



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-090

**Application of a STUDENT WITH A DISABILITY, by parent, for review of a determination of a hearing officer relating to the provision of educational services by the**

### **Appearances:**

Mayerson & Associates, attorneys for petitioner, Gary S. Mayerson, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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 the costs of the student's tuition at the Aaron School 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**

During the 2011-12 school year, the student attended the Aaron School (see Dist. Exs. 2 at p. 1; 5; 6 at p. 1).<sup>1</sup> On March 25, 2012, the parent executed an enrollment contract with the Aaron School for the student's attendance from September 2012 through June 2013 during the 2012-13 school year (see Parent Ex. UU at pp. 1-5; see also Parent Ex. Z at pp. 1-6).

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<sup>1</sup> The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On April 24, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (sixth grade) (see Dist. Exs. 2 at pp. 1, 16-18, 20; 3 at p. 1; see also Tr. pp. 108-09, 170-71). Finding that the student remained eligible for special education and related services as a student with autism, the April 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement for instruction in mathematics, English language arts (ELA), social studies, and science at a specialized school with the following related services: three 45-minute sessions per week of individual speech-language therapy; two 45-minute sessions per week of speech-language therapy in a small group; two 45-minute sessions per week of individual physical therapy (PT); three 45-minute sessions per week of individual occupational therapy (OT); and one 45-minute session per week of counseling in a small group (see Dist. Ex. 2 at pp. 1, 16-17, 20).<sup>2</sup> The April 2012 CSE also created annual goals with corresponding short-term objectives to address the student's needs (*id.* at pp. 4-15).

By letter dated June 15, 2012, the parent advised the district that the April 2012 IEP was not appropriate for the student because it did not include sufficient "1:1 teaching intervention" or a sufficient "level of services," the IEP failed to include a recommendation for parent counseling and training, and the IEP did not include appropriate and sufficient "behavioral interventions" (Parent Ex. O at p. 1). In addition, the parent indicated that she had not yet received a final notice of recommendation (FNR), and unless the district offered the student an "appropriate placement and program," the student would attend the Aaron School for the 2012-13 "twelve-month" school year—as a "component of his educational program"—and she would seek funding for the costs of the student's tuition at the Aaron School, as well as related services, applied behavior analysis (ABA) therapy, ABA supervision, a summer camp program, and round-trip transportation (*id.* [emphasis in original]).

By FNR dated June 16, 2012, the district summarized the special education and related services recommended in the April 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 11 at p. 1).

In a letter dated June 21, 2012, the parent indicated that she received the FNR, but she had not been "afforded any opportunity to participate in [the] site selection" (Parent Ex. Q at p. 1). The parent indicated that she would make "every effort" to visit the assigned public school site, and to assist in making an "informed decision," the parent requested that the district answer approximately 21 enumerated questions (*id.* at pp. 1-2).

By letter dated June 26, 2012, the parent advised the district that the April 2012 IEP was not appropriate for the student and repeated some of the same reasons set forth in the June 15, 2012 letter as a basis for her conclusion; in addition, the parent indicated that the April 2012 IEP failed to contain sufficient "supports to address [the student's] individual needs" (compare Parent Ex. O at p. 1, with Parent Ex. R at p. 1). The parent further indicated that she visited the assigned public school site on June 21, 2012 and, based upon the visit, she determined that the "program" was not appropriate for the student (Parent Ex. R at p. 1). More specifically, the parent indicated that the assigned public school site did not have a copy of the April 2012 IEP;

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

the "placement referral form" incorrectly listed the student as a sixth grade student; the only seat available for the student at the assigned public school site was in a sixth grade class; the assigned public school site used "some sort of 'positive behavior system'" that would not provide the student with "regular and consistent behavioral reinforcements;" students received instruction for academic subjects in a "large group setting," which would not be appropriate for the student; the assigned public school site only used three "assessment tools;" two teachers at the assigned public school site indicated to the parent that they did not have any "formal" training in ABA; the classrooms at the assigned public school site lacked "instructional control;" and no one at the assigned public school site could provide the parent with "any information" regarding the identity of the related services providers or whether the assigned public school site could provide the student with all of the related services recommended in the IEP (id. at pp. 1-2). Thus, the parent informed the district that the student would "continue" to attend the Aaron School for the 2012-13 school year, and she would seek funding for the costs of the student's tuition at the Aaron School, as well as related services, ABA therapy, ABA supervision, a summer camp program, and round-trip transportation (id. at p. 2).

