



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-003

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Law Office of Peter D. Hoffman, PC, attorneys for petitioners, Peter D. Hoffman, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Franklin Academy for the 2012-13 and 2013-14 school years. 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 2010-11 school year (sixth grade) and 2011-12 school year (seventh grade), the student attended general education classes at an out-of-State, "college prep" nonpublic school with "small classes" of 10 to 14 students; however, in March 2012, the student received 1:1 instruction through an out-of-State "tutoring educational program" in order to complete his course requirements at the out-of-State, "college prep" nonpublic school (see Tr. pp. 1222, 1225-29, 1364-66; see generally Dist. Exs. 8-9; 30-36; 41-60; 62).¹

¹ During the 2010-11 and 2011-12 school years, the public school district where the out-of-State nonpublic school was located (district of location) prepared a "Service Plan" for the student, but the student did not receive any special education programs or services from either the out-of-State nonpublic school or pursuant to the "Service Plan" developed by the district of location (see Tr. pp. 1222-23, 1226, 1366, 1368-72; Dist. Ex. 6 at pp. 1-9).

On May 10, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (eighth grade) (see Dist. Ex. 8 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the May 2012 CSE reviewed and discussed the student's present levels of performance, annual goals, placement options, testing accommodations, program modifications, and transitional needs (id. at p. 2).² At that time, the May 2012 CSE agreed to arrange a "parental visit to [the district middle school] to consider the placement," noting further that the CSE would "reconvene to finalize placement recommendations" (id.).

On June 5, 2012, the parents visited the district middle school (see Dist. Ex. 9 at pp. 1-2). In a letter dated June 5, 2012, the parents received notice of the student's acceptance to attend the Franklin Academy for the 2012-13 school year (see Parent Ex. DD at p. 1; see also Dist. Exs. 119-29; 131-40).

On June 6, 2012, the CSE reconvened to discuss "additional information" about the student and to "consider his needs for support, so that an appropriate program c[ould] be identified for the 2012-13 school year" (Dist. Ex. 9 at p. 2). The June 2012 CSE discussed the parents' visit to the 12:1+2 special class placement at the district middle school, the parents' concerns about the "appropriateness" of the "program," and the "need for a program search" (id.). At that time, the June 2012 CSE recommended that the student visit the 12:1+2 special class program at the district middle school for a "trial time frame" after he completed his school year (id.).

In a letter dated June 22, 2012, the parents advised the district that they rejected the "IEP . . . dated 6/5/12" and reserved the right to place the student in "private special education" at district expense (Dist. Ex. 68).

On or about July 1, 2012 through July 14, 2012, the student attended a summer program at the Franklin Academy (see Dist. Ex. 133-34; 136-37; Parent Ex. FF at pp. 1-2). On July 8, 2012, the parents executed an enrollment contract with the Franklin Academy for the student's attendance during the 2012-13 school year (see Parent Ex. DD at p. 2).^{3,4}

On August 30, 2012, the CSE reconvened to finalize the student's IEP for the 2012-13 school year (see Dist. Ex. 10 at pp. 1-2).⁵ After reviewing "previously completed components of

² The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ Following the June 2012 CSE meeting and throughout July 2012, the parents exchanged e-mails with various district staff who attended the June 2012 CSE meeting (see Dist. Ex. 112 at pp. 1-14). As a result, the parents received a class profile of the classroom, and the parties continued to raise and address issues about the student's 2012-13 program and placement (id.). In an e-mail dated July 11, 2012, the district school psychologist indicated that the parents did "not necessarily agree" that the student needed an "outside program," and further, that the student would be leaving the following week for "camp" until August 23, 2012 (id. at pp. 6, 9-10). On July 16 2012, the parents and the student met with the district school psychologist who attended the June 2012 CSE meeting; the meeting lasted approximately two hours (see Dist. Ex. 112 at pp. 8-13).

⁴ By letter dated August 10, 2012, the parents' attorney provided the district with a letter of representation, and further notified the district that the parents rejected the "current IEP" (Dist. Ex. 70 at pp. 1-4).

⁵ According to the comments in the August 2012 IEP, the additional parent member was "excused" from the meeting pursuant to the "request of the parent's attorney and the parent" (Dist. Ex. 10 at p. 2).

the IEP to ensure that they remain[ed] accurate," the August 2012 CSE reviewed and revised the annual goals, as well as the program modifications, assistive technology needs, and testing accommodations (id. at p. 2). Based upon the information, the August 2012 CSE recommended a 12:1+2 special class placement at the district middle school along with related services consisting of one 30-minute session per week of individual psychological counseling, one 30-minute session per week of psychological counseling in a small group, and one 30-minute session per week of individual parent counseling (id. at pp. 1-2, 9, 13). Additionally, the August 2012 CSE recommended supplementary aids and services, program modifications, and accommodations; assistive technology devices and services; testing accommodations; and supports for school personnel on behalf of the student, which included one 30-minute session per quarter of assistive technology consultation services, one 40-minute team meeting per week, and one 30-minute session per month of psychological counseling services consultation (id. at pp. 9-11).⁶ At the conclusion of the meeting, the parents informed the August 2012 CSE that the "recommended program" would not meet the student's needs, and the student would attend an out-of-State "private boarding school" (id. at p. 2).⁷

