway observed during their visit (id.). The parents also alleged that the assigned school had "only about" five girls in the "overall program," the students at the assigned school functioned at a higher academic level, the assigned school did not use applied behavior analysis (ABA), and the assigned school did not offer a sensory gymnasium (id.).

In addition, the parents asserted that Imagine was an appropriate placement for the student (Parent Ex. A at p. 2). As relief, the parents requested reimbursement for the costs of the student's tuition at Imagine for the 2011-12 school year, the provision of round-trip transportation for the student's attendance at Imagine, and the provision of related services recommended in the student's "last agreed upon IEP" (id. at pp. 2-3).<sup>7</sup>

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

On May 8, 2012, the parties met for a prehearing conference for scheduling purposes, and proceeded with the impartial hearing on June 14, 2012, concluding on September 21, 2012 (Tr. pp. 1-181; see IHO Exs. I-II). In a decision dated November 7, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, the parents' unilateral placement of the student at Imagine was appropriate, and the parents were entitled to reimbursement for the costs of the student's tuition at Imagine for the 2011-12 school year (IHO Decision at pp. 9-12).

To conclude that the district failed to offer the student a FAPE, the IHO found that the district failed to present testimony regarding the assigned school, and therefore, the hearing record contained no evidence as to the effectiveness of the teaching methodology to be used at the assigned school, the ability of the assigned school to meet the student's academic and social/emotional management needs, or whether the assigned school had the capacity to group the student appropriately with other students (IHO Decision at pp. 9-10). Having found that the district failed to offer the student a FAPE on these grounds, the IHO did not address the parents' "other claims" (id. at p. 10).

The IHO next determined that Imagine was an appropriate placement for the student for the 2011-12 school year (see IHO Decision at pp. 10-11). The IHO found that Imagine offered a program to meet the student's unique needs, including related services of OT, PT and speech-language therapy (id.). In addition, the IHO concluded that the student made "significant"

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<sup>7</sup> The parents did not seek reimbursement for the costs of the student's attendance at the residential summer camp selected by the parents (see Parent Ex. A at pp. 1-3).

progress at Imagine, and the student had access to a sensory gymnasium to address her sensory needs (id. at p. 11). The IHO further found that although Imagine did not offer a 12-month school year program as recommended by the May 2011 CSE, the parents appropriately substituted a summer program enabling the student to maintain skills (id.). Moreover, the IHO noted that the parents were not seeking reimbursement for the costs of the summer program the student attended (id.).

Finally, with regard to equitable considerations, the IHO found no basis for reducing an award of tuition reimbursement (see IHO Decision at p. 11). Consequently, the IHO directed the district to reimburse the parents for the costs of the student's tuition at Imagine for the 2011-12 school year upon the submission of proof of the student's attendance (id. at p. 12).

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

The district appeals, and asserts that the IHO erred in finding that the district did not offer the student a FAPE for the 2011-12 school year and that equitable considerations supported the parents' request for tuition reimbursement.<sup>8</sup> In particular, the district argues that no legal authority exists to support the IHO's conclusion that the district was obligated to present evidence about the actual classroom where the student would have been placed at the assigned school. Consequently, as the sole basis for the IHO's determination that the district failed to offer the student a FAPE for the 2011 -12 school year, the district asserts that the IHO's must be annulled.<sup>9</sup>

In addition, the district argues that the IHO erred in finding that equitable considerations supported an award of tuition reimbursement. The district asserts that the parents did not meet their burden to prove that they cooperated with the CSE and maintained a genuine interest in a public school program. The district also alleges that the parents' 10-day notice of unilateral placement was not sufficient under applicable regulations. As relief, the district seeks to annul the IHO's decision in its entirety.

