



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-199

**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 XXXXXXXXX**

### **Appearances:**

The Law Offices of Neal H. Rosenberg, attorneys for petitioner, Meredith Garfunkel, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Ilana Eck, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered the student an appropriate special education and related services and denied her request for tuition reimbursement at the Aaron Academy (Aaron) for the 2012-13 school year. The appeal must be dismissed. The cross-appeal must be sustained.

### **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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

In this case, there is no dispute that the student was determined eligible for special education and related services as a student with a speech or language impairment (Tr. p. 39; Dist. Exs. 1 at pp. 1, 12; see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).<sup>1</sup> A spring 2010

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<sup>1</sup> The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this proceeding (Tr. pp. 10, 39, 126;).

neuropsychological evaluation indicated that the student attended the public school through fifth grade, and according to observation and progress reports, the student attended Aaron during the 2011-12 school year (Parent Ex. C at p. 1; Dist. Exs. 5-6). On March 22, 2012, the parent executed an enrollment contract with Aaron for the student's attendance during the 2012-13 school year (Tr. p. 332; Parent Ex. M).<sup>2</sup>

On April 2, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (eighth grade) and to review his three-year reevaluation testing results (Tr. p. 20; Dist. Exs. 1 at p. 12; 2). For the 2012-13 school year, the April 2012 CSE proposed placement of the student in a 12:1+1 special class for math, English language arts (ELA), social studies and science within a community school (Tr. pp. 39-40; Dist. Exs. 1 at p. 8; 2 at p. 1).<sup>3</sup> Related services recommendations for the student included the provision of three 40-minute sessions per week of speech-language therapy in a group, and one weekly 40-minute session of 1:1 counseling (Tr. p. 39; Dist. Exs. 1 at pp. 8, 12; 2 at p. 2). The April 2012 CSE also developed annual goals to address the student's needs in the areas of decoding, encoding, writing, math, and counseling in addition to speech and language (Dist. Exs. 1 at pp. 4-7; 2 at p. 2).

By final notice of recommendation (FNR) to the parent dated August 15, 2012, the district summarized the services proposed in the April 2012 IEP, and notified the parent of the particular public school site to which the student had been assigned (Dist. Ex. 3). Upon receipt of the August 2012 FNR, the parent contacted the assigned school in order to conduct a site visit (Tr. pp. 319-20; Dist. Ex. 3). By letter to the district dated August 17, 2012, the parent indicated that the district had yet to notify her of the assigned public school site (Parent Ex. D). The parent further noted that despite her reservations about the appropriateness of a 12:1+1 special class for the student, she was "certainly open to looking at" a 12:1+1 classroom; however, the parent indicated that she had "no option" but to continue the student's enrollment at Aaron because the district had not provided her with a "placement recommendation" (id.).

On September 7, 2012, the parent visited the assigned public school site (Tr. pp. 312-23; Parent Ex. E at p. 1). In a letter to the district dated September 11, 2012, the parent outlined the reasons why she determined that the assigned public school site was not appropriate for the student (id. at pp. 1-2). According to the parent, the principal at the site agreed that the site was not appropriate for the student, and the parent indicated that the site was overwhelming, impossible to navigate, and did not offer a small structured school environment for the entire day (Parent Ex. E at p. 1). She indicated her belief that the classes were socially inappropriate and that she was not given a clear answer about methods used to address students' behavioral needs other than that they were "put in a room with the dean for three days with dividers so the child could not look at anyone" (id.). According to the parent, she saw only classes with boys, which would be socially limiting for the student (id.). The parent indicated that she was told there the classes "vary greatly" with respect to math and reading levels and that would be no small group instruction (id.). She further noted that the assigned public school site and the April 2012 IEP

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<sup>2</sup> 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).

<sup>3</sup> A handwritten notation on the April 2012 indicated that the student would participate in the mainstream environment for two periods a day and lunch (Tr. p. 115; Dist. Ex. 1 at p. 8).

did not offer the student the support throughout the entire school day that he needed in order to interact with peers, transition and learn, and that he should not be "mainstreamed" with 400 students for lunch or participate in specials such as music or gym with mainstreamed students (id. at p. 2). She indicated her concern with placing the student in a 12:1+1 special class placement (id.). The parent advised that she planned to continue the student's enrollment at Aaron and that she intended to seek an award of payment of the student's tuition to be provided at public expense (id.).

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

In a due process complaint notice dated December 5, 2012, the parent requested an impartial hearing in which she asserted that the district failed to offer the student a free appropriate public education (FAPE) during the 2012-13 school year (Dist. Ex. 8 at p. 1). Among other things, the parent alleged that the district did not offer the student a FAPE because: (1) the April 2012 CSE lacked an individual who would implement the April 2012 IEP; (2) the April 2012 CSE failed to consider appropriate evaluative data; (3) the April 2012 IEP failed to accurately and completely reflect the information that was before the April 2012 CSE; (4) the annual goals contained in the April 2012 IEP were insufficient, inappropriate, and could not be implemented in the district's proposed program; (5) placement of the student in a 12:1+1 special class was not appropriate for him, particularly because the student had been previously enrolled in that setting and did not make appropriate progress; (6) the April 2012 IEP called for mainstreaming the student "throughout the day," which would overwhelm him; and (7) although the April 2012 IEP reflected that the student exhibited social deficits, the April 2012 IEP lacked appropriate strategies and interventions to address those needs (id. at pp. 1-2).