In a letter dated August 30, 2012, the parents notified the district that the "proposed program" at the district middle school was not appropriate to meet the student's needs, and further notified the district of their intentions to place the student at the Franklin Academy (see Dist. Ex. 73). During the 2012-13 school year, the student attended the Franklin Academy (see Dist. Exs. 12 at p. 2; 38 at p. 1; 39 at p. 1; 40 at pp. 1, 3).

On October 2, 2012, the parents consented to the following reevaluations of the student: an adaptive behavior assessment, a Level 1 Assessment (Student Interview and Parent Profile), the Bruininks-Oseretsky Test of Motor Proficiency, the Test of Visual Perception, the Visual Motor Integration Test, an assistive technology evaluation, and an OT evaluation (see Dist. Ex. 82; see also Dist. Exs. 81 at pp. 1-4; 83 at pp. 1-2).⁸ The district completed the reevaluations of the student during October and November 2012 (see Dist. Exs. 37-40).

⁶ The August 2012 CSE also "reaffirmed the need" to complete a Level 1 assessment and a Career Interest Inventory; in addition, the August 2012 CSE indicated it would seek parental consent for an assistive technology evaluation, an occupational therapy (OT) evaluation, an adaptive behavioral scale, a functional behavioral assessment (FBA) and a "behavioral improvement plan" (see Dist. Ex. 10 at p. 2).

⁷ For the purpose of clarity, the May 2012 IEP was superseded as a result of the June 2012 and August 2012 CSE meetings, and the resulting August 2012 IEP—which modified both the May 2012 and June 2012 IEPs—became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (see Dist. Exs. 8 at pp. 1-2; 9 at pp. 1-2; 10 at pp. 1-2; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Consequently, this decision will refer to the August 2012 IEP as the IEP at issue for the 2012-13 school year.

⁸ The district initially requested the parents' consent for reevaluations in a letter dated September 14, 2012; however, the parents forwarded that letter to their attorney to "revise the authorizations" and indicated to the district that they would sign the authorizations upon completing the necessary revisions (Dist. Ex. 79). In a letter dated September 24, 2012, the district indicated that because an FBA was "specific to the program" recommended for the student, the FBA could only be done with the student "attending our program;" thus, the letter requesting the parents' consent for evaluations did not list an FBA (Dist. Ex. 80).

On January 8, 2013, the parents executed an enrollment contract with the Franklin Academy for the student's attendance during the 2013-14 school year (see Parent Ex. DD at p. 5; see also Dist. Ex. 141).⁹

On May 14, 2013, a subcommittee of the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (ninth grade) (see Dist. Ex. 12 at pp. 1-3). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the May 2013 CSE subcommittee recommended a 12:1+2 special class placement and integrated co-teaching (ICT) services for instruction in mathematics at the district high school (id. at pp. 1, 10, 14).^{10, 11} The May 2013 CSE subcommittee also recommended related services consisting of one 30-minute session per week of individual psychological counseling, one 30-minute session of psychological counseling in a small group, and one 30-minute session per week of individual parent counseling (id. at pp. 1, 10). Additionally, the May 2013 CSE subcommittee recommended supplementary aids and services, program modifications, and accommodations; assistive technology devices and services; testing accommodations; and supports for school personnel on behalf of the student, which included one 30-minute session per quarter of assistive technology consultation services, one 40-minute team meeting per week, and one 30-minute session per month of psychological counseling services consultation (id. at pp. 10-12). At the conclusion of the meeting, the parents notified the May 2013 CSE subcommittee of their intention to continue the student's "placement" at the Franklin Academy (id. at p. 2).

By letter dated June 18, 2013, the parents rejected the "IEP" for the 2013-14 school year because the "proposed placement at [the district high school was] not appropriate given [the student's] history and his needs" (Dist. Ex. 106). In addition, the parents notified the district of their intentions to place the student at the Franklin Academy and to seek reimbursement for the costs of the student's placement (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 27, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12, 2012-13, and 2013-14 school years (see Dist. Ex. 1 at pp. 1-3). Relevant to this appeal and with respect to the 2012-13 school year, the parents alleged that notwithstanding the discussions regarding out-of-district placement options for the student, the district failed to follow up with the parents about these options and failed to send the parents "information regarding outside referrals" after the June 2012 CSE meeting (id. at pp. 11-13). Also, the parents asserted that the district middle school was "not equipped to deal with [the student's] social functioning issues and did not have a residential program," and the student would not be appropriately functionally grouped (id. at p. 12). The parents alleged that the ICT services recommended by the June 2012 CSE were not appropriate, as the CSE failed to "sufficiently and appropriately address [the student's] social and

⁹ On February 12, 2013, the CSE reconvened to review the reevaluations and recommended additional writing and reading software as assistive technology devices or services for the student for the remainder of the 2012-13 school year (compare Dist. Ex. 10 at pp. 9-10, with Dist. Ex. 11 at pp. 1-3, 10-12).

