



# The University of the State of New York

The State Education Department

State Review Officer

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No. 13-083

**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 [REDACTED]**

## **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darfino, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Aaron School (Aaron) for the 2012-13 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**

On May 24, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Exs. 3 at pp. 1, 13; 4 at p. 1).<sup>1</sup> Finding the student eligible for special education and related services as a student with autism, the CSE recommended a 12:1+1 special class placement for math, English language arts, social studies, and sciences (Dist. Ex. 3 at pp. 1, 9). The CSE also recommended the following related services: three 40-minute sessions per week of speech-language therapy; one 40-minute session per week

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<sup>1</sup> At the time of the May 2012 CSE meeting, the student was attending Aaron (Tr. pp. 167, 755-56). The Commissioner of Education has not approved Aaron as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

of individual occupational therapy (OT); one 40-minute session per week of group OT; one 40-minute session per week of individual counseling; and one 40-minute session per week of group counseling (*id.* at pp. 9-10).

In a letter dated May 31, 2012, the parent submitted a private neuropsychological evaluation report to the district and requested that the CSE reconvene to consider the evaluation (Parent Ex. L).<sup>2</sup> A CSE reconvened on June 13, 2012 to consider this evaluation (Dist. Exs. 5 at p. 1; 6; *see* Tr. pp. 189-91, 787-88). As a result of this meeting, the CSE generated an IEP dated June 13, 2012 that added a new decoding goal and two additional supports for the student's management needs but otherwise retained the recommendations of the May 2012 IEP (Dist. Ex. 5 at pp. 4, 6; *see* Tr. p. 195-96).<sup>3</sup>

In a final notice of recommendation (FNR) dated August 15, 2012, the district summarized the 12:1+1 special class and related services recommendations in the June 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 7).<sup>4</sup>

By letter dated August 21, 2012, the parent rejected the district's recommended placement and indicated her intention to unilaterally place the student at Aaron and seek the costs of the student's education from the district (Parent Ex. J at p. 1). In this letter, the parent indicated that she wished to "determine whether or not [the assigned public school site] [wa]s an appropriate placement for [her] son" (*id.*). The parent indicated that she made "many attempts" to visit the assigned public school but was prevented from doing so because the school was closed until September (*id.*). While the parent indicated that it remained her "intention to tour the school . . . as soon as it is open", she stated that she could not accept the district's placement and would enroll the student at Aaron for the 2012-13 school year and seek the costs of the student's education from the district (*id.*). The parent further requested reimbursement for the student's related services, costs, and round-trip transportation to Aaron in an air-conditioned school bus (*id.*).

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

In an amended due process complaint notice dated October 11, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that Aaron was an appropriate unilateral placement, and that equitable considerations did not affect the parent's request for an award of tuition reimbursement (Dist. Ex.

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<sup>2</sup> The parent also requested reimbursement for the cost of the evaluation (*see* Parent Ex. L).

<sup>3</sup> For the purpose of clarity, the May 2012 IEP was superseded as a result of the June 2012 CSE meeting and the resulting June 2012 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-level review (*see* McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \*8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; *see also* Application of the Dep't of Educ., Appeal No. 12-215; *see generally* Dist. Exs. 3; 5). Consequently, this decision will address the May 2012 CSE and resulting IEP only to the extent necessary to conduct an analysis of the June 2012 IEP.

<sup>4</sup> Although the August 2012 FNR explicitly referenced the May 2012 CSE meeting, the district would have been required to implement the June 2012 IEP if the student had enrolled in the public school system for the 2012-13 school year.

2 at pp. 1-15).<sup>5</sup> Due to the large number of claims (approximately 120 numbered allegations) contained in the parent's amended due process complaint notice and the limited issues presented on appeal, only those allegations both germane to the findings in the IHO's decision and presented on appeal are described below. Accordingly, the parties' familiarity with the remaining claims is from the due process complaint is presumed.

The parent's contentions included claims that a 2009 psychoeducational evaluation was invalid and inappropriately relied on by the May and June 2012 CSEs (Dist. Ex. 2 at p. 11); the June 2012 CSE did not consider a May 2012 neuropsychological evaluation report and failed to develop an IEP that reflected the recommendations therein (id. at pp. 5, 12; see p. 4); the district failed to conduct sufficient evaluations to assess the student in all areas of disability (id. at pp. 3, 8); the May and June 2012 IEPs' annual goals were inappropriate (id. at p. 5; see pp. 4, 12); and both the May and June 2012 CSEs failed to consider special factors and, thus, erred by failing to conduct a functional behavioral analysis (FBA) or develop a behavioral intervention plan (BIP) for the student (id. at pp. 8, 10).