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

In an amended due process complaint notice dated July 13, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year based upon approximately 121 separately enumerated allegations (see Parent Ex. B at pp. 1-13).<sup>3</sup> Relevant to this appeal, the parent alleged that the April 2012 CSE failed to develop "critical assessment reports" in order to develop the IEP, the CSE failed to conduct independent evaluations or assessments of the student, the CSE failed to conduct an appropriate functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) despite the student's "interfering behaviors," and the CSE failed to conduct—or otherwise discuss—a classroom observation of the student at the April 2012 CSE meeting (id. at pp. 3-5, 9 [emphasis in original]). Next, the parent alleged that the April 2012 CSE failed to develop measurable annual goals to meet the student's identified areas of need, failed to "adequately address" the student's individualized needs, and failed to include "objective" methods of measurement for any of the annual goals (id. at p. 6). Moreover, the parent asserted that the April 2012 CSE failed to develop adequate short-term objectives or benchmarks for each annual goal in order to assess the student's progress, and overall, the CSE failed to create annual goals that were "clear, unambiguous, adequate, sufficiently challenging, and individualized" (id. at pp. 6-7). Further, the parent alleged that the April 2012 CSE failed to develop annual goals for parent counseling and training and also failed to develop "transition goals" or goals that targeted the student's difficulty with generalization (id. at pp. 3, 7-8). Additionally, the parent alleged that the April 2012 CSE incorporated annual goals into the April 2012 IEP that were "specifically designed to be implemented" in the same "teaching environment" as provided at the Aaron School (id. at p. 8 [emphasis in original]).

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<sup>3</sup> The parent's initial due process complaint notice, dated July 5, 2012, included approximately 115 separately enumerated allegations in support of the parent's assertion that the district failed to offer the student a FAPE for the 2012-13 school year (compare Parent Ex. A at pp. 1-15, with Parent Ex. B at pp. 1-16). Aside from repeating approximately 114 of the 115 allegations in the initial due process complaint notice, the parent's amended due process complaint notice included approximately seven new allegations (compare Parent Ex. A at pp. 3-12, with Parent Ex. B at pp. 3-12).

Next, the parent alleged that the April 2012 CSE did not meaningfully consider the student's need for assistive technology, and failed to "properly support" the student's "existing 'assistive technology'" (Parent Ex. B at p. 9). In addition, the parent asserted that the April 2012 CSE failed to recommend parent counseling and training (id. at p. 4). Next, the parent asserted that the April 2012 CSE failed to "meaningfully include" her in the "placement selection process" and incorrectly indicated in "paperwork" that the student would enter the sixth grade at the assigned public school site (id. at pp. 8, 12). The parent also alleged the following deficiencies with the assigned public school site: the observed classroom included students with "various classifications and varying needs," the April 2012 CSE recommended the same "placement" for both the 2011-12 and 2012-13 school years, the assigned public school site could not meet the student's related service mandates or "properly implement" the April 2012 CSE's "behavior plan," the assigned public school site used a methodology that would not be appropriate for the student, the students in the observed classroom were "unduly disparate in age" and were not functionally grouped, and the staff at the assigned public school site were not trained in ABA (id. at pp. 7-12).

Turning to the unilateral placement, the parent alleged that the Aaron School's "program" was reasonably calculated to provide the student with meaningful educational benefit (Parent Ex. B at p. 13). Finally, the parent asserted that there were no "equitable circumstances" that would bar or diminish the requested relief (id.). As relief, the parent sought reimbursement or funding for the costs of the student's tuition at the Aaron School for the 2012-13 school year, as well as for the costs of related services, ABA therapy, ABA supervision, a summer camp program, round-trip transportation, and "compensatory education" for any failure to provide the student with pendency services (id.).

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

On August 28, 2012, the IHO conducted a prehearing conference, and on September 4, 2012, the parties proceeded to an impartial hearing, which concluded on February 14, 2013 after four days of proceedings (see Tr. pp. 1-506; IHO Ex. I at pp. 1-2).<sup>4</sup> In a decision dated April 22, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year, and therefore, the IHO denied the parent's request for payment of the costs of the student's tuition at the Aaron School and for payment of the costs of home-based ABA services, as well as OT, speech-language therapy, and parent counseling and training (see IHO Decision at pp. 19-22, 28).<sup>5</sup> More specifically, the IHO found that the April 2012 CSE was not required to complete an FBA or develop a BIP for the student because the evidence demonstrated that the student's behavior was not "serious enough to warrant an FBA or BIP" (id. at pp. 19-20). The IHO also

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<sup>4</sup> On September 28, 2012, the IHO issued an order on pendency, which directed the district to provide the following services as the student's pendency (stay-put) placement: 5 to 10 hours per week of home-based ABA services; five 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; two 60-minute sessions per week of individual counseling; parent counseling and training in the school; five 45-minute sessions per week of speech-language therapy provided "outside" the school; and four 30-minute sessions per week of OT provided "outside" the school (Interim IHO Decision at pp. 3-5).