¹⁰ The student's eligibility for special education programs and related services as a student with other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

¹¹ The May 2013 CSE subcommittee referred to the 12:1+2 special class placement in the May 2013 IEP as the "Bridge" program (see Dist. Ex. 12 at pp. 1, 10).

emotional issues," and its recommendation for the student to attend the district middle school was also not appropriate (id. at p. 13). Next, the parents asserted that the June 2012 CSE failed to consider "literature" they provided regarding the student's nonverbal learning difference profile (id. at pp. 13-14). Finally, the parents alleged that the "placement" recommended by the August 2012 CSE was not appropriate (id. at p. 14).

With respect to the 2013-14 school year, the parents alleged that the 12:1+2 special class placement with ICT services for instruction in mathematics at the district high school, together with weekly individual and small group counseling and weekly parent counseling, recommended by the May 2013 CSE subcommittee was not appropriate (see Dist. Ex. 1 at p. 15). The parents also alleged that the district high school was "too big" for the student, and in "such large environments," the student became "overwhelmed" and had "physical altercations" (id.).

With respect to the unilateral placement, the parents alleged that the Franklin Academy—a "college preparatory school"—was an appropriate placement for the student (see Dist. Ex. 1 at p. 16). The parents noted that the program at the Franklin Academy was "narrowly tailored to meet [the student's] specific learning needs" (id. at p. 17). Additionally, the parents indicated that the student made progress at the Franklin Academy during the 2012-13 school year (id. at p. 19). With regard to equitable considerations, the parents asserted that they fully cooperated with the district (id.). As relief, the parents requested compensatory educational services for the district's failure to offer the student a FAPE during the 2011-12 and 2012-13 school years, and to be reimbursed for the costs of the student's tuition at the Franklin Academy for the 2012-13 and 2013-14 school years (id. at pp. 2, 20).

B. Impartial Hearing Officer Decision

On September 20, 2012, the parties proceeded to an impartial hearing, which concluded on September 12, 2014 after 17 days of proceedings (see Tr. pp. 1-3001).¹² In a decision dated November 22, 2014, the IHO concluded that the district offered the student a FAPE for the 2012-13 and 2013-14 school years, and thus, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition at the Franklin Academy for the 2012-13 and 2013-14 school years (see IHO Decision at pp. 53-71).

Turning to the 2012-13 school year, the IHO found that contrary to the parents' assertions the evidence demonstrated "substantial parental participation" at the May 2012 and June 2012 CSE meetings regarding the parents' "request for non-district placements" (IHO Decision at pp. 57-59). The IHO also found that the parents informed the CSE about the student's nonverbal learning disorder, the parents visited the 12:1+2 special class placement at the district middle school in July 2012, and the district school psychologist "explained the recommended program" to the parents at the July 16, 2012 meeting (id. at p. 58). Relying upon testimonial evidence, the IHO found that the CSE chairperson "reported that he explored other potential placements" in May and June 2012, but "based on his knowledge of [the student's] profile," the CSE chairperson opined that the 12:1+2 special class placement at the district middle school was appropriate

¹² At the impartial hearing, the parents withdrew the request for compensatory educational services for the district's alleged failure to offer the student a FAPE for the 2011-12 school year (see Tr. pp. 1160, 1180-92; see also IHO Decision at pp. 7, 56). Consequently, the IHO determined that given the applicable statute of limitations, she would "only consider claims" for the 2012-13 and 2013-14 school years (IHO Decision at pp. 7, 56).

(id.)¹³ In addition, the IHO concluded that the August 2012 CSE considered the parents' concerns regarding the student's social/emotional functioning, and as a result, recommended "special education services from a special education teacher to support the student throughout the day as well as substantial related services including individual and group counseling" (id.).

Next, the IHO found that the evidence in the hearing record did not support the parents' contention that the district failed to consider "other programs" besides the 12:1+2 special class placement at the district middle school (see IHO Decision at p. 59). With respect to the parents' allegation that the ICT services recommended in June 2012 IEP were not appropriate, the IHO determined that the June 2012 IEP "was not the final IEP as there were many questions to answer before determining the appropriate placement," noting further that the parents and student were scheduled to visit the 12:1+2 special class placement (id.). Turning to the parents' contention that the district middle school was "not equipped to deal with [the student's] social functioning and did not have a residential program," the IHO found that based upon the parents' testimony the August 2012 CSE did not receive any report "recommending a residential placement" (id.). Moreover, the IHO noted that the parents' privately obtained April 2012 neuropsychological assessment did not include any recommendation for a "small school or even a small class, but merely recommended 'increased educational, emotional and social support'" (id.).