With respect to the assigned public school site, the parent argued that assigned public staff were inadequately trained; it was "unknown" whether the school could implement the student's IEP at the time the FNR was issued; the "school environment[,] including the cafeteria and gym" was "too large"; the parent was prohibited from viewing the assigned public school site; and the students in an observed classroom "were not similar to [the student] in academic . . . social development, physical development, and management needs" (Dist. Ex. 2 at pp. 6, 7, 11-13).

The parent further alleged that Aaron was an appropriate unilateral placement for the student and that no equitable considerations precluded or diminished the parent's sought relief as she "acted reasonably and in good faith" (Dist. Ex. 2 at p. 2). For remedies, the parent requested the costs of the student's education; an order directing the district to locate and enroll the student in a non-public school; a Nickerson letter; weekly vision therapy sessions in a separate location; the provision of monthly parent training and counseling on the student's IEP; "compensatory" parent training and counseling; reimbursement for the May 2012 neuropsychological evaluation; "a set of independent and comprehensive education[al] and psychological evaluations"; transportation in an air-conditioned mini-bus and limited time travel; and an award of compensatory education (id. at pp. 2, 16; see also pp. 3, 11).<sup>6,7</sup>

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<sup>5</sup> The IHO granted the parent's request to amend the original due process complaint notice, dated September 5, 2012 (Dist. Ex. 24 at p.1; see Parent Ex. A at pp. 1-11). I note that the original due process complaint notice contains a typographical error and identifies its date as "September 5, 2011" (Parent Ex. A at p. 1).

<sup>6</sup> The parent withdrew her request for compensatory education at a prehearing conference held on September 27, 2012 (see Tr. pp. 123-24; Dist. Ex. 23 at p. 23). However, despite this withdrawal, the amended due process complaint dated October 11, 2012 contains an identical request for compensatory education (compare Dist. Ex. 2 at p.7, with Parent Ex. A at p. 7). Although the parent does not pursue this relief on appeal, I would find that the parent waived her compensatory education claim under these circumstances.

<sup>7</sup> The parent wrote to the district on September 14, 2012 detailing perceived deficiencies with the assigned public school site based upon an observation of this school (see Parent Ex. HH at pp. 1-3). This letter was submitted after the parent filed her due process complaint notice and after a resolution session failed to resolve the parent's complaint (see Parent Exs. A at p. 1; I at p. 1; HH at p. 1).

## B. Impartial Hearing Officer Decision

An impartial hearing convened on September 27, 2012 and concluded on February 27, 2013 after seven days of proceedings (see Tr. pp. 1-1044). In a decision dated April 8, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year and denied the parent's requested relief (IHO Decision at pp. 21, 26).

First, regarding the process by which the June 2012 IEP was developed, the IHO found that the June 2012 CSE appropriately considered a 2009 psychoeducational evaluation report which was less than three years old at the time of meeting and, thus, timely in view of the 3-year requirement for reevaluation (IHO Decision at p. 6). The IHO also found that the May 2012 neuropsychological evaluation was considered by the June 2012 CSE, which reconvened specifically to consider the evaluation report (id. at p. 8). The IHO also cited testimony from the district representative indicating that the evaluation's results were not "vastly different from the information [the CSE] already had" and noted that the CSE added a goal to the June 2012 IEP based on the results of the 2012 evaluation (id.). Further, the IHO found that the results of the 2012 neuropsychological evaluation did not, as the parent urged, require the CSE to adopt "specific recommendations" or conduct "further testing" (id. at 8).<sup>8</sup>

Next, considering the parent's challenge to the June 2012 IEP, the IHO found that the IEP contained "a set of strategies to help the [s]tudent with his academic, emotional, and social needs" (id. at p. 15; see pp. 16-18). As for the annual goals contained in the June 2012 IEP, the IHO found that the IEP's goals were appropriate, noting that the IEP contained goals addressing the student's reading comprehension, reading fluency, decoding skills, writing, typing, fine motor skills, and counseling needs (id. at pp. 18-19). Although the May 2012 CSE did not prescribe a decoding goal for the student, the IHO found that the CSE "would likely" have recommended a decoding goal in the May 2012 IEP had the student's current teacher at Aaron not opined that it was unnecessary at the CSE meeting (id. at 9).

As for the June 2012 CSE's consideration of special factors, the IHO found that a formal FBA was not necessary because the CSE had "a great deal of knowledge regarding the causes, functions, and remedies for the [s]tudent's behavior" and developed an "appropriate, flexible, and nuanced approach to the student's . . . needs" in the June 2012 IEP (IHO Decision at pp. 15, 16). In particular, the IHO found that the "flexible tools and strategies" identified as supports for the student's management needs in the June 2012 IEP, including "use of a classroom wide behavior management system", would have met the student's behavior needs (id. at p. 15; see id. at pp. 15-16).