The parent further alleged that she did not find the assigned public school site to be appropriate for the student's needs (Dist. Ex. 8 at pp. 1-2). Among other things, she claimed that the assigned public school site's enrollment was too large for the student and that he would become overwhelmed if he were to attend the public school site (id. at p. 1). The parent further maintained that the student required a small, structured setting throughout the school day and that the student would not be able to transition to different classrooms throughout the school day in that building (id.). In addition, the parent argued that within the proposed classroom, the district would not functionally group the student for instructional purposes (id. at p. 2). Furthermore, the parent alleged that her son would have been inappropriately placed in a classroom composed entirely of boys who exhibited significant behavioral needs (id.). Finally, the parent contended that the lack of small group instruction in a 12:1+1 special class further rendered the assigned public school site inappropriate for the student (id.).

The parent maintained that Aaron provided the student with appropriate special education support (Dist. Ex. 8 at p. 2). As a remedy, the parent requested an award of payment of the student's tuition for Aaron for the 2012-13 school year to be provided at public expense (id.).

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

On April 7, 2013, an impartial hearing convened and concluded on July 16, 2013, after four days of proceedings (IHO Decision at p. 2; Tr. pp. 1-561). In a decision dated September

12, 2013, the IHO determined that the district offered the student a FAPE during the 2012-13 school year, and accordingly, she denied the parent's request for relief (IHO Decision at p. 20). Specifically, with respect to the parent's allegations that the April 2012 CSE did not include a special education teacher who would have executed the student's IEP, the IHO concluded that the lack of such an individual from the CSE did not result in a denial of a FAPE to the student (id. at pp. 15-16). She further found that regardless of the parent's assertion that the district did not obtain a social history of the student, the April 2012 CSE had gathered sufficient information regarding the student's needs in order to craft an appropriate program for him (id. at p. 16).<sup>4</sup> Furthermore, the IHO described the CSE's review of the matter as "very comprehensive," and found that the April 2012 CSE "thoroughly considered the contents of the reports available to it and was aware of the student's history, strengths and deficits" (id. at p. 17). Next, with respect to the appropriateness of the annual goals enumerated in the April 2012 IEP, the IHO concluded that the CSE fully discussed the substance of the goals, and relied upon input from the student's classroom teacher (id.). Moreover, the IHO determined that the April 2012 CSE based the substance of the annual goals on information furnished by Aaron and that the annual goals were aligned with the student's needs and abilities (id.).

With respect to the parent's contentions challenging the student's placement in a 12:1+1 special class, while the IHO was troubled by "the high level" of the student's behaviors, she noted that the district special education teacher who conducted the classroom observation participated in the April 2012 CSE concurred in the placement recommendation (IHO Decision at pp. 17-18). The IHO described the program recommendation as "less intensive" than the program offered at Aaron, but concluded that the evidence did not support a conclusion that the student could not make meaningful progress from the April 2012 IEP, and even if not the same gains as he would attending Aaron's program (id. p. 18). In addition, although the student reportedly experienced verbal abuse at the time he previously attended a 12:1+1 special class placement in the district, the IHO found no evidence to support a finding that abuse and bullying was an expected condition in every community school in the district (id.). She further noted that the student was at a different time developmentally when he was last placed in a district 12:1+1 special class placement (id.). The IHO also found that the April 2012 CSE incorporated additional supports and specific goals into the IEP which were designed to assist the student with social difficulties that might arise as a result of his participation in a mainstream environment (id.). Additionally, the IHO indicated that the student's actual participation in the mainstream environment would be "very limited," and she further noted that a classroom paraprofessional accompanied the students for a majority, if not all, of the time that they were transitioning (id.). Lastly, the IHO noted that the April 2012 CSE found that the student would receive educational benefits from learning to navigate a mainstream environment in a supported situation (id.).

Lastly, although the IHO determined that the district was required to present evidence demonstrating that the assigned public school site could implement the student's IEP, she also

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<sup>4</sup> As neither party has appealed from the IHO's determination that the April 2012 CSE thoroughly considered the contents of the reports available to it and that the April 2012 CSE considered sufficient evaluative material to formulate the April 2012 IEP, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see IHO Decision at pp. 16-17).

characterized the nature of the parent's claims surrounding the appropriateness of the assigned public school site as speculative (IHO Decision at p. 20). In any event, she concluded that the grouping and curriculum offered in the proposed 12:1+1 special class were appropriate (*id.*). The IHO concluded that there was no basis in the hearing record to support a finding that the assigned public school site could not properly execute the student's IEP (*id.*).