<sup>5</sup> At the impartial hearing, the parent withdrew the requests for payment for a summer camp program, compensatory education, and round-trip transportation (see Tr. pp. 474-76, 502-05; IHO Decision at p. 3).

found that the student's "primary behavior deficit"—namely, his distractibility—was not "unknown" and that the April 2012 CSE properly relied upon information provided by the student's then-current teacher from the Aaron School (Aaron School teacher)<sup>6</sup> who attended the CSE meeting, which indicated that the student could follow a "school-wide plan" (*id.* at p. 20). In addition, the IHO concluded that the April 2012 IEP included several management needs, such as "visual, verbal, and tactile prompts; teacher check-ins; repetition and redirection; and whole body listening and sensory breaks" to address the student's distractibility, as well as his tendency to shut down (*id.*).

Next, the IHO determined that the April 2012 CSE was not required, pursuant to regulations, to conduct a classroom observation of the student, and the hearing record contained no evidence regarding whether the April 2012 CSE did or did not discuss assistive technology (*see* IHO Decision at p. 20). Further, the IHO found "irrelevant" the parent's assertion that the April 2012 CSE did not discuss the "buzzer system" used by the student's "at-home ABA therapist in late 2012 and adopted by the school in 2013" (*id.*). Concerning annual goals, the IHO found that the hearing record contained undisputed testimony regarding the "origin" of the annual goals in the April 2012 IEP, as well as the "discussion" about the annual goals at the April 2012 CSE meeting (*id.* at pp. 20-21). In addition, the IHO noted that the student's Aaron School teacher used the annual goals in the April 2012 IEP for "her instructional plan" for the student (*id.* at p. 21). As such, the IHO agreed with the district's argument that the "correlation" between the annual goals developed by the Aaron School and the annual goals in the April 2012 IEP indicated that the "parent's complaint in this regard [was] disingenuous and without merit" (*id.*).

With respect to the "recommended program," the IHO noted that the parent asserted "no real objection" to the 12:1+1 special class placement, and noted further that it represented the "precise ratio the parent preferred, and with more related services than requested" (IHO Decision at p. 21). The IHO also indicated that while the parent objected to the "statement" in the April 2012 IEP that the student attended "5th grade at the Aaron School," it was undisputed that the student did not function at the 6th grade level, and based upon the evidence, the student's placement in a 6th grade classroom—"based upon his chronological age"—did not "require [the student] to be taught at a 6th grade level" (*id.*). In addition, the IHO found that while the April 2012 CSE's failure to recommend parent counseling and training was a "serious omission," such omission, by itself, did not warrant a finding that the district failed to offer the student a FAPE for the 2012-13 school year (*id.* at pp. 21-22). Finally, the IHO found that the parent's testimony regarding her visit to the assigned public school site was "not credible" and that her objection to the functional grouping of the students at the assigned public school site was "simply not relevant" given that the student never attended the assigned public school site (*id.* at p. 22). As a result of the foregoing, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year (*id.* p. 23).

Having determined that the district offered the student a FAPE for the 2012-13 school year, the IHO nonetheless addressed the appropriateness of the parent's unilateral placement of the student at the Aaron School, whether the student required home-based services as a

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<sup>6</sup> The Aaron School teacher who attended the April 2012 CSE meeting was the student's teacher for both the 2011-12 school year and the 2012-13 school year (*compare* Dist. Ex. 2 at p. 24, *with* Tr. pp. 275-82, 292).

component of the student's educational program, equitable considerations, and whether the parent was entitled to direct funding of the costs of the student's tuition at the Aaron School (see IHO Decision at pp. 23-27). With regard to the unilateral placement, the IHO found that the Aaron School "simply did not offer a program designed to meet [the student's] individual special education needs" (*id.* at p. 23). In addition, the IHO found that the hearing record lacked evidence to establish that the Aaron School offered the student "individualized instruction" or explained why the Aaron School changed the student's related services from individual to group services (*id.* at pp. 23-25). Moreover, the IHO found that the evidence did not support the parent's contention that the student required home-based services to "support [the student's] educational program" (*id.* at pp. 25-26). Finally, the IHO found no evidence that equitable considerations would either preclude or diminish the parent's requested relief (*id.* at pp. 26-27). However, the IHO concluded that the parent failed to establish an entitlement to direct funding of the costs of the student's tuition at the Aaron School for the 2012-13 school year (*id.* at pp. 27-28).

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

The parent appeals, and contends that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year, that the Aaron School was not an appropriate unilateral placement, and that she was not entitled to direct funding of the costs of the student's tuition at the Aaron School. Initially, the parent seeks recusal of the SRO, and attaches additional documentary evidence in support of the request. Next, the parent asserts that she was "intentionally excluded" from the "school site" selection process, and urges that this was a "material and procedural FAPE deprivation." In addition, the parent argues that the April 2012 CSE failed to complete any assessments or conduct a classroom observation of the student, and thus, the April 2012 CSE relied exclusively on the "reports" provided by the parent in the development of the April 2012 IEP. Moreover, the parent contends that the April 2012 CSE failed to conduct a FBA of the student or develop a BIP or otherwise "mention" the "school-wide plans" in the April 2012 IEP that was referenced in testimony at the impartial hearing. In addition, the parent argues that any testimony about the "'school-wide' behavior plan" constituted impermissible retrospective testimony.