In an answer, the parents assert that the IHO properly concluded that the district failed to offer the student a FAPE. In a cross-appeal, however, the parents assert that the IHO "could have and should have" relied upon additional issues to conclude that the district failed to offer the student a FAPE, including the following: (1) the 6:1+1 special class placement in a specialized school with a 1:1 health paraprofessional was not reasonably calculated to enable the student to receive educational benefit and was not supported by the information before the May 2011 CSE; (2) the May 2011 CSE failed to conduct an FBA and did not otherwise have sufficient information about the student's social/emotional functioning to develop an appropriate BIP; (3) the annual goals in the May 2011 IEP were vague and not measurable; (4) the recommended services of a full-time, 1:1 health paraprofessional was not reasonably calculated

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<sup>8</sup> Although aggrieved by the IHO's finding that Imagine was an appropriate placement for the student for the 2011-12 school year, the district did not appeal the IHO's determination on this issue; as such, the IHO's determination has become final and binding upon the parties and will not be reviewed on appeal (see 34 CFR 300.514[a], [b]; 8 NYCRR 200.5[j][5][v]).

<sup>9</sup> Noting that the IHO issued no findings regarding the procedural or substantive adequacy of the May 2011 IEP, the district also indicates that the May 2011 IEP was reasonably calculated to enable the student to receive educational benefits in the least restrictive environment (LRE).

to enable the student to receive educational benefit, and the May 2011 IEP did not include any annual goals related to the health paraprofessional services; (5) the May 2011 IEP did not include a recommendation for parent counseling and training, denying the parents the opportunity to participate in the decision-making process; (6) the May 2011 CSE failed to provide the parents with an opportunity to meet with a placement officer, denying the parents of the opportunity to participate in the decision-making process; and (7) the May 2011 CSE failed to recommend an appropriate teaching methodology in the IEP.

Additionally, the parents allege that the district's "unprecedented" number of appeals during the calendar year suggests a "lack of respect" for adverse IHO decisions, as well as a perception of SRO bias in favor of school districts. The parents also allege that the district failed to remedy defects in the student's IEP during the 30-day resolution period. As relief, the parents seek to uphold the IHO's decision in its entirety and seek further findings in the parents' favor with respect to whether the district offered the student a FAPE.

In an answer to the cross-appeal, the district responds to the enumerated allegations, and further asserts that the parents raised two additional arguments—regarding the perceived SRO bias in favor of school districts and the failure to properly use the 30-day resolution session—for the first time on appeal. The district seeks to dismiss the parents' cross-appeal in its entirety.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998] quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly

impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 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, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

Turning first to the parents' cross-appeal, although the parents seek a determination that the district failed to offer the student a FAPE based upon additional issues, many of the additional issues have been raised for the first time on appeal and are not properly preserved for review. Specifically, the parents raise the following issues for the first time in their cross-appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2011-12 school year: (1) the 6:1+1 special class placement in a specialized school with a 1:1 health paraprofessional was not reasonably calculated to enable the student to receive educational benefit and was not supported by the information before the May 2011 CSE; (2) the May 2011 CSE did not otherwise have sufficient information about the student's social/emotional functioning to develop an appropriate BIP; (4) the recommended services of a full-time, 1:1 health paraprofessional were not reasonably calculated to enable the student to receive educational benefit; (5) the May 2011 IEP did not include a recommendation for parent counseling and training, denying the parents the opportunity to participate in the decision-making process; (6) the May 2011 CSE failed to provide the parents with an opportunity to meet with a placement officer, denying the parents of the opportunity to participate in the decision-making process; and (7) the May 2011 CSE failed to recommend an appropriate teaching methodology in the IEP. (see Tr. pp. 1-181; Dist. Exs. 2-12; Parent Exs. A-Q; IHO Exs. I-III).

With respect to the issues now raised in the parents' cross-appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise

issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include any of the issues raised for the first time on appeal in the parents' cross-appeal—specified above—as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2011-12 school year. The hearing record demonstrates that the issues for resolution before the IHO included challenges to the measurability of the annual goals in the IEP; the May 2011 CSE's failure to develop annual goals related to the services of the full-time, 1:1 health paraprofessional; the May 2011 CSE's failure to conduct an FBA; and allegations concerning the assigned school (see Parent Ex. A at pp. 1-4). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend their due process complaint notice (see Tr. pp. 1-181; Dist. Exs. 2-12; 20; Parent Exs. A-Q; IHO Exs. I-III).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these additional issues now raised in their cross-appeal or seek to include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration, and renders the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at \*4-\*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]); M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B., 2011 WL 4375694, at \*6, quoting Hope v.

Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at \*13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Consequently, the contentions in the parents' cross-appeal raised for the first time on appeal are outside the scope of my review, and therefore, I will not consider them (see M.P.G., 2010 WL 3398256, at \*8; Snyder, 2009 WL 3246579, at \*7; see also Application of a Student with a Disability, Appeal No. 11-042; Application of a Student with a Disability, Appeal No. 11-041; Application of the Dep't of Educ., Appeal No. 11-035; Application of a Student with a Disability, Appeal No. 11-008; Application of a Student with a Disability, Appeal No. 11-002; Application of a Student with a Disability, Appeal No. 10-105; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-112).<sup>10</sup>

## **B. Annual Goals**

Turning to the properly preserved dispute regarding the annual goals in the May 2011 IEP, the parent alleges that "[c]ertain" annual goals contained impermissibly "vague, immeasurable language," were "bereft of methods of measurement," and that the May 2011 IEP failed to include any annual goals regarding the services of the recommended full-time, 1:1 health paraprofessional. As discussed more fully below, a review of the hearing record does not support the parents' contentions.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

In this case, the May 2011 CSE included information from a variety of sources—including the student's educational progress report, speech-language annual review report, and OT progress report—to describe the student's present levels of performance in the May 2011 IEP (compare Parent Ex. C at pp. 3-6, with Parent Exs. H at pp. 1-2; I at pp. 2-3; J at pp. 1-2). According to the May 2011 IEP, the student receptively followed most one-step directions when

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<sup>10</sup> To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51), I note that the additional issues raised in the parents' cross-appeal were not initially elicited by the district in testimony, and therefore, I find that the district did not "open the door" to these issues under the holding of M.H. (see J.C.S., 2013 WL 3975942, at \*9; B.M. v New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]).

motivated to do so, and communicated via vocalizations, utterances, gestures, signs, and the use of a picture exchange communication system (PECS) (Parent Exs. C at p. 3; I at p. 2). The May 2011 IEP also indicated that although the student continued to make progress, she presented with severe deficits in receptive, expressive and pragmatic language skills and oral motor skills, which the May 2011 CSE described as "severely below age level" in the IEP (Parent Exs. C at p. 3; I at p. 2). According to the May 2011 IEP, the student exhibited global delays in gross and fine motor skills, self-care skills, play skills, and social skills (Parent Exs. C at p. 5; J at p. 2). The May 2011 IEP further described the student as requiring "constant attention and positive reinforcement to progress" and to avoid attention seeking or avoidance behaviors, such as dropping to the floor and throwing items down (Parent Exs. C at p. 4; see Parent Exs. H at pp. 1-2; I at p. 1; J at p. 1). The May 2011 IEP included 14 annual goals and approximately 44 short-term objectives, which the district's special education teacher who participated at the May 2011 CSE meeting testified had been based upon annual goals provided by the student's Imagine teacher and service providers (Tr. pp. 18, 20, 33, 35-41; Parent Ex. C at pp. 10-21). A review of the annual goals and short-term objectives in the May 2011 IEP demonstrates that they targeted the student's deficits in readiness skills; expressive, receptive, and pragmatic language skills; oral motor skills; comprehension skills; mathematical sorting skills; visual-perceptual skills; self-care skills; and motor skills (Parent Ex. C at pp. 10-21).

## **1. Measurability**

Turning to the parents' specific assertion regarding measurability, a review of the May 2011 IEP indicates that a majority of the annual goals and short-term objectives set forth the evaluation criteria (80 percent, 4 out of 5 trials), and some of the annual goals and short-term objectives identify the evaluation schedule (over 10 sessions) with which the annual goal will be achieved (id. at pp. 11, 13, 15-16, 19-21). Many of the annual goals and short-term objectives also identify the supports provided to the student (hand over hand assistance, moderate or maximal assistance, verbal commands, modeling, prompting or pictures) (id. at pp. 10-21). Further, the May 2011 IEP indicates that three reports of progress would be provided during the school year (id.). While each annual goal does not indicate an evaluation procedure that would be used to determine the student's progress, generally the annual goals and short-term objectives contain sufficiently detailed information regarding the conditions under which each objective was to be performed as required for measurement of progress. Overall the annual goals and short-term objectives included in the student's May 2011 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring her progress (see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-005; Application of a Student with a Disability, Appeal No. 11-073; Application of a Student with a Disability, Appeal No. 09-038; Application of the Dep't of Educ., Appeal No. 08-096).