Addressing some of the parent's specific contentions, the IHO found that the student did not require a scribe, as the IEP's provision of "double time" for examinations would provide sufficient support to the student while encouraging him to "develop . . . necessary skills for living" (IHO Decision at p. 19). The IHO also rejected the parent's argument that standard promotional criteria were inappropriate for the student, noting that the June 2012 IEP offered numerous test accommodations to the student (id. at p. 20). The IHO further found that the student did not require questions read and re-read during testing (id. at pp. 20-21). The IHO also

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<sup>8</sup> While the IHO found the 2012 neuropsychological evaluation report's testing accurate, she found that the examiner, who testified at the impartial hearing, "lacked credibility" (id. at p. 13; see id. at pp. 14-15).

found that the provision of the FNR in August 2012 did "not render [the] placement offer inappropriate" (*id.*). Finally, the IHO found that a 12:1+1 class "with the supports set forth on the IEP" was reasonably calculated to meet the student's needs (*id.* at p. 21).

Regarding the parent's contentions pertaining to the assigned public school site, the IHO found "no reason" why the student could not "attend a public school, a public school cafeteria[,] or a large school" (IHO Decision at p. 21). Specifically, the IHO found that the student's needs were not "so extreme that the noise of a cafeteria would be inappropriate or that the number of students in the building would cause him to be at risk or to put others at risk" (*id.*). The IHO similarly found that the parent's inability to view the assigned school did "not render [the] placement offer inappropriate" (*id.*). In sum, the IHO found "no reason to suppose that the [June 2012] IEP could not have been implemented appropriately at the site offered or that the instructional grouping would have been inappropriate" (*id.*).

Turning to the parent's request for reimbursement for the May 2012 neuropsychological evaluation, the IHO rejected this claim as there was no evidence before or after the commencement of the impartial hearing that the parent "disagreed with the results of any prior evaluation [conducted by the district]" (IHO Decision at p. 26; *see id.* at pp. 24-26).

Although the IHO determined that the district offered the student a FAPE for the 2012-13 school year, the IHO also found, in the alternative, that the student's program at Aaron was inappropriate to address his needs (*id.* at pp. 21-24). Specifically, the IHO found that the student did not make progress during the 2012-13 school year as evidenced by declining grades; that Aaron did not provide support to overcome the student's work avoidant habits with regard to writing, and that behavioral management strategies employed by Aaron failed to address the student's sensory needs and, as such, were ineffective (*id.* at pp. 22-24). Accordingly, the IHO denied the parents' request for tuition reimbursement and "special education transportation in an air-conditioned mini-bus" (*id.*).

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

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. As a preliminary matter, the parent contends that the IHO was biased because, according to anecdotal information, she "rarely, if ever, finds [in favor of] . . . parents." With regard to the process by which the June 2012 IEP was developed, the parent argues that the May 2012 neuropsychological evaluation was not considered in determining the student's "placement." As for the June 2012 IEP, the parent alleges that it failed to mention the student's tendency to "leave" or indicate how he would be managed in a large school. The parent further argues that the assigned public school site would not have been able to implement the June 2012 IEP and, in any event, that its large size made it inappropriate for the student. Finally, the parent reiterates her request for reimbursement for the May 2012 neuropsychological examination.

In an answer, the district denies the parent's material assertions and argues that the IHO's decision should be upheld in its entirety. First, the district argues that the petition should be dismissed because it does not meet the form requirements for pleadings set forth in State Regulations. Next, the district contends that the IHO properly concluded that the district offered the student a FAPE for the 2012-13 school year. The district further avers that considerations

pertaining to the assigned public school site's ability to implement the June 2012 IEP are legally speculative insofar as the student did not attend the public school. The district additionally argues that the IHO's alternative finding that Aaron was not an appropriate placement is supported by the evidence in the hearing record. The district also contends that equitable considerations do not weigh in favor of an award of tuition reimbursement because the parent never seriously considered enrolling the student in a public school. Finally, the district argues that the IHO properly found that the parent was not entitled to reimbursement for the May 2012 neuropsychological evaluation because she did not express disagreement with any evaluations conducted by the district.