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

The parent appeals and requests findings that the district failed to provide the student with a FAPE during the 2012-13 school year, that Aaron constituted an appropriate unilateral private placement and that equitable considerations favor her claim for relief. The parent alleges that the district denied the student a FAPE, in part due to the absence of a special education teacher from the committee who would have been responsible for implementing the student's IEP, which in turn resulted in an improperly constituted CSE. Additionally, the parent submits that the annual goals included in the April 2012 IEP were inappropriate for the student, because they did not accurately reflect the student's academic levels, nor could they be implemented in a 12:1+1 special class in a community school. The parent also contends that placement in a 12:1+1 special class was not appropriate for the student, in part because the student had previously been placed in a 12:1+1 special class and did not make appropriate progress. She further submits that a 12:1+1 special class was too large for the student and that such a setting would not provide him with the necessary support to receive educational benefits. The parent also argues that the recommendation for placement in a 12:1+1 special class would require the student to attend mainstream classes, which was not appropriate for him, in part, because the student would not benefit from exposure to nondisabled peers. Furthermore, the parent alleges that the April 2012 CSE's recommendation to place the student in a 12:1+1 special class was not supported by the evaluative information before it. Moreover, the parent argues that the April 2012 IEP did not adequately support the student's social/emotional needs. Lastly, the parent asserts numerous allegations challenging the assigned public school site selected by the district, including her contention that the student would not have been functionally grouped in the proposed 12:1+1 classroom. Moreover, the parent submits that the student would have been grouped among students who experienced behavioral difficulties, which would have further rendered the particular classroom inappropriate. The parent further asserts that due to its size, the assigned public school site was not appropriate for the student, because it would overwhelm him. More specifically, the parent maintains that the hearing record fails to support the IHO's finding that the student's transitions would be adequately supported at the assigned public school. In addition, the parent alleges that placement of the student in the assigned public school site was not appropriate, because the assigned public school site could not offer the student the necessary support throughout the school day. Specifically, the parent contends that the student's placement in the mainstream setting for non-academic subjects was not appropriate for the student's special education needs.

Next, the parent maintains that Aaron constituted an appropriate unilateral private placement for the student during the 2012-13 school year, in part because it addressed his academic deficits in the areas of English and math. The parent further asserts that the student made progress in English and math as a result of the strategies and interventions employed at Aaron. The parent also alleges that Aaron addressed the student's social/emotional needs, and as

a result, the student's self-esteem has improved and he has expanded his social circle. The parent acknowledges that while the district might characterize Aaron as an overly restrictive educational setting for the student, the parent maintains that Aaron offers the student socially appropriate peers. In addition, the parent argues that Aaron has met the student's language needs, and that the student receives special education support throughout the day. Lastly, the parent argues that equitable considerations favor her request for relief, because she participated in and cooperated with the CSE process. Although the parent admits that she entered into an enrollment agreement with Aaron prior to the CSE meeting, she submits that this does not evidence a lack of intent to enroll the student in a district school. Instead, the parent maintains that she was open-minded with respect to enrolling the student in an appropriate district assigned public school. The parent also alleges that, should a finding that equitable considerations support her claim, she is entitled to an award of direct payment of the student's tuition to be provided at district expense.

In an answer, the district contends that it offered the student a FAPE for the 2012-13 school year, that the hearing record does not establish that Aaron constituted an appropriate unilateral placement for the student and that equitable considerations bar the parent's request for relief. The district alleges that despite the lack of special education teacher from the April 2012 CSE who would have been personally responsible for implementing the disputed IEP, the absence of such an individual did not render the April 2012 IEP inappropriate. Next, the district alleges that the hearing record supports a finding that the goals enumerated in the April 2012 IEP were sufficient and appropriately discussed among the CSE members. The district also contends that the hearing record demonstrates that the April 2012 CSE's recommendation for placement of the student in a 12:1+1 special class for academic subjects, in conjunction with a mainstreaming component for specials would have adequately supported the student's special education needs in the least restrictive environment. The district asserts that mainstreaming the student for non-academic subjects did not result in the denial of a FAPE. Moreover, the district submits that the recommendation for placement of the student in the 12:1+1 special class was supported by the evaluative data before the April 2012 CSE. In addition, the district maintains that the IHO properly determined that the bullying experienced by the student in his prior 12:1+1 special class in a community was not an expected condition in every community school.

The district also argues that Aaron was not an appropriate unilateral private placement for the student, because it was overly restrictive. Specifically, the district claims that the student was denied access to nondisabled peers, because Aaron exclusively educates students with disabilities. Next, the district alleges that the hearing record weighs against a finding that equitable considerations support the parent's request for relief in this instance, because the parent did not seriously consider enrolling the student in a district public school, and was merely "going through the motions" for the purposes of asserting a tuition reimbursement claim. The district also contends that the hearing record does not demonstrate that the parent was eligible for direct payment of tuition because she lacked the ability to pay the tuition for Aaron.

The district also asserts a cross-appeal from the IHO's determination that the district was required to demonstrate at the impartial hearing that the assigned public school site would have adhered to the April 2012 IEP. The district maintains that any claims regarding the adequacy of the assigned public school site were speculative in nature, and cannot form the basis for a finding that it did not offer the student a FAPE. In any event, the district contends that the IHO properly

rejected the parent's claims in relation to the grouping of students within the proposed 12:1+1 special class in the assigned public school site.

The parent submitted an answer to the cross-appeal, in which she maintains that the IHO correctly determined that the district was obligated to demonstrate the appropriateness of the assigned public school site.

## **V. Applicable Standards**

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with

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

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

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

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

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

## **VI. Discussion**

### **A. Scope of Impartial Hearing and Review**

Prior to addressing the merits of the instant matter, I must first determine which issues were properly preserved for appeal. Initially, an independent review of the hearing record reflects that the IHO exceeded her jurisdiction by addressing an issue not included in the parent's due process complaint notice, namely, the IHO concluded that the April 2012 CSE did not predetermine the student's IEP, and that its failure to obtain a social history of the student did not result in a denial of a FAPE to the student (compare IHO Decision at pp. 15-16, with Dist. Ex. 8).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*5-\*7 [S.D.N.Y. Aug. 13, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8

NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parent's due process complaint notice cannot be reasonably read as claiming that the April 2012 CSE impermissibly predetermined the student's IEP or that the lack of social history deprived the student of a FAPE (see Dist. Ex. 8 at pp. 1-2). Further, the hearing record does not reflect that the parent requested or that the IHO authorized an amendment to the due process complaint notice to include these issues. Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, the parent could not pursue and IHO should not have rendered findings on claims of a denial of a FAPE based upon whether the district engaged in impermissible predetermination or whether its failure to include a social history among the evaluative data considered by the April 2012 CSE.<sup>5</sup>

Based on the foregoing, the IHO exceeded her jurisdiction in making determinations of whether there was predetermination by the CSE and whether the lack of a social history deprived the student of a FAPE.