Addressing the parents' argument that the "proposed special class observed" at the district middle school failed to provide the "type of social functioning" the student needed, the IHO concluded that such argument was speculative and contrary to the testimonial evidence (IHO Decision at pp. 59-60). The IHO also found that the hearing record contained no evidence upon which to conclude that the student could not "learn in the special class in the community middle school," and further, that the recommended placement offered the student a "smaller, more nurturing environment" that was "designed to function as a school within the middle school" for the 2012-13 school year (id. at pp. 60-61).

Based upon the evidence in the hearing record, the IHO concluded that the August 2012 IEP offered the student a FAPE for the 2012-13 school year, noting that the IEP provided the student with assistive technology, special alerts, and management needs that corresponded with the recommendations in the April 2012 neuropsychological assessment to address the student's "fine motor and executive deficits" (IHO Decision at pp. 60-61). The IHO also found that the August 2012 CSE's related services recommendations for individual and group counseling addressed the student's social/emotional issues and was "consistent with the evaluations and input from the parent[s] and the [neuropsychologist]" who conducted the April 2012 neuropsychological assessment (id. at p. 61). Next, the IHO found that the program modifications recommended in the August 2012 IEP addressed the student's "executive functioning deficits as noted in [the April 2012 neuropsychological assessment]," which indicated that the student required "consistent support to complete tasks and structure his time" (id.). The IHO also determined that the August 2012 IEP addressed the student's "special education problems in a small learning environment with a large and varied amount of supports and services, and provided mainstreaming opportunities" (id. at pp. 61-62). Finally, the IHO found that the testing accommodations recommended in the August 2012 IEP addressed the student's "anxiety" as indicated in the April 2012 neuropsychological assessment (id. at p. 62).

¹³ The same district individual acted as the CSE chairperson for the May 2012, June 2012, August 2012, February 2013, and May 2013 meetings (see Dist. Exs. 8 at p. 1; 9 at p. 1; 10 at p. 1; 11 at p. 1; 12 at p. 1). For clarity, this individual will be referred to as the CSE chairperson throughout this decision.

With regard to the development of the August 2012 IEP, the IHO found that the CSE relied on "sufficient current evaluative data"—which included reports from the student's then-current teachers, as well as the April 2012 neuropsychological assessment—to obtain the student's present levels of academic and social/emotional functioning (IHO Decision at p. 62). In addition, the IHO concluded that the information obtained about the student supported the August 2012 CSE's decision to recommend a 12:1+2 special class placement (id. at pp. 62-63). Next, the IHO discussed the parents' attempt to raise the district's alleged failure to conduct an FBA and to develop a behavioral intervention plan (BIP) in a post-hearing brief; the IHO determined that she need not address the issue because the evidence in the hearing record demonstrated that the August 2012 CSE considered the parents' concerns about the student's social/emotional functioning and appropriately recommended individual and group counseling, parent counseling, and weekly team meetings to address the student's behavior issues (id. at pp. 64-65). Finally, the IHO found that the evidence supported a finding that the district middle school could properly implement the August 2012 IEP (id. at pp. 62-63, 65-66).

With regard to the 2013-14 school year, the IHO found that the recommended 12:1+2 special class placement with ICT services for instruction in mathematics was appropriate (see IHO Decision at pp. 66-67). Generally, the IHO also found that the May 2013 CSE subcommittee considered and relied upon updated evaluative information about the student in developing the May 2013 IEP, as well as input from those individuals who observed the student (id. at p. 67). The IHO further found that the May 2013 IEP appropriately included related services; supplemental services, program modifications, and accommodations; and assistive technology (id.). With respect to the parents' allegations regarding the district high school, the IHO found that the school "was not too large an environment" for the student due to the close proximity of the student's academic and elective classes (id. at p. 68). Finally, the IHO found that the program recommended in the May 2013 IEP "addressed the student[s] special education needs in a small learning environment within a large high school and provided substantial supports and services and offered [the student] mainstreaming opportunities" (id.). Therefore, the IHO concluded that the May 2013 IEP offered the student a FAPE for the 2013-14 school year (id.).