Next, the parent asserts that the evidence in the hearing record indicated that the district's policy of not recommending "any after school services" supported a "claim of impermissible predetermination." In addition, the parent asserts that the April 2012 CSE failed to "assess or recommend" the student's need for assistive technology. Concerning annual goals, the parent asserts that the April 2012 CSE did not discuss the percentages assigned to each annual goal at the meeting, and the annual goals lacked "baseline measurements" to determine if the student was meeting the annual goals. The parent also alleges that the IHO erred in finding that the failure to recommend parent counseling and training in the April 2012 IEP did not constitute a failure to offer the student a FAPE. Concerning the assigned public school site, the parent asserts that it had a seat available for the student in a sixth grade classroom, the "offered placement" turned on the student's age rather than his functioning level, and a four year age difference existed between the students in the classroom. The parent further alleges that the IHO's credibility findings—including the credibility findings related to the district special education teacher and the parent—should be reversed.

Concerning the unilateral placement, the parent contends that the IHO erred in finding that the student's program at the Aaron School was not designed to meet the student's individual needs. In addition, the parent asserts that the student's home-based ABA services were a "necessary and appropriate" part of the student's "total educational program." Finally, the parent asserts that the IHO properly found that there were no equitable considerations that would preclude or diminish the parent's requested relief; however, the parent argues that the IHO erred in concluding that the parent did not establish that she could not afford the student's tuition at the Aaron School for the 2012-13 school year.<sup>7</sup>

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's decision 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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Manaroneck 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

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<sup>7</sup> As noted above, the parent's amended due process complaint notice included approximately 121 separately enumerated allegations in support of the contention that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. B at pp. 1-13). The IHO's decision—while addressing several issues—did not address all 121 allegations (compare Parent Ex. B at pp. 1-13, with IHO Decision at pp. 1-29). To the extent that the parent submitted a "Limited Appeal" and does not appeal or now advance arguments related to issues in the amended due process complaint notice that the IHO did not address as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year, these unaddressed issues are deemed abandoned and will not be considered in this appeal (compare Parent Ex. B at pp. 3-13, with IHO Decision at pp. 19-27, and Pet. ¶¶ 4-63).

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. Request for Recusal**

Regarding the parent's request for recusal, State regulations provide that an SRO must have no personal, economic, or professional interest in the hearing which he or she is assigned to review (8 NYCRR 279.1[c][4]) and must be "independent of, and may not report to, the office of the State Education Department which is responsible for the general supervision of educational programs for children with disabilities" (8 NYCRR 279.1[c][3]). An SRO shall recuse him self or herself and transfer the appeal to another SRO if he or she was substantially involved in the development of a State or local policy challenged in the hearing; was employed by a party or a party's representative in the hearing; or engaged in the identification, evaluation, program or placement of the student who is the subject of the hearing (8 NYCRR 279.1[c][4]).<sup>8</sup>

As the SRO assigned to this review, I am not personally familiar with the parties in this case, nor do I have any personal, economic, or professional interest relevant to these proceedings (8 NYCRR 279.1[c][4]). Moreover, the New York State Education Department is not a party in

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<sup>8</sup> The third criterion for recusal extends to cases in which an SRO has been involved with "other similarly situated children in the school district which is a party to the hearing" (8 NYCRR 279.1[c][4][iii]).

this matter, and notably, the parent's allegations that decisions from the Office of State Review have been untimely due to insufficient staffing as a basis for the request for recusal are, as indicated above, not relevant to a recusal inquiry. Additionally, recusal in such a context makes little sense insofar as it would only have the opposite effect and exacerbate any delay. Having given the parent's request due consideration, I find that I am able to impartially render a decision and that the State regulations do not require recusal in this instance.<sup>9</sup>

## 2. Credibility Findings

Next, the parent asserts that the IHO's credibility findings—specifically, the finding that the district special education teacher's testimony was "credible" and that the parent's testimony regarding her visit to the assigned public school site was "not credible"—should be "reversed."<sup>10</sup>

An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this case, a review of the non-testimonial evidence and the entire hearing record—when read as a whole—does not compel conclusions contrary to those made by the IHO. Based on the foregoing, the IHO's credibility findings will not be disturbed.