## **2. Health Paraprofessional**

While the parents accurately observe that the student's May 2011 IEP lacked annual goals regarding the services of the recommended full-time, 1:1 health paraprofessional, it must initially be noted that annual goals must relate to the student's needs that result from the student's

disability and need not be tied to a specific service.<sup>11</sup> Nevertheless, a review of the student's May 2011 IEP indicates that the May 2011 CSE adequately addressed the role of the 1:1 health paraprofessional in supporting the student. The May 2011 IEP identified the student's needs related to safety, hygiene, dressing, mealtime, distractibility, functional communication, and her tendency to engage in attention seeking and avoidance behaviors (Parent Ex. C at pp. 3-7). The May 2011 IEP also identified the student's social/emotional management needs indicating that the student needed, among other things, visual, verbal and tactile cues,; praise and encouragement; and the services of a 1:1 health paraprofessional (*id.* at p. 6). The May 2011 IEP also indicated that the student's health and physical management needs required supervision for safety in and out of the classroom, assistance with daily hygiene and dressing needs, and assistance during mealtime, including the pacing of food and fluid intake and using utensils (*id.* at p. 7). As stated previously, the May 2011 IEP included annual goals addressing the student's functional communication, comprehension, self-care, and safety needs, some of which would the student would achieve by exhibiting the skill with two different "instructors" (*id.* at pp. 11, 15-16, 19-20). As the May 2011 IEP identified the types of activities the student required additional support to complete, and the May 2011 CSE recommended a full-time, 1:1 health paraprofessional to provide the student with additional support, I decline to find that the May 2011 CSE was required to develop annual goals specifically related to the services of the health paraprofessional in order for the student to receive a FAPE.

### **C. Special Factors and Interfering Behaviors**

In the cross-appeal, the parents assert that the May 2011 CSE's failure to conduct an FBA prior to developing the BIP included with the May 2011 IEP resulted in a failure to offer the student a FAPE. A review of the hearing record does not support the parents' contention.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* E.H. v. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S., 454 F. Supp. 2d at 149-50; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and

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<sup>11</sup> Neither the IDEA, nor federal and State regulations require that the duties of district staff be detailed in a student's IEP. Distinguishable from this point are cases in which IHOs or SROs have relied upon their equitable authority to fashion a remedy in a specific case by directing the identification of staff duties in a student's IEP in a manner that is beyond that normally required by the IDEA or attendant federal or State regulations (J.K. v. Springville-Griffith Inst. Cent. Sch. Dist. Bd. of Educ., 2005 WL 711886, at \*9 [W.D.N.Y. Mar. 28, 2005] [noting that the directive to a CSE to consider the addition of a 1:1 aide and the inclusion of the duties of such aide in writing in the student's revised IEP "as required by SRO Munoz," but also noting that the failure to include such duties in the IEP in accordance with the SRO's order did not constitute a denial of a FAPE]). However, districts are not prohibited by law from developing annual goals related to the services of a paraprofessional.

services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at \*1 [S.D.N.Y. Apr. 7, 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 2010 WL 3242234). Nevertheless, the Second Circuit has explained that when required "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all (R.E., 694 F3d at 190). The Court also noted that when required "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors (id.).

In this instance, the May 2011 CSE's failure to conduct an FBA in this instance did not result in a denial of a FAPE because the BIP identified the problem behaviors and prescribed strategies to address them (see Parent Ex. C at p. 26). A review of the BIP indicates that it accurately reflects the student's interfering behaviors as described in the undated Imagine educational progress report, the March 2011 OT progress report, and the May 2011 speech-language annual review report (compare Parent Ex. C at p. 26, with Parent Exs. H at p. 2; I at p. 1; J at p. 1). In particular, the BIP indicated that the student exhibited behaviors that interfered with learning when she sought "attention to avoid work that she [was] expected to do" (Parent Ex. C at p. 26). The BIP also described the student's behaviors targeted to be reduced, included dropping to the floor and throwing or dropping items and putting her hands and other objects into

her mouth (id.). The BIP reinforced positive behaviors, and rewarded the student for appropriate participation in activities while also maintaining appropriate "body position" and handling objects appropriately (id.). The BIP also identified supports used to help the student change the behaviors, including providing her with verbal support, gestures, physical prompts, planned redirection, immediate tangibles and intermittent reward systems (id.).<sup>12</sup>