Having concluded that the district offered the student a FAPE for the 2012-13 and 2013-14 school years, the IHO nonetheless determined that the Franklin Academy was not an appropriate unilateral placement for the student for the 2012-13 and 2013-14 school years, and equitable considerations did not weigh in favor of the parents' request for relief (see IHO Decision at pp. 68-71). With regard to the unilateral placement, the IHO found that the parents failed to demonstrate how the Franklin Academy addressed the student's academic and social/emotional needs or how the Franklin Academy was tailored to the student's unique special education needs, and in particular, the student's social/emotional needs (id. at pp. 68-70). With respect to equitable considerations, the IHO found that the parents "did not cooperate with the CSE's efforts to provide FAPE" for the 2012-13 school year because they were not "forthcoming regarding the need for a residential placement" (id. at p. 70). Additionally, the IHO found that the parents failed to inform the August 2012 CSE that the student attended a summer program at the Franklin Academy (id. at pp. 70-71). As a result, the IHO indicated that she need not address the issue pertaining to the grandmother's payment of the student's tuition at the Franklin Academy (id. at p. 71).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 and 2013-14 school years.¹⁴ Specific to the 2012-13 school year, the parents assert that the CSE failed to adequately consider the information in the April 2012 neuropsychological assessment and provided "no information" regarding how the student's "emotional dysregulation would be addressed." Next the parents disagreed with the IHO finding that there was "substantial parental participation" at the May and June 2012 CSE meetings, noting that the CSE failed to adequately consider "outside placements" for the student and failed to send referral packets to potential placements. The parents also argue that the evidence did not support the IHO's finding that a July 2012 meeting between the parents and the district school psychologist constituted a visit to the "special class," and further deny that the parents' visit to the district middle school in June 2012 constituted parental participation because the "special class" was not in "session." The parents allege that the August 2012 IEP failed to mention a document distributed to the CSE, which described a nonverbal learning disability. The parents also allege that the IHO erred in finding that the August 2012 CSE considered the parents' concerns about the student's social/emotional functioning, and argue that the CSE failed to discuss or conduct an FBA or develop a BIP for the student. Next, the parents argue that the IHO erred in finding that the 12:1+2 special class placement was appropriate. The parents disagreed with the IHO's finding that the parents failed to provide the August 2012 CSE with a report recommending a residential program. The parents also disagreed with the IHO's finding that the CSE relied upon sufficient evaluative information in developing the August 2012 IEP. Additionally, the parents assert that the district middle school was not appropriate for the student, as it was too large and the student would have difficulty navigating the school, and further, the student would not be appropriately functionally grouped at the district middle school.

With regard to the 2013-14 school year, the parents assert that the IHO erred in finding that the 12:1+2 special class placement with ICT services was appropriate. The parents also assert that the May 2013 CSE did not explain how the recommended placement would address the student's nonverbal learning disability or emotional dysregulation, and the CSE failed to consider the parents' concerns. The parents assert that the IHO erred in finding that the district high school was not too large of an environment for the student. Finally, the parents assert that the IHO erred in finding that the Franklin Academy was not appropriate and that equitable considerations did not weigh in favor of their request for relief.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety. Additionally, the district argues that the parents failed to raise the issues of parental participation, functional grouping at the district middle school, the parents' receipt of the August 2012 IEP, the sufficiency of the evaluative information relied upon to develop the August 2012 IEP, and whether the CSE failed to conduct an FBA and to develop a

¹⁴ To the extent that the parents do not appeal the IHO's findings related to school years prior to the 2012-13 and 2013-14 school years or the IHO's determination to limit the decision to issues regarding the 2012-13 and 2013-14 school years, the IHO's findings related to prior school years—and the decision to address issues related to the 2012-13 and 2013-14 school years—have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

BIP for the student in the due process complaint notice, and consequently, these issues are outside of the permissible scope of review on appeal.¹⁵

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. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

¹⁵ As properly argued by the district, since the parents assert for the first time on appeal that the district failed to offer the student a FAPE for the 2012-13 school year because the August 2012 CSE relied upon outdated or insufficient evaluative information, the parents' untimely receipt of the August 2012 IEP, and the CSE's failure to discuss or conduct an FBA or to develop a BIP for the student, these allegations are outside the permissible scope of review and will not be considered (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 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., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]). However, contrary to the district's assertions and upon review of the parents' due process complaint notice, I find that the parents did raise the issues of parental participation and functional grouping at the district middle school in the due process complaint notice; therefore, these issues are properly before me on appeal and will be considered (see Dist. Ex. 1 at pp. 11-13).