## B. April 2012 CSE Process

### 1. Evaluative Information/Classroom Observation

Next, the parent asserts that the April 2012 CSE failed to complete any assessments or a classroom observation of the student in the development of the April 2012 IEP, and instead, relied solely on the reports the parent provided to the CSE. A review of the evidence in the hearing record does not support the parent's contentions, and thus, the IHO's findings will not be disturbed.

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<sup>9</sup> The parent submitted additional documentary evidence for consideration on appeal in support of the request for the SRO to recuse himself or herself. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the additional documentary evidence could have been offered at the time of the impartial hearing, and it is not now necessary to render a decision in this matter, especially in light of the fact that the grounds cited by the parent as the basis for the request to recuse are not grounds upon which an SRO is required to recuse himself or herself pursuant to State regulations (see 8 NYCRR 279.1[c][4]).

<sup>10</sup> The parent also requests an "'additional evidence' hearing" so that the SRO could "draw his or her own conclusions" regarding the parent's credibility. However, in light of the legal standard giving due deference to an IHO's credibility findings unless "non-testimonial evidence in the hearing record justifies a contrary conclusion," it is unclear how additional testimonial evidence would be relevant in this inquiry.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (see S.F., 2011 WL 5419847, at \*10 [indicating that based upon 20 U.S.C. § 1414(c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at \*23 [S.D.N.Y. March 29, 2013]).

Generally, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 CFR 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

In this case, the evidence in the hearing record establishes that the April 2012 CSE reviewed and considered the following evaluative information in the development of the April 2012 IEP: a March 2010 psychological evaluation (see Dist. Ex. 1 at pp. 1-8 [assessing the student's cognitive skills, academic skills, and adaptive functioning]); an October 2011 Aaron School counseling plan (see Dist. Ex. 5 [reporting that the student exhibited difficulty with areas of "self-awareness, emotional expression and self-regulation . . . social responsibility and

navigating complex social situations"); a January 2012 speech-language evaluation report (see Dist. Ex. 10 at pp. 1-3 [noting significant improvement in the student's behavioral and social/emotional development, receptive language skills (comprehending directions, following sequential directions), but continued weaknesses in understanding "semantic relationships in order to improve conversational skills" and in understanding spoken paragraphs in order to respond to questions, make inferences, and make predictions]); a February 2012 Aaron School mid-year report (see Dist. Ex. 6 at pp. 1-12 [describing the student's interests, academic abilities, learning needs, and social/emotional functioning]); an April 2012 ABA/behavior report (see Dist. Ex. 9 at pp. 1-7 [describing the student's learning characteristics, academic needs, behavioral limitations, language skills, social skills, cognitive skills and academic performance, leisure skills, and activities of daily living (ADL) skills]); an April 2012 speech-language therapy progress report (see Dist. Ex. 7 at pp. 1-2 [noting progress, but continued difficulty in the areas of attention and auditory processing]); and an undated OT progress report (see Dist. Ex. 8 at pp. 1-2 [indicating the focus of therapy as the student's "fine motor/graphomotor skills, body awareness and spatial relations, motor planning, and overall organization" of his academic environment]) (see Tr. pp. 116-21; Dist. Ex. 2 at p. 1). In addition, the evidence in the hearing record indicates that the parent and the student's Aaron School teacher attended the April 2012 CSE meeting and provided information regarding the student's needs (see Tr. pp. 109-10; Dist. Exs. 2 at p. 24; 3 at pp. 1-2). Here, the existing evaluative information reviewed and relied upon by the April 2012 CSE—together with the parent's input and the Aaron School teacher's input—provided the CSE with a significant amount of relevant information about the student's needs, including information related to his cognitive and academic skills, his social/emotional and behavioral skills, his attention and distractibility, his related service needs, his adaptive living skills, and his management needs (see Tr. pp. 109-10; Dist. Exs. 1 at pp. 1-8; 3 at pp. 1-2; 5; 6 at pp. 1-12; 7 at pp. 1-2; 8 at pp. 1-2; 9 at pp. 1-7; 10 at pp. 1-3). In addition, the hearing record lacks any evidence that the April 2012 CSE required additional evaluative information about the student; consequently, the evaluative information was more than sufficient for the April 2012 CSE to properly develop the student's April 2012 IEP and the parent's assertion must be dismissed (see D.B., 966 F. Supp. 2d at 329-31).

Regarding the parent's contention that the April 2012 CSE failed to conduct a classroom observation of the student, the district special education teacher who attended the April 2012 CSE meeting testified that a district social worker most recently conducted a classroom observation of the student in 2010 (see Tr. pp. 105-07, 149-50). In addition, the district special education teacher testified that while no one at the April 2012 CSE meeting discussed or considered completing an updated classroom observation of the student, it was not necessary at that time because the Aaron School teacher participated at the April 2012 CSE meeting, as well as the parent (see Tr. pp. 150-52). Therefore, based upon a review of the evidence in the hearing record and given that the parent cites neither evidence nor legal authority to support a finding that the April 2012 CSE was obligated to perform a classroom observation of the student as part of either an initial evaluation or a reevaluation of the student, the absence of a classroom observation of the student did not result in a failure to offer the student a FAPE for the 2012-13 school year.