## 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, 180-83, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court

found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Form Requirements for Pleadings**

As a preliminary matter, the district argues that the petition does not "clearly indicate the reasons for challenging the [IHO's] decision," nor does it include citations to the hearing record or identify the findings, conclusions, and orders of the IHO with which the parent disagrees (see 8 NYCRR 279.4[a]). State regulations require that a "party seeking review shall file with the Office of State Review . . . the petition for review," which "shall clearly indicate the reasons for challenging the [IHO's] decision, identifying the findings, conclusions and order to which the exceptions are taken, and shall indicate what relief should be granted" (8 NYCRR 279.4[a]). In addition, a petition, answer, reply, and memorandum of law "shall each set forth citations to the record on appeal, and shall identify the relevant page number(s) in the hearing decision, transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number (8 NYCRR 279.8[b]). Moreover, all pleadings must "set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][3]).

The district correctly notes that the parent's petition is devoid of any citations to the hearing record and, thus, does not technically conform to State regulations (8 NYCRR 279.8[b]). However, I disagree that the petition fails to identify the conclusions of the IHO that the parent objects to. In this case, the district was able to formulate a responsive answer to the petition that addresses and responds to the discrete issues identified by the parent in her petition. Moreover, the parent, who is proceeding pro se at this juncture, appears to be acting in a good faith attempt to comply with the requirements. Therefore, in spite of the parent's noncompliance with the form requirements identified above, I decline to exercise my discretion to dismiss the petition on this basis.

#### **2. Scope of Review**

On appeal, the parent argues that the June 2012 IEP failed to address the student's fleeing tendencies and indicate how the student would be managed in a large school setting. I note that these issues have been raised by the parent for the first time on appeal. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original

due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the parent's due process complaint does not allege facts that would reasonably place the district on notice of these claims. While the due process complaint notice contains allegations regarding the size of the assigned school, it does not allege claims that the IEP was defective because it should have included written information regarding the student's ability or inability to attend a large school (see Dist. Ex. 2 at p. 13). Accordingly, I decline to consider such IEP claims. To hold otherwise would render the 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]).

Even assuming for the sake of argument that these claims were properly raised, they would nevertheless fail. The hearing record reflects that the June 2012 CSE was aware of the student's "escape or avoidance tactics" at the CSE meeting and recommended supports in the IEP to address them (Tr. pp. 249-50; see Dist. Ex. 5 at p. 3). Specifically, the IEP included a myriad of management needs, including the "[u]se of a classroom[-]wide behavior management system", and individual and group counseling as well as counseling-related goals (Dist. Ex. 5 at pp. 3-4, 8-9, 11; see Tr pp. 209-11, 353-54).

Regarding the parent's contention that the IEP should have indicated how the student would be managed in a large school, the June 2012 CSE was not obligated to include details on the student's IEP regarding the student's needs in a specific school setting because the location where the district would implement the June 2012 IEP had not yet been determined at the time of the May and June 2012 CSE meetings (Tr. pp. 796-97; Dist. Exs. 5, 7; see R.E., 694 F.3d at 191 ["[t]he [district's] practice is to provide general placement information in the IEP, such as the staffing ratio and related services, and then convey to the parents a final notice of recommendation, or FNR identifying a specific school at a later date."]).<sup>9</sup> Accordingly, even if properly presented, these claims would be rejected.

### **3. IHO Bias**

In her petition, the parent contends that the IHO was biased against her, as evidenced by anecdotal evidence that this IHO rarely finds in favor of parents. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-

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<sup>9</sup> Additionally, the district did not raise these issues in the first instance at the impartial hearing "in support of an affirmative, substantive argument" (B.M. v. New York City Dep't of Educ., 2014 WL 2748756, at \*2 [2d Cir. Jun. 18, 2014]; see Tr. pp. 249-50; see also M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]).

052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]).

After a careful review of the hearing record, I conclude that the IHO was unbiased and observed the procedures of due process throughout this proceeding. Although the parent disagrees with the conclusions reached by the IHO, that disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Application of a Child with a Disability, Appeal No. 06-035; Application of a Child with a Disability, Appeal No. 06-013; Application of a Child with a Disability, Appeal No. 96-03; Application of a Child with a Disability, Appeal No. 95-75). Thus, upon careful consideration of the hearing record, I find that there is no evidence that the IHO displayed bias against the parent.

### **B. Consideration of May 2012 Neuropsychological Evaluation**

On appeal, the parent alleges that the district did not consider the May 2012 neuropsychological evaluation in making a placement determination for the student.<sup>10</sup> It is evident from the context of the parent's petition that by "placement", the parent refers to the "bricks and mortar" school to which the student was assigned, and not the student's "general educational program" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [observing that "educational placement", as used in the IDEA, refers to a student's "general educational program"]; K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. 2010]). The parent's claim, then, relates to the appropriateness of the assigned school and is discussed in the following section below.