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. 2012-13 CSE Process—Parental Participation

Turning to the parties' dispute with respect to parental participation during the 2012-13 CSE process, although the evidence in the hearing record supports the parents' arguments that the CSE failed to keep the parents informed about potential out-of-district programs or a program search, the weight of the evidence in the hearing record supports the IHO's determination.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

At the impartial hearing, the CSE chairperson testified that the parents inquired about "what other options might potentially be available" for the student at the May 2012 CSE meeting (see Tr. pp. 88-89). In response to the parents' inquiry, the May 2012 CSE discussed placement

options, including "therapeutic and other kinds of programs," outside of the district but within the surrounding area for students on the autism spectrum (see Tr. pp. 78, 88-89, 262-63, 267-68, 427-28; Dist. Ex. 8 at p. 2). At the May 2012 CSE meeting, the CSE also wanted the parents to consider the district middle school as a potential placement, and arranged for the parents to visit the district middle school to "consider the placement"—and the parents visited on June 5, 2012 (Dist. Exs. 8 at p. 2; 9 at pp. 1-2; see Tr. pp. 77-79).

At the June 2012 CSE meeting, the CSE discussed the parents' visit to the 12:1+2 program on the previous day and the parents' concerns about it as a "potential placement," as well as the "need for a program search;" at the impartial hearing, the CSE chairperson testified, however, that the June 2012 CSE did not recommend a program search or agree to send out packets to other programs (see Tr. pp. 79-80, 272-73, 277-80, 296-97, 301, 308-11; Dist. Ex. 9 at p. 2). In addition, the CSE chairperson testified that the CSE did not make a placement recommendation at the June 2012 CSE meeting because they wanted to "further discuss a program search" and they wanted the student, himself, to visit the 12:1+2 special class at the district middle school (Tr. pp. 272-43, 277-80; see Dist. Ex. 9 at p. 2; compare Dist. Ex. 8 at p. 1, with Dist. Ex. 9 at p. 1). However, the CSE chairperson also testified that they "started to have contact" with out-of-district placements to initially determine whether openings existed, but he could not recall whether he discussed these efforts with the parents (Tr. pp. 281-82; see Tr. pp. 299-301, 306-07). Ultimately, the August 2012 CSE recommended a 12:1+2 special class placement at the district middle school (see Tr. pp. 85-88; compare Dist. Ex. 8 at p. 1, and Dist. Ex. 9 at p. 1, with Dist. Ex. 10 at p. 1). At the impartial hearing, the CSE chairperson testified that although the May 2012 CSE did not know at that time which program option "made the most sense," as the CSE process "moved forward, [the CSE] felt strongly that the solution" was the 12:1+2 special class placement at the district middle school (Tr. pp. 88-89). In addition, the CSE chairperson testified that "[o]ver the course of time [the CSE] became convinced" that the 12:1+2 special class placement at the district middle school was "very similar to" the out-of-district programs or placements discussed at either the May or June 2012 CSE meetings, and further, that the 12:1+2 special class placement also "satisfied the least restrictive environment test" (Tr. pp. 414-26).

At the impartial hearing, the parents testified that during the June 2012 CSE meeting they expressed concerns about the appropriateness of the 12:1+2 special class at the district middle school and asked about other available programs—and the CSE chairperson "began to name them" and relayed "anecdotal stories" about the programs (Tr. pp. 1247-48). In addition, the parents testified that they thought it "would be really great if there were some option other than" the 12:1+2 special class because they were not "sure that [it] was appropriate" (see Tr. pp. 1247-49). However, after the June 2012 CSE meeting, the parents testified that they did not receive any further information about "other placement options" (Tr. pp. 1256-60). According to the evidence in the hearing record, however, the parents advised the district that they rejected the June 2012 IEP in a letter dated June 22, 2012, and reserved the right to place the student in "private special education" at district expense (Dist. Ex. 68).

At the impartial hearing, neither the CSE chairperson nor the parents recalled any discussion at the August 2012 CSE meeting about program or placement options other than the 12:1+2 special class at the district middle school (see Tr. pp. 349-50, 389, 1274-77). In addition, a review of the August 2012 IEP does not indicate any discussion at the August 2012 CSE meeting about program or placement options other than the 12:1+2 special class at the district middle school (see Dist. Ex. 10 at pp. 1-13). Similarly, a review of the prior written notices sent

to the parents after each CSE meeting reveals that the district did not include any information about whether the CSEs considered conducting an out-of-district program or placement search or the results of any such search, or whether the CSEs declined to proceed with such search (see Dist. Exs. 63; 66 at pp. 1-2; 72 at pp. 1-2).

Given the foregoing, it appears that although the May and June 2012 CSEs continued to consider and discuss placement and program options for the student—including potential out-of-district programs—the CSE did not effectively communicate the status of any out-of-district program search, or whether the CSE agreed to or refused to conduct an out-of-district program search to the parents. Indeed, the prior written notices sent to the parents after each CSE meeting recited the same information with regard to "other options considered and the reasons why those options were rejected," namely, "[t]here were no other options considered at this time" (see Dist. Exs. 63; 66 at p. 1; 72 at p. 1). However, even assuming that the CSE's failure to effectively communicate with the parents or the CSE's failure to keep the parents adequately apprised of any out-of-district program search constituted procedural violations, the hearing record does not contain sufficient evidence upon which to conclude that such procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE 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]). Rather, the evidence in the hearing record indicates that the parents were afforded the opportunity to participate in the development of the August 2012 IEP and to express and present their concerns.¹⁶ At the May 2012 CSE meeting, the parents, the neuropsychologist who completed the April 2012 neuropsychological assessment, and the learning specialist from the student's then-current nonpublic school reported on the student's needs and expressed their concerns regarding the student's ability to engage in academics (see Tr. pp. 251-53, 257-58, 259-61, 1232-33, 1589-90, 1697-98; Dist. Exs. 8 at pp. 2, 4; 62). Both the May and June 2012 CSEs decided to reconvene to finalize the student's IEP for the 2012-13 school year in order to provide the parents and the student with an opportunity to visit the 12:1+2 special class placement at the district middle school (see Tr. pp. 78-80, 272-73, 627, 645, 1235; Dist. Exs. 8 at p. 2; 9 at p. 2). During both the June and August 2012 CSE meetings, the parents expressed their concerns regarding the student's executive functioning skills and social/emotional needs, along with the appropriateness of the 12:1+2 special class placement (see Tr. pp. 78, 85-86, 292-93, 347-48, 387, 467, 629-30, 669, 1247-48, 1275; Dist. Exs. 9 at pp. 2, 5; 10 at p. 2). Additionally, the June 2012 CSE discussed the information provided by the parents, which described a nonverbal learning difference profile (see Tr. pp. 293-96, 387, 1247-50; see also Parent Ex. A). Thus, contrary to the parents' arguments, the IHO properly determined that the parents had an opportunity to participate in the development of the August 2012 IEP, and as discussed further below, the August 2012 IEP was reasonably calculated to enable the student to receive educational benefits.

B. August 2012 IEP—12:1+2 Special Class Placement

The parents assert that the IHO erred in finding that the 12:1+2 special class placement was appropriate, arguing that the 12:1+2 special class placement did not address the student's social/emotional issues. The district argues that the hearing record supports the IHO's finding

¹⁶ The parents also took advantage of the opportunity to express their concerns about the district's recommendations to district staff through e-mails, telephone calls, and meetings outside of the May, June and August 2012 CSE meetings (see Tr. pp. 273-74, 1233-35, 1255-60; Parent Exs. P; Q at pp. 1-2; T at p. 1; U at pp. 1-2).

that the August 2012 CSE developed an IEP that was reasonably calculated to address the student's social/emotional needs. A review of the evidence in the hearing record supports the IHO's determination, and thus, the parents' assertions must be dismissed.

To address the student's needs identified in the August 2012 IEP, the August 2012 CSE recommended a 12:1+2 special class placement, together with related services; annual goals; management needs; supplemental aids and services, program modifications, and accommodations; support to school personnel on behalf of the student; and assistive technology devices and services (see Dist. Ex. 10 at pp. 1, 5, 7-11). State regulations provide that the "maximum class size for special classes containing 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, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

In reaching the decision to recommend a 12:1+2 special class placement, the evidence in the hearing record indicates that the May, June, and August 2012 CSEs considered the following evaluative information in the development of the August 2012 IEP: an October 2007 social history; a February 2011 educational evaluation (see Dist. Ex. 33 at pp. 1-4 [concluding that the student demonstrated academic skills within the average range, but academic fluency within the below average range]); a February 2011 psychological evaluation (see Dist. Ex. 32 at pp. 1-4 [noting overall cognitive potential solidly within the average range with strengths in verbal and language based areas and weaker skills in perceptual reasoning and processing speed]); a March 2011 service plan (see Dist. Ex. 6 at p. 9 [recommending one to two hours per month of special education teacher consultation services for writing and organizational skills]); a May 2011 report card; an April 2012 neuropsychological assessment (see Dist. Ex. 36 at pp. 1-5 [reflecting the student's strengths and weaknesses in the areas of cognition; executive control; sensory input and motor response; affect, emotion, and motivation; and academics]); and a May 2012 report card (see Dist. Ex. 10 at pp. 3-4).

A review of the August 2012 IEP demonstrates that the CSE incorporated the student's testing results, including those obtained from the administration of the February 2011 educational evaluation and the February 2011 psychological evaluation, in the IEP (see Dist. Exs. 10 at pp. 3-4; 32 at pp. 2-3; 33 at pp. 2-4). In addition, a review of the August 2012 IEP reflects that the CSE relied upon the April 2012 neuropsychological assessment to describe the student's present levels of academic achievement, functional performance and learning characteristics (compare Dist. Ex. 10 at pp. 4-5, with Dist. Ex. 36 at pp. 1-5). Specifically, the August 2012 IEP indicated that the student had a strong fund of knowledge, but he exhibited emotional sensitivity to peer interactions and processing deficits in the areas of visual spatial processing, motor coordination, some executive processes, and processing of social/emotional information (compare Dist. Ex. 10 at pp. 4-5, with Dist. Ex. 36 at pp. 2-4). The August 2012 IEP also reflects the diagnoses reported in the April 2012 neuropsychological assessment, including mild autism spectrum disorder along with some mood instability, in the context of above average intellectual capacity (compare Dist. Ex. 10 at p. 5, with Dist. Ex. 36 at p. 4). At that time, the student's academic needs included weaknesses in written expression, organization, fluency, and mathematics (see Dist. Ex. 10 at pp. 4-5). In addition, the August 2012 IEP reflected the parents' report that the student struggled academically and received "home school[ing]" since March "to assist him in academic progress" (id. at p. 4). The August 2012 IEP also indicated that the student struggled socially and emotionally (id. at p. 5).

Consistent with information considered by the August 2012 CSE, the August 2012 IEP described the student as "playful" and as a student who tried to "contribute socially," but further noted that he exhibited "emotional sensitivity to peer interactions," and "'scripted' interactions with peers," he did not read social cues effectively, and he had been the target of bullying (see Dist. Exs. 10 at p. 5; 36 at p. 3). Physically, the August 2012 IEP reported that the student was fit and active, but concerns remained regarding his visual spatial skills, his motor skills, and his organization skills (see Dist. Ex. 10 at p. 5; see also Tr. pp. 1079-81). To address the student's management needs, the August 2012 IEP indicated the need for a structured environment with clear expectations, extended time for written assignments, the need to complete homework, access to a word processor and spell check, and testing modifications to local exams as needed (see Dist. Ex. 10 at p. 5).

At the impartial hearing, the CSE chairperson testified that based on "extensive conversations" and a review of the evaluative information, the student's social/emotional needs could be met in the recommended 12:1+2 special class placement, indicating further that the student had similar social and academic needs to other students in that program (see Tr. pp. 90-92). Similarly, the district school psychologist testified that the student's social/emotional needs would be addressed "through a small class" like the 12:1+2 special class (see Tr. pp. 748-50). In order to meet the student's academic needs, his fine motor weaknesses, processing deficits, and executive functioning difficulties—in addition to providing a structured environment with clear expectations—the August 2012 IEP included approximately 10 annual goals that targeted the student's needs in the areas of study skills, reading, writing, and mathematics; the August 2012 IEP also provided strategies to address the student's management needs, which included extended time for written assignments, access to a word processor and spell check, and testing accommodations for local exams (see Dist. Ex. 10 at pp. 5, 7-8, 11). The August 2012 IEP also included program modifications to address the student's executive functioning deficits, which were consistent with the finding in the April 2012 neuropsychological assessment that the student required consistent support to complete tasks and structure his time (compare Dist. Ex. 10 at pp. 9-10, with Dist. Ex. 36 at p. 4). To address the student's emotional sensitivity, episodes of intense emotions, and difficulty reading social cues, the August 2012 IEP included approximately five annual goals that targeted his social/emotional skills, and included related services of individual and group psychological counseling, parent counseling, and psychological counseling consultation services to school personnel on behalf of the student (see Dist. Ex. 10 at pp. 8-10; see also Tr. pp. 94-96; 475-77; 643-44; 748-50; 753-54; 784-85).

The August 2012 IEP also included the following supports for school personnel on behalf of the student: one quarterly assistive technology consultation, one weekly team meeting, and one psychological counseling services consultation (see Dist. Ex. 10 at p. 10). In addition, the August 2012 IEP included the following supplemental aids and services, program modifications, and accommodations: preferential seating, refocusing and redirection, writing process instruction, support for long-term assignment organization, cueing and prompting, directions clarified and repeated, monitoring organization and time management, and additional time to complete assignments (id. at pp. 9-10). The August 2012 CSE also recommended assistive technology devices and services, including access to a word processor and word prediction software (id. at p. 10). Finally, the August 2012 CSE recommended testing accommodation, including preferential seating, extended time, waiving spelling requirements, access to a word processor, questions read and clarified, a separate location, a flexible schedule, and the use of break periods (id. at p. 11).

In light of the foregoing, the evidence in the hearing record demonstrates the IHO correctly determined that the August 2012 IEP was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

C. May 2013 IEP—12:1+2 Special Class Placement and ICT Services

The parents assert that the IHO erred in finding that the 12:1+2 special class placement with ICT services was appropriate, and argue that the May 2013 CSE did not explain how the recommended placement would address the student's nonverbal learning disability or emotional dysregulation, and the CSE failed to consider the parents' concerns. A review of the evidence in the hearing record supports the IHO's finding that the May 2013 IEP was appropriate to meet the student's needs and offered the student a FAPE for the 2013-14 school year.

To address the student's needs identified in the May 2013 IEP, the