In summary, the evidence in the hearing record demonstrates that the April 2012 CSE adequately considered and reviewed a variety of sources of information describing the student's needs in order to develop the April 2012 IEP (Tr. pp. 111-12, 114-15, 117-32; compare Dist. Ex.

2 at pp. 1-2, with Dist. Exs. 1, 5-10), and the April 2012 CSE's failure to conduct further assessments or a classroom observation of the student did not result in a failure to offer the student a FAPE for the 2012-13 school year.

### **C. April 2012 IEP**

#### **1. Annual Goals**

Turning next to annual goals, the parent asserts that the April 2012 CSE did not discuss the methods of measurement (percentages) assigned to the annual goals in the April 2012 IEP, and the annual goals failed to include "baseline measurements" upon which to determine if the student met the annual goals. 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][II]; 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 the 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]).

First, although the parent asserts that the annual goals were not appropriate because they lacked baselines upon which to measure progress, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—that is, the annual goal must be "measurable." As described below, the annual goals included the regulatory criteria, and overall, aligned with the student's identified needs.

Next, the April 2012 IEP included approximately 26 annual goals with approximately 72 corresponding short-term objectives to address the student's identified needs in the areas of reading (reading fluency and reading comprehension), writing, mathematics skills, attention, sensory processing, self-help skills, language, self-awareness, impulse control, emotional regulation, social responsibility, fine motor skills, strength, endurance, and posture (see Dist. Ex. 2 at pp. 4-15). In addition, a review of the annual goals reveals that, consistent with the applicable State regulations, each annual goal included the required evaluative criteria (i.e., 80 percent accuracy in 4 out of 5 trials, 75 percent accuracy in 4 out of 5 trials), evaluation procedures (i.e., class activities, teacher or provider observations), and schedules to measure progress (i.e., two times per month, one time per week) (id.).

In developing the annual goals at the April 2012 CSE meeting, the district special education teacher testified that the Aaron School teacher provided input at the CSE meeting regarding the student's academic performance, and the CSE sought the Aaron School teacher's "agreement" in creating the annual goals—including the "accuracy rates for each particular item

or goal" (Tr. pp. 111, 134-35, 165-70). In addition, the April 2012 CSE used the February 2012 Aaron School mid-year report "as a grid or base" for each annual goal and relied upon the "goals" and "narrative" in the undated OT progress report and the April 2012 speech-language therapy progress report to further develop the annual goals (Tr. pp. 117-21, 134-35, 165-70; compare Dist. Ex. 2 at pp. 4-15, with Dist. Ex. 6 at pp. 1-12, and Dist. Ex. 7 at pp. 1-2, and Dist. Ex. 8 at pp. 1-2). Finally, the district special education teacher testified that although not reflected in the April 2012 CSE meeting minutes, the April 2012 CSE did discuss the percentages or rates of accuracy for the annual goals as the criteria for measurement (see Tr. pp. 165-67).

Thus, overall the evidence in the hearing record supports a finding that the annual goals in the April 2012 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at 334-35; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; 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, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

## **2. Consideration of Special Factors—Interfering Behaviors**

The parent contends the April 2012 CSE failed to complete an FBA and develop a BIP for the student, and further, that the testimonial evidence regarding the "'school-wide' behavior plan" may not be relied upon as impermissible retrospective testimony. A review of the evidence in the hearing record supports the IHO's conclusion that, in this case, the April 2012 CSE was not required to conduct an FBA or to develop a BIP for the student.

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. Bd. of Educ., 2009 WL 3326627, at \*3 [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). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and 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., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Ga vrity 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]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a student's need for a [BIP] must be documented in the IEP" (*id.*). 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 (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA 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 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 "[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 addresses the student's problem behaviors (*id.*).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's

behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted in appropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>11</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], [available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf](http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf)). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