## **B. April 2012 CSE and IEP**

### **1. April 2012 CSE Composition**

Turning next to the parent's contention that the April 2012 CSE was not properly composed due to the absence of a special education teacher who would have been responsible for implementing the April 2012 IEP, a review of the hearing record reveals no basis upon which to reverse the IHO's conclusion.

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<sup>5</sup> To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at \*5-\*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9 [Aug. 5, 2013]; B.M., 2013 WL 1972144, at \*5-\*6), the issues raised and addressed sua sponte by the IHO in the decision were initially raised—if at all during the impartial hearing—by counsel for the parent during closing statements (see, e.g., Tr. p. 470). While the district solicited testimony regarding the creation of the draft IEP (see Tr. p. 36), which ultimately formed the basis for the IHO's determination that IEP was not predetermined, this examination of the witness elicited general background information as part of routine questioning and did not serve to "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at \*10-\*11; J.C.S., 2013 WL 3975942, at \*23; B.M., 2013 WL 1972144, at \*6). Similarly, where, as here, during cross-examination, counsel for the parent questioned the district school psychologist about the existence of a social history of the student prior to the April 2012 CSE meeting, but cross-examination by counsel for the parent cannot be relied upon to open the door to the issue (Tr. pp. 97-98; M.H., 685 F.3d at 250-51).

The presence of a "special education teacher" or "special education provider" of the student is required by the IDEA (20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The Official Analysis of Comments to the federal regulations states that the special education teacher member of the CSE "should be the person who is, or will be, responsible for implementing the IEP" (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). In this case, it is undisputed that the district special education who took part in the April 2012 CSE would not have been responsible for implementing the April 2012 IEP; however, the hearing record lacks any evidence to show that this 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 (Tr. pp. 89, 122-23; 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47).<sup>6</sup> This is particularly so given that the student's Aaron special education teacher participated in the CSE meeting by telephone (Tr. pp. 34-35, 37; Dist. Ex. 1 at p. 15). According to the district school psychologist, the April 2012 CSE valued the student's special education teacher's input, because the special education teacher was working with the student on a daily basis, and the teacher "had a very good sense" of the student's functioning (Tr. p. 37). She further described the student's special education teacher's role on the CSE as "critical," because the special education teacher provided the committee with a lot of information regarding the student's skills and areas of deficit (Tr. pp. 37-38; see Tr. pp. 55-56). The district school psychologist also indicated that the April 2012 CSE addressed the student's "most salient" areas of concern at the meeting, because the committee spent 90 minutes just discussing the student's functioning during the meeting (Tr. pp. 72, 99). In addition, the district school psychologist testified that the student's Aaron special education teacher helped the April 2012 CSE develop the goals (Tr. p. 38). Additionally, the resultant IEP reflected information that was provided by the Aaron teacher (compare Tr. pp. 54-55, with Dist. Ex. 1 at pp. 1-2). As the Aaron teacher—who was directly acquainted with this student's particular needs—was able to fully participate in the April 2012 CSE meeting, I find that the lack of a district special education teacher member of the CSE who would have been able to execute the IEP, did not rise to the level of a denial of a FAPE in this instance (A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; see A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*7 [S.D.N.Y. Aug. 9, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student]'s educational and therapeutic needs"]; Application of a Student with a Disability, Appeal No. 12-071; Application of the Dep't of Educ., Appeal No. 12-010; Application of the Dep't of Educ., Appeal No. 08-105).

## 2. Annual Goals

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<sup>6</sup> The hearing record reveals that the district special education teacher also served as district representative during the April 2012 CSE meeting (Tr. pp. 34, 89; Dist. Ex. 1 at p. 14). Although the district school psychologist noted that the district special education teacher who served on the April 2012 CSE had not taught in a classroom since 2007, the district school psychologist indicated that the district special education teacher was very knowledgeable in terms of the skills that students needed as the curriculum developed (Tr. pp. 122-23). According to the district school psychologist, the district special education teacher's knowledge base regarding special education was "really quite impressive" (Tr. p. 123).

Relative to the parties' dispute concerning the substantive adequacy of the annual goals set forth in the April 2012 IEP, State and federal regulations require that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Here, the parent alleges that the annual goals enumerated in the April 2012 IEP did not reflect the student's academic levels. Initially, relative to the issue of the annual goals, the parties do not dispute that the April 2012 IEP contained an accurate description of the student's educational needs based upon the February 2012 mandated three-year evaluation of the student, Aaron reports, and verbal teacher reports and the parent's concerns considered by the April 2012 CSE (Tr. pp. 30, 107-09; Dist. Exs. 1 at pp. 1-4; 2 at p. 1; 4 at pp. 4-6, 5 at pp. 1-26 at pp. 1-10; 7 at pp. 1-8).