Assuming for purposes of argument that the parent's claim could be read to allege that the CSE did not consider the 2012 neuropsychological evaluation in making its recommendations, this claim is not supported by the evidence in the hearing record. A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation

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<sup>10</sup> While the final notice of recommendation references the May 2012 CSE meeting, there is no evidence suggesting that the district did not consider the June 2012 IEP in selecting an assigned school or that it would not have implemented the June 2012 IEP at the assigned school (Dist. Ex. 7).

any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require a [CSE] to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind-Brook Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013]; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. Sept. 16, 2013]).

Here, the June 2012 CSE specifically reconvened for the purpose of discussing the 2012 neuropsychological evaluation (Dist. Ex. 6 at p. 1; see Tr. pp. 189-91, 787-88). The parent testified that the CSE met for 45 minutes for the sole purpose of discussing the May 2012 neuropsychological evaluation (Tr. pp. 787-88). The CSE determined that the testing results contained in the evaluation were substantially similar to the December 2009 psychoeducational evaluation (Dist. Ex. 6 at p. 1; see Tr. pp. 195, 200, 281). Nevertheless, the June 2012 CSE reviewed the May 2012 neuropsychological evaluation and, based upon its recommendations, added a new decoding goal and two supports for the student's management needs to the June 2012 IEP (Dist. Ex. 5 at pp. 4, 6; see Tr. p. 195-96). Therefore, there is ample evidence in the hearing record that the June 2012 CSE considered the May 2012 neuropsychological evaluation (see, e.g., Dist. Ex. 5 at pp. 1, 6; Tr. pp. 195, 200, 281).

### **C. Assigned Public School Site**

Finally, the parent contends that the assigned public school site was inappropriate for the student and could not implement the June 2012 IEP. The district, in response, avers that considerations regarding the assigned public school site are speculative in this case because the parent rejected the June 2012 IEP before the time to implement the IEP had arrived. 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 the parents' "[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., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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"]).

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., 526 Fed. App'x 135, 141 [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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). 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>11</sup> When the Second Circuit spoke 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 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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the June 2012 IEP because a retrospective analysis of how the district would have implemented the student's June 2012 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; 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 prior to the time the district became obligated to implement the June 2012 IEP (see Parent Ex. J at p. 1). 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 a 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

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<sup>11</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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. v. New York City Dep't of Educ., 694 F.3d 167, 191-92 [2d Cir. 2012]; T.Y., 584 F.3d at 420 [the 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.

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 in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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 (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 claims that the assigned public school site would not have properly implemented the June 2012 IEP.<sup>12</sup>

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation; that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

#### **D. IEE Reimbursement**

Finally, I turn to the parent's request for reimbursement for the May 2012 neuropsychological evaluation, which the parent contends constituted an independent educational evaluation (IEE) (see Dist. Ex. 21). The IDEA as well as State and federal

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<sup>12</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; 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]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't. of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]). IEEs are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). A parent has the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392 at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]; see also Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 590 [3d Cir. 2000]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 550 [D. Conn. 2002]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

Upon review of the hearing record, there is no evidence that the parent disagreed with any aspect of any evaluation obtained by the school district as required by federal and State regulations (34 CFR 300.502[a], [b]; 8 NYCRR 200.5[g][1]; see R.L., 363 F. Supp. 2d at 234-35; Application of a Student with a Disability, Appeal No. 10-101; Application of a Student with a Disability, Appeal No. 10-033; Application of a Student with a Disability, Appeal No. 09-144). While the parent contends on appeal that she pursued the May 2012 neuropsychological evaluation because the district failed to conduct "observations or evaluation[s]" of the student prior to the June 2012 CSE meeting, the evidence in the hearing record leads to a contrary conclusion. The IHO found, and the hearing record reflects, that the June 2012 CSE considered a December 2009 psychoeducational report which remained timely and relevant at the time of the CSE meeting (Dist. Ex. 4; see Exs. 3 at p. 1; 9).<sup>13</sup> Accordingly, I see no reason to depart from the IHO's determination that the district was not required to reimburse the parent for the cost of the May 2012 neuropsychological evaluation (IHO Decision at pp. 24-26).

## **VII. Conclusion**

A review of the evidence in the hearing record supports the IHO's determination that the June 2012 IEP was reasonably calculated to enable the student to receive educational benefits; therefore, it is not necessary to reach the issue of whether Aaron was appropriate for the student or whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ.,

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<sup>13</sup> Further, this determination of the IHO was not appealed by the parent and has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at \*10 [S.D.N.Y. Aug. 21, 2014]; D.D-S., 2011 WL 3919040, at \*13).

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                          **October 15, 2014**

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