It is undisputed that the April 2012 CSE did not conduct an FBA or develop a BIP (see Dist. Ex. 2 at p. 3). At the impartial hearing, the district special education teacher testified that the April 2012 CSE "reviewed and discussed" the April 2012 ABA/behavior report, which noted that the student "frequently" exhibited "[s]everal behavior limitations" that interfered with his academic performance, including: "emotional outbursts, staring off into space, requests for desired items, walking away from the learning table and off-topic preferred conversation" (see Tr. pp. 119-20, 158-61; Dist. Ex. 9 at p. 2). Notwithstanding this review and discussion, however, the district special education teacher further testified that the April 2012 CSE "deferred" to the Aaron School teacher's input and assessment of the student's behavior in the classroom because "the teacher [was] the person who [was] there with him on a daily basis in regard[] to instruction" (Tr. pp. 158-61, 163). At the April 2012 CSE meeting, the Aaron School teacher relayed that, at that time, the student was not engaging in any "acting out behaviors" at school, and the student did not need a BIP because he "follow[ed] the positive reinforcement of the classroom behavior plan" (Tr. pp. 130, 159-64). According to the April 2012 CSE meeting minutes, the Aaron School teacher stated at the April 2012 CSE meeting that the student did "not have outburst[s] at school" (Dist. Ex. 3 at p. 2). In addition, the district special education teacher testified that the Aaron School teacher also told the April 2012 CSE that the student did not

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<sup>11</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

engage "in any disruptive behavior or behavior which interfered with his instruction that would need a BIP" (Tr. pp. 132-33).<sup>12</sup> Based upon the information available to the April 2012 CSE, and in particular, the Aaron School teacher's input at the April 2012 CSE meeting, the CSE determined that neither an FBA nor a BIP was warranted (see Tr. pp. 130, 133, 161-64; Dist. Ex. 9 at pp. 1-2). To otherwise address the student's identified behaviors of distractibility and his tendency to shut down, the April 2012 CSE recommended management needs, which included intervention strategies—such as providing verbal, visual and tactile prompts, frequent teacher check-ins, repetition, positive reinforcement, whole body listening and sensory breaks—to help the student remain focused and regulated (see Dist. Ex. 2 at pp. 1-2).

Based upon the foregoing, the evidence in the hearing record supports the IHO's conclusion that the April 2012 CSE was not required to conduct an FBA or to develop a BIP for the student.

### **3. Consideration of Special Factors—Assistive Technology**

Next, the parent contends that the April 2012 CSE failed to "assess or recommend any need for assistive technology." One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Upon review of the evidence in the hearing record, the April 2012 CSE had no information available to it identifying any need to assess the student for assistive technology—nor does the parent now allege that she requested an assistive technology evaluation of the student or otherwise specify what assistive technology the student required (see Tr. pp. 1-506; Dist. Exs. 1-11; Parent Exs. A-Z; AA-BB; NN-VV; IHO Exs. I-VII; see also Pet. ¶ 21).<sup>13</sup> Even assuming, however, that the failure to conduct an assistive technology evaluation constituted a procedural violation, the parent alleges no factual or legal basis upon which to conclude that such inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity

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<sup>12</sup> At the impartial hearing, the Aaron School teacher—who was the student's teacher during both the 2011-12 and 2012-13 school years—testified that the student exhibited behaviors that "interfered with his own learning," but he did not exhibit behaviors that interfered with the learning of others (Tr. pp. 280-82, 304-06). However, it is unclear whether the Aaron School teacher's testimony pertained to the student's behaviors during the 2011-12 school year or to the 2012-13 school year, and moreover, the evidence in the hearing record does not demonstrate whether she informed the April 2012 CSE that the student exhibited such behaviors (see Tr. pp. 280-330; Dist. Ex. 3 at pp. 1-2).

<sup>13</sup> To the extent that the parent asserts that the "buzzer system" may be considered as a form of assistive technology, the evidence in the hearing record indicates that the "buzzer system" was not used with the student until after the April 2012 CSE meeting during the 2012-13 school year (Tr. pp. 293-304, 349-51). Further, the Aaron School teacher testified that the "buzzer system" was not raised as a topic for discussion at the April 2012 CSE meeting (see Tr. p. 328).

to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

#### 4. Related Services—Parent Counseling and Training

Next, the parent asserts that the IHO erred in finding that the April 2012 CSE's failure to recommend parent counseling and training in the April 2012 IEP did not result in a failure to offer the student a FAPE for the 2012-13 school year. State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13 [d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Here, while it is undisputed that the April 2012 CSE did not recommend parent counseling and training as a related service in the student's April 2012 IEP, the hearing record in this case does not contain sufficient evidence upon which to conclude that the failure to recommend parent counseling and training in the April 2012 IEP resulted—in whole, or in part—in a failure to offer the student a FAPE for the 2012-13 school year (see Tr. pp. 1-506; Dist. Exs. 1-11; Parent Exs. A-Z; AA-BB; NN-VV; IHO Exs. I-V II). In addition, although the April 2012 CSE's failure to recommend parent counseling and training in the student's IEP violated State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 2014 WL 53264, at \*4 [2d Cir. Jan. 8, 2014]; M.W., 725 F.3d at 141-42).<sup>14</sup>

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<sup>14</sup> The district is cautioned, however, that it can not continue to disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction, and after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the