The April 2012 IEP contained approximately 13 annual goals, which addressed the areas of decoding, encoding/spelling, writing, mathematics, social/emotional, and speech-language communication (Dist. Ex. 1 at pp. 4-7). The hearing record establishes that the annual goals enumerated in the April 2012 IEP contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress or gauge the need for continuation or revision, and contained adequate evaluative criteria (id.). A review of the April 2012 IEP shows that each annual goal identified the specific skill the student was to achieve, the criteria by which the student's success toward achieving the skill was to be measured, the procedures that would be utilized by the special education teacher/counselor to evaluate the student's success, and how frequently the special education teacher/counselor was to measure the student's progress toward meeting the particular annual goal (id.). Additionally, contrary to the parent's claims, the annual goals in the April 2012 IEP were directly aligned with the student's needs as described in the present levels of academic performance section in the IEP; specifically, his needs related to reading, decoding of multi-syllabic words, encoding, sentence and paragraph writing and paragraph organization, creating an outline, mathematic operations including subtracting, multiplying, and dividing fractions, solving multi-step problems, processing language and emotions, social interaction, and anxiety and self-control (Tr. pp. 67-72; Dist. Ex. 1 at pp. 1-7). Furthermore, each annual goal included in the April 2012 IEP incorporated a supportive management strategy (i.e., direct instruction, visual and verbal cueing, use of graphic organizers, role-playing, modeling) directly aligned to the student's identified management needs noted in the April 2012 IEP (Tr. p. 68; Dist. Ex. 1 at pp. 3-7).

Furthermore, the evidence in the hearing record went further to suggest that the annual goals contained in the April 2012 IEP were in part the byproduct of the parent's and the Aaron teacher's participation (see Tr. pp. 72, 99; Dist. Ex. 2; T.P., 544 F.3d at 253-54). According to the district school psychologist, the April 2012 CSE discussed "every single one" of the goals

during the meeting (Tr. p. 66). The district school psychologist also indicated that no one at the April 2012 CSE disagreed with the goals (Tr. p. 74). The district school psychologist further noted that the April 2012 IEP's annual goals were appropriate for the student, because they targeted specific skills in deficit areas she characterized as "his most salient areas of concern at the time of the meeting" (Tr. pp. 66-67, 72). According to the April 2012 CSE meeting minutes recorded by the district school psychologist and the district representative during the meeting, the April 2012 CSE developed the student's academic goals at the meeting, and discussed the expected instructional grade levels for the 2012-13 school year (Tr. p. 99; Dist. Exs. 1 at p. 15; 2 at p. 2). The April 2012 CSE meeting minutes reflect a collaborative effort between district personnel, the parent and the student's Aaron teacher to address the parent's concerns regarding the student's annual goals in the April 2012 IEP (see Dist. Ex. 2). Specifically, the April 2012 CSE meeting minutes showed that the student's Aaron teacher offered his input and that the teacher participated in developing academic, counseling, and speech-language goals (id. at p. 2).<sup>7</sup> In addition, the April 2012 CSE meeting minutes indicated the parent requested a writing goal related to appropriate spacing and punctuation in the April 2012 IEP (id.). Correspondingly, the April 2012 IEP reflects that the April 2012 CSE included a goal, which targeted writing mechanics specific to spacing within and between words and punctuation (Dist. Exs. 1 at p. 5; 2 at p. 2).

Overall, the annual goals and short-term objectives contained on the student's April 2012 IEP, when read together, target the student's identified areas of need and provide information sufficient to guide a teacher in instructing the student and measuring his progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at \*11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*13-\*14 [S.D.N.Y. Aug. 19, 2013]; 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]). Accordingly, the parent's claims surrounding the appropriateness of the annual goals incorporated into the April 2012 must fail.

### **3. 12:1+1 Special Class Placement**

The parent also alleges that the IHO erred in concluding that the April 2012 CSE's recommendation of a 12:1+1 special class for academic subjects, with participation in the mainstream environment for all special in a community school was appropriate for the student (IHO Decision at pp. 19-20). Specifically, the parent contends that documents before the April 2012 CSE did not support a recommendation for a 12:1+1 class placement for the student. She further argues that the April 2012 IEP did not adequately support the student's social/emotional needs, nor did the recommended supports in the April 2012 IEP sufficiently address the student's previous experiences in a 12:1+1 class that resulted in the student's lack of progress, difficulties

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<sup>7</sup> The April 2012 CSE meeting minutes showed agreement between the parent and the Aaron teacher's input specific to counseling goals (Dist. Ex. 2 at p. 2).

with peers, and with bullying. Conversely, the district asserts that the IHO properly concluded that the 12:1+1 special class placement for academic subjects, combined with a mainstreaming component for non-academic classes was appropriate to meet the student's needs. An independent review of the hearing record supports the IHO's conclusion.

With regard to the background information relative to the recommended placement, the April 2012 CSE had available for consideration several evaluative documents including a 2012 psychoeducational evaluation, a 2012 classroom observation, a December 2011 Aaron progress report, and a 2012 Aaron School progress report (Tr. p. 30; Dist. Exs. 4-7).<sup>8</sup> The evaluative information discussed at the April 2012 CSE is not in dispute (Tr. pp. 55-57). According to the district school psychologist noted she provided the parent with a draft of the April 2012 IEP that she created prior to the CSE meeting, that included the relevant information from the psychological and Aaron School reports (Tr. p. 36). The district school psychologist further indicated that the April 2012 CSE thoroughly discussed the student's academic, social, and physical strengths and weaknesses (Tr. p. 38; see Dist. Ex. 2 at pp. 1-2). In addition to the parent's input, the hearing record reveals that the student's Aaron teacher "absolutely" participated in the April 2012 CSE and that he provided input about the student that the district school psychologist described as "critical" to developing the student's IEP, because the teacher provided the April 2012 CSE with information about the student's skill areas, areas of concern, deficiency and strength, and he helped develop the student's goals (Tr. pp. 34-36, 37-38). Consistent with information recorded in the April 2012 CSE meeting minutes, the district school psychologist indicated that each section of the April 2012 IEP reflected the parent's concerns and that the parent had an opportunity to participate and voice her concerns and/or disagreement (Tr. pp. 38, 140; Dist. Ex. 2 at pp. 1-2). Furthermore, the district school psychologist testified that the Aaron special education teacher affirmed that the test scores in the February 2012 psychoeducational evaluation were consistent with the student's skill levels that he saw every day (Tr. p. 54). The district school psychologist also noted that no one during the April 2012 CSE voiced disagreement with the CSE's recommendation for a 12:1+1 special class in a community school (Tr. p. 44).