In addition, recent legal authority indicates that any failure on the part of the district to conduct an FBA does not automatically support a finding that the district failed to offer the student a FAPE, particularly whereas here, the May 2011 IEP included a BIP corresponding to progress reports obtained from Imagine and identifying the student's behaviors, and the BIP appropriately addressed the student's interfering behaviors (see M.W. v. New York City Dep't of Educ., 2013 WL 3868594 [2d Cir. July 29, 2013] [explaining that "[w]here the IEP actually includes a BIP, parents should at least suggest how the lack of an FBA resulted in the BIP's inadequacy or prevented meaningful decision-making"]; R.E., 694 F.3d at 190-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; A.C., 553 F.3d at 172-73; Cabouli, 2006 WL 3102463, at \*3; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \* 7-\*9 [S.D.N.Y. October 16, 2012]; C.F., 2011 WL 5130101, at \*9-\*10; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at \*10 [S.D.N.Y., Mar. 30, 2011]; Connor v. New York City Dep't of Educ., 2009 WL 3335760, at \*4 [S.D.N.Y. Oct. 13, 2009]).

#### **D. Assigned School**

Here, the district contends on appeal that no legal authority exists to support the IHO's conclusion that the district was obligated to present evidence about the actual classroom where the student would have been placed at the assigned school as a basis upon which to conclude that the district failed to offer the student a FAPE.

Generally, challenges to a district's assignment of a student to a particular public school site or classroom delves into the implementation of the IEP, and failing to implement an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11), and the sufficiency of the district's offered program must be determined on the basis of the IEP itself (see R.E., 694 F.3d at 186-88). In R.E., the Second Circuit also explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (694 F.3d at 195; see F.L., 2012 WL 4891748, at \*15-\*16; R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at \*16 [S.D.N.Y. Nov. 16, 2012]; Ganje, 2012 WL 5473491, at \*15) [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced]; see also [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

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<sup>12</sup> At the time of the May 2011 CSE meeting, the student was attending Imagine, and therefore, conducting an FBA to determine how the student's behavior related to the student's environment at Imagine has diminished value where, as here, the CSE did not have the option of recommending that the student be placed at Imagine and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Public 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 success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While 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 J.F. v. New York City Dep't of Educ., 2013 WL 1803983, at \* 2 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 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., 2012 WL 6691046, at \*5-\*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [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]), I now find it necessary to depart from those cases. Since these 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), 2013 WL 2158587, at \*4 [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. v New York City Dep't of Educ., 2013 WL 3814669, at \*6, quoting R.E., 694 F.3d at 187 [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>13</sup> In view of the foregoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site.

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

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<sup>13</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 T.Y., 584 F.3d at 420 [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.

a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

In this instance, the parents rejected the assigned public school site that the student would have attended prior to the time the district would have become obligated to implement the student's May 2011 IEP (Parent Exs. C at p. 2; D at p. 2; E). As indicated above, a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (see K.L., 2013 WL 3814669 at \*6). As the time for implementation of the student's IEP at the assigned public school site had not yet occurred when the parents rejected the district's offer, the parents' challenges to functional grouping, the teacher's selection of classroom methodology, the lack of a sensory gym, and the ratio of male to female students were speculative claims. These were claims regarding the execution of the student's program and the district was not obligated to present retrospective evidence to refute them (R.E., 694 F.3d 167, 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at \*6; R.C., 2012 WL 5862736, at \*16). Accordingly, the IHO's findings relating to the assigned school location must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

## **VII. Conclusion**

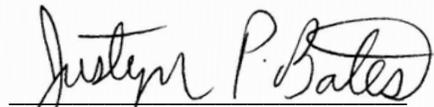
Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to reach the issue of whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at \*12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have also considered the parties' remaining contentions and find that they lack merit.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** Albany, New York  
August 9, 2013

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