## 5. After-School Services

The parent asserts that the April 2012 CSE impermissibly engaged in predetermination when it failed to recommend "any after school services" for the student.<sup>15</sup> A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-\*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]).<sup>16</sup> In this instance, even assuming that the district had a policy of not recommending after-school or home-based services, the April 2012 CSE reviewed and considered reports provided by the student's then-current home-based providers—including the April 2012 ABA/behavior report, the April 2012 speech-language therapy progress report, and the undated OT progress report—all of which indicated that the student received some benefit from the home-based services (see Tr. pp. 116-121, 227-28; Dist. Exs. 2 at p. 1; 3 at p. 2; 7 at pp. 1-2; 8 at pp. 1-2; 9 at pp. 1-7). However, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1151-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573-74 [11th Cir. 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*17-\*18 [E.D.N.Y. Oct. 30, 2008]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at \*7 [S.D.N.Y. April 21, 2008]).

At the impartial hearing, one of the student's home-based ABA therapists—who did not attend the April 2012 CSE meeting—testified that, in her opinion, the home-based ABA services were "necessary for [the student] to continue to make educational and developmental progress" (Tr. p. 356). The ABA therapist also "strongly recommended" in the April 2012 ABA/behavior report that the student "continue to receive a minimum of 8 hours of 1:1 ABA services at home"

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IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

<sup>15</sup> As the IHO properly noted, the parent did not dispute the appropriateness of the recommended 12:1+1 special class placement or the related services recommended in the April 2012 IEP; moreover, the parent does not dispute these issues on appeal (see IHO Decision at p. 21; see also Parent Ex. B at pp. 1-13; Pet. ¶¶ 4-32). According to the April 2012 CSE meeting minutes, the Aaron School teacher agreed that a 12:1+1 "would provide [the student] with positive peer models" (Dist. Ex. 3 at p. 2).

<sup>16</sup> In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process" (Dirocco v. Bd. of Educ., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (Dirocco, 2013 WL 25959, at \*18).

(Dist. Ex. 9 at p. 6). Notwithstanding the ABA therapist's testimony and her recommendation in the April 2012 ABA/behavior report, a review of the evidence in the hearing record reveals that none of the other evaluations before the April 2012 CSE indicated that the student required home-based services (see Tr. pp. 308-09, 312, 381, 400, 427; Dist. Ex. 1 at pp. 1-6; 5; 6 at pp. 1-8; 7 at p. 1; 8 at p. 1; 9 at pp. 1-7). Rather, the evidence in the hearing record indicates that, although the student benefited from home-based services, the April 2012 CSE was not required to maximize the student's potential by providing the student with additional services (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132; see Thompson, 540 F.3d at 1155 [holding that "[t]he Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program"].<sup>17</sup> Although the hearing record indicates that the home-based services were beneficial to the student, the IDEA does not require districts to provide "everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; R.B., 2013 WL 5438605, at \*15 [noting that "[w]hile the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"] [emphasis in original], citing N.K. v New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013]; Student X, 2008 WL 4890440, at \*17-\*18 [finding that "while [the student] presented uncontradicted testimony that the ABA is helpful . . . testimony that [the student] would regress or make only trivial progress without the at-home services was speculative"]; see Grim, 346 F.3d at 379). Accordingly, even if the April 2012 CSE failed to recommend after-school or home-based services in the April 2012 IEP based, in part, upon district policy, the evidence in the hearing record does not support a finding that this procedural violation impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

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

The parent contends that the "proposed class" at the assigned public school site was not appropriate for the student for a variety of reasons—including that the only "seat" available for the student was in a sixth grade classroom, the teachers lacked ABA training, the "behavior management methods" used would not promote independence, and the classroom had a four year age difference among the students. 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., 553 Fed. App'x at 9; 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

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<sup>17</sup> Notably, at the impartial hearing, the parent testified that if the Aaron School provided the student with individual speech-language therapy and OT, the student's home-based services could be reduced (see Tr. p. 427).

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. 2014]). 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>18</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 her claims regarding implementation of the April 2012 IEP because a retrospective analysis of how the district would have implemented the student's April 2012 IEP at the assigned public school site is not an

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<sup>18</sup> Concerning the parent's contention that she was improperly excluded from the "site selection" process, 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 Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [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., 746 F.3d at 79). 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., 694 F.3d at 191-92; 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.

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 their choosing prior to the time the district became obligated to implement the April 2012 IEP (see Parent Exs. O at pp. 1-2; R at pp. 1-7). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that 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 her claims that the assigned public school site would not have properly implemented the April 2012 IEP.<sup>19</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, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist., 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston

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<sup>19</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., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 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 Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 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., 2013 WL 4495676, at \*26; 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 at 286; N.K., 961 F. Supp. 2d at 588-90; 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]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; 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., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 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]).

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]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Aaron School was an appropriate placement or whether equitable considerations weighed in favor of the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

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

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**