According to the hearing record, in formulating the student's IEP, the April 2012 CSE incorporated the results of the February 2012 psychoeducational evaluation—which included an administration of both the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) and the Woodcock-Johnson III Test of Cognitive Ability (WJ-III) to the student—directly into the April 2012 IEP (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 4 at pp. 1-4). As noted in the April 2012 IEP, the results of the WISC-IV yielded a verbal comprehension standard score in the average range, and perceptual reasoning, working memory, and processing speed standard scores that fell within the borderline range—indicating to the evaluator that the student's overall cognitive functioning was within the borderline range (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4 at pp. 1-4). In addition, the results of the WJ-III—as noted in the April 2012 IEP—produced story recall and reading fluency subtests standard scores in the average range, letter word, passage comprehension, and applied problems subtests scores in the low average range, and

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<sup>8</sup> According to the district school psychologist, prior to the April 2012 CSE meeting, she also reviewed two private psychological evaluations provided by the parent, as well as the above noted evaluative documentation (Tr. p. 30; Parent Ex. C at pp. 1-15). The hearing record contains only one of the privately obtained psychological evaluations (Parent Ex. C at pp. 1-15).

calculation and spelling subtests standard scores in the borderline range (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4 at pp. 2-4). The April 2012 IEP indicated that the student performed between the average and borderline range of academic functioning, with story recall as his greatest strength (Dist. Ex. 1 at p. 1).

In addition, the hearing record reveals that in crafting the student's IEP, the April 2012 CSE also obtained and relied upon information about the student from the district-obtained February 2012 classroom observation report, the December 2011 and March 2012 progress reports from Aaron, as well as verbal reports from his Aaron special education teacher, who participated in the meeting by telephone (Tr. pp. 30-34; Dist. Exs. 1 at pp. 1-3, 12, 15, 2 at pp. 1-2; 5 at pp. 1-2; 6 at pp. 1-10; 7 at pp. 1-8).<sup>9</sup> Per the April 2012 IEP, according to the March 2012 Aaron progress report, academically, the student was receptive to teacher direction when asked to slow down and pronounce his words more effectively when reading for greater comprehension and that he possessed internal motivation to do well on quizzes and homework (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at pp. 4-5). The April 2012 IEP further noted as per the March 2012 Aaron progress report, that the student was an active participant in science labs and he enjoyed hands-on learning (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 5). The April 2012 IEP also reflected that at the meeting, the CSE discussed that the student responded well to positive reinforcement and the use of multiple modalities (Dist. Ex. 1 at p. 2). In addition, the April 2012 IEP indicated the student liked to pre-read, and to know what questions would be asked of him beforehand, and that the student seemed to be helped by the use of scaffolding of directions, chunking of materials, use of checklists and outlines, and sequential breakdown of information in order to work in a step-by-step manner (id.). According to the April 2012 IEP, the student displayed ongoing difficulty with decoding (id.). Despite improvement in basic operations in math, the April 2012 IEP revealed that the student had a continued weakness in adding, subtracting, multiplying, and dividing fractions (id.). Furthermore, the April 2012 IEP noted that the student also exhibited difficulty solving multi-step problems (id.). Although the April 2012 IEP noted the student's strength in summarizing reading passages, a skill that helped him remain on task, the April 2012 IEP also indicated that at the time of the meeting, the student was working on writing succinct sentences in paragraph form (id.). Additionally, the April 2012 IEP reflected the student's difficulty organizing his notes into sentences and paragraphs (id.).

Socially, the April 2012 IEP indicated the parent advised the CSE that the student preferred to be with adults more than with peers (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 1). The April 2012 IEP included specific information from the March 2012 Aaron progress report that the student was gaining confidence in developing and maintaining peer relationships, and he was working on various parameters that affected his appropriate communication skills

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<sup>9</sup> The district school psychologist specified the relevancy of the information the April 2012 CSE obtained from each of the evaluative documents available to it, for purposes of the student's annual review for 2012-13 school year (Tr. pp. 31-33). Specifically, she testified that the February 2012 psychoeducational evaluation indicated the student's cognitive and academic functioning, and detailed areas of social and emotional concerns (Tr. pp. 31-32). The district school psychologist added that the February 2012 classroom observation provided the CSE with a sense of the student's day-to-day functioning (Tr. p. 32). Likewise, she testified that the Aaron reports provided the April 2012 CSE with a good perspective on how the student functioned in the private school from day-to-day, as well as provided information about his concerns and needs in that environment (Tr. p. 32). In addition, the district school psychologist noted that the participation of the student's special education teacher was helpful in developing the April 2012 IEP (Tr. p. 33).

(i.e., verbal and non-verbal communication, physical proximity to communication counterpart) (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at pp. 9-10). Emotionally, he worked on identifying stress triggers and problem solving strategies (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 9). The April 2012 IEP revealed that at times the student's willingness to participate in groups decreased (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 10). The April 2012 IEP also recorded the CSE's discussion that male role models were effective for the student (Dist. Ex. 1 at p. 2). Additionally, the April 2012 IEP indicated that the student role-played potential peer interactions (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 9). Although the April 2012 IEP noted that the student worked hard to follow positive peer interactions and to socialize with peers, it also noted that the student tended to resort to topics of interest to him (i.e., video games) (Dist. Ex. 1 at p. 2). According to the April 2012 IEP, the student benefitted from processing his feelings with adults specific to topics with which he experienced difficulty (id.). Moreover, the April 2012 IEP noted that the student could be disruptive with teachers and peers and that his conversation could be tangential and off task (id.). Further, while the April 2012 IEP reflected that the student experienced difficulty with self-control, it also noted that he was able to be redirected "fairly quickly" (id.). A review of the April 2012 IEP also reflects that the parent voiced her concerns with the student's attention and on his language delays, which affected his ability to process and reason (id.). In regards to the student's physical development, the April 2012 IEP indicated the student was interested in a variety of sports and enjoyed taking piano lessons (id.).

In light of the background information above, and turning to the issue, the April 2012 CSE was cognizant of the student's average to borderline cognitive and academic skills combined with his need for a small classroom environment with additional adult support, the hearing record supports a conclusion that the April 2012 CSE's recommendation of a 12:1+1 special class placement for academic subjects in a community school, was reasonably calculated to enable the student to make meaningful educational gains (Dist. Ex. 1 at pp. 1, 8). With respect to the April 2012 CSE's recommendation for placement of the student in a 12:1+1 special class, State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

According to the district school psychologist, the April 2012 CSE recommended a 12:1+1 special class for academic subjects in a community school after considering student's academic deficits, social concerns, and pragmatic language difficulties for which he required a small classroom setting to support him during the school day, in order for him to function academically (Tr. p. 43).<sup>10</sup> The district school psychologist indicated the April 2012 CSE

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<sup>10</sup> While I do not rely on the school psychologist's testimony that the evaluation reports she read in preparation for the April 2012 CSE meeting did not support the parent's position that the student did not make progress when he previously attended a 12:1+1 class, her testimony indicated that although she respected the parent's

discussed the option of placement in a 12:1 class; however, in the April 2012 IEP, the CSE rejected that option as "insufficiently supportive" (Tr. p. 43; Dist. Ex. 1 at p. 13). Consistent with the April 2012 IEP, the district school psychologist's testimony indicated the student's distractibility and social concerns warranted an additional adult in the classroom to support the student in navigating social relationships and to satisfy his need for redirection (Tr. pp. 43-44; Dist. Ex. 1 at p. 13). Additionally, the April 2012 CSE recommended related services of counseling to support the student's social/emotional needs and speech-language therapy to support his language-based concerns (Tr. p. 43). With respect to the student's participation in the mainstream environment for non-academic subjects, I note that the CSE must be mindful of the IDEA's strong preference for mainstreaming, or educating children with disabilities, to the maximum extent appropriate, alongside their non-disabled peers (M.H. v. New York City Dep't. of Educ., 685 F.3d 217, 224 [2d Cir. 2012]). Here, in this particular instance, notwithstanding the parent's concerns that participation in the mainstream environment would not offer the student any educational benefits, the district school psychologist testified that based on the discussion that took place during the April 2012 CSE meeting, there was insufficient reason to conclude that the student would have been overwhelmed by participation in the mainstream environment (Tr. pp. 78-79).<sup>11</sup> For example, the student's Aaron teacher advised the April 2012 CSE that the student was working on following positive role models and making efforts to interact with peers (Tr. pp. 113, 134-35; Dist. Ex. 2 at p. 1). Similarly, the March 2012 Aaron progress report indicated the student gained confidence in his ability to maintain and develop peer relationships and that he looked forward to developing peer relationships next term, and was enthusiastic about succeeding in school (Dist. Ex. 6 at pp. 3, 8). While the district school psychologist indicated that the April 2012 CSE provided support to the student during academic subjects, she indicated that the student could function with nondisabled peers during non-academic subjects (Tr. pp. 77-78).<sup>12</sup> In particular, although the district school psychologist explained that the student required support when adding fractions, she suggested that the student could and should learn to function with nondisabled peers during gym, art and music (Tr. p.

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position, the evaluative data over time did not support the parent's perspective (Tr. pp. 47-48). The district school psychologist indicated that the available data demonstrated the student made slow progress over time, and that his removal from nondisabled peers rendered no significant difference in his progress (Tr. pp. 50-52).

<sup>11</sup> Although the parent contends that the student's experiences with bullying while previously enrolled in a district 12:1+1 special class rendered the April 2012 CSE's recommendation inappropriate, there is no basis in the hearing record to support such a finding. Initially, I note that for purposes of a tuition reimbursement claim, each school year must be treated separately (see Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at \*21-\*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008]). Therefore, the student's prior experiences in a 12:1+1 special class setting during prior school years have little to no bearing on the appropriateness of such a recommendation for purposes of her claims arising out the 2012-13 school year. Moreover, recent OSEP guidance suggests that certain changes to the education program of a student with a disability, who was the target of bullying behavior may constitute a denial of the IDEA's requirement that the district provide FAPE in the LRE (Dear Colleague Letter, 61 IDELR 263 [OSEP Aug. 20, 2013]).

<sup>12</sup> The district school psychologist explained that the student "was not operating in a vacuum," such that he was mandated to receive counseling and speech-language therapy and that there would be providers in the building to address any concerns that might arise (Tr. pp. 78-79).

78).<sup>13</sup> The district school psychologist opined that the role of education was to help individuals learn how to function in a larger society, and one way to accomplish this mission was to allow access to nondisabled peers, so that disabled students learn how to negotiate and function, and that the April 2012 CSE accounted for that in this instance (Tr. p. 45). To the extent that the parent claims that participation in the mainstream environment could overwhelm the student, the district school psychologist referred to the supports in the April 2012 IEP, such as counseling, speech-language therapy and goals to support the student's social/emotional deficits (Tr. pp. 78-79, 113).<sup>14</sup>

As previously discussed, with the participation of the Aaron teacher, the April 2012 CSE developed a thorough array of classroom management strategies and annual goals to address the student's needs (Dist. Exs. 1 at pp. 3-7; 2 at p. 2). For example, the April 2012 IEP prescribed the provision of graphic organizers, outlines, verbal praise, guided note taking, individualized attention, modeling, scaffolding, clear instructions, a consistent behavioral reinforcement system, highlighting, repetition and redirection, completion of task for the teacher to help him remain active, and assigned seating next to peers with whom the student could get along (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 6 at pp. 3-7).<sup>15</sup> Consistent with evaluative documentary evidence available to the CSE, and the minutes of the April 2012 CSE, the April 2012 IEP also indicated that "given the extent of [the student's] cognitive and academic delays," the student required modifications to the general education curriculum (Dist. Exs. 1 at p. 3; 2 at p. 2).<sup>16</sup> The April 2012 CSE indicated in the IEP that the student required instruction for all academic subjects in a small classroom setting with additional adult support (Dist. Ex. 1 at pp. 8, 11, 13). Furthermore, for State and local tests administered to general education students, the April 2012 CSE recommended testing accommodations of extended time (double), separate location when given extended time, use of a calculator for math exams, directions read aloud, and answers recorded in test booklet (id. at pp. 9-10).

Based on the foregoing evidence a 12:1+1 special class placement, with the support of the modifications and academic management strategies incorporated into the student's April 2012

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<sup>13</sup> I note, however, that the April 2012 IEP does not specify the level of support that the student would receive during non-academic subjects (Dist. Ex. 1 at p. 8).

<sup>14</sup> To the extent that the parent alleges that the April 2012 IEP was deficient, because it did not set forth a transition plan to facilitate the student's transfer from Aaron to a district public school, the IDEA does not impose such a requirement on school districts (see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y., Oct. 16, 2012]; A.L. v. New York City Dept. of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z.-L. v. New York City Dept. of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011] *aff'd sub nom. R.E.*, 694 F.3d at 195). In any event, the district school psychologist pointed to supports incorporated into the April 2012 IEP to facilitate the student's transition to the assigned public school site such as counseling, speech-language therapy in addition to the support provided by the student's special education teacher and paraprofessional (Tr. p. 79).

<sup>15</sup> The student's Aaron teacher added highlighting and the provision of assigned seating to the management needs built into the April 2012 IEP (Dist. Ex. 2 at p. 2).

<sup>16</sup> The April 2012 CSE meeting minutes reflected that all members of the CSE agreed that the student required a modified curriculum (Dist. Ex. 2 at p. 2).

IEP, was tailored to address the student's individual special education needs and was reasonably calculated to provide him with educational benefits in the LRE.

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

Turning next to the district's cross-appeal, as detailed below, the district correctly argues that the IHO erred to the extent that she concluded that the district was required to present evidence during the impartial hearing showing that the assigned public school site would deliver services to the student in conformity with his IEP, because the parent rejected the April 2012 IEP prior to the commencement of the school year, and opted not to enroll him in the proposed 12:1+1 special class in the assigned public school.

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., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C., 906 F. Supp. 2d at 273 [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in

which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at \*4 [2d Cir. May 21, 2013]), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing, the parent cannot prevail on claims that the district would have failed to implement the April 2012 IEP at the public school site as a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at \*6; R.E., 694 F3d at 186 [2d Cir. 2012]; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the April 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. D; M).<sup>17</sup> Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington School Dist., 2013 WL 6818376, at

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<sup>17</sup> Even if the parent could retrospectively challenge the IEP through after acquired information, the parent's reliance on D.C. v. New York City Dep't. of Educ. in this instance would be misplaced, because in making her decision in this case, the parent did not rely on information provided to her regarding the assigned public school site; rather, she rejected the April 2012 IEP prior to the beginning of the school year (Tr. p. 332; Parent Ex. M; D.C. v. New York City Dep't. of Educ., 2013 WL 1234864 [S.D.N.Y. 2013] ).

\*13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE)]. However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parent to challenge the IEP services through information she acquired after the fact. I disagree with the IHO's conclusion, that under these circumstances the district was required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site, when the parent rejected it and unilaterally placed the student.

## **VII. Conclusion**

Having determined, as did the IHO, that the evidence in the hearing record demonstrates that the district sustained its burden to establish that if offered the student a FAPE in the LRE 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 Aaron was an appropriate placement or whether equitable considerations support the parent's claim (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**Dated:** Albany, New York  
December 31, 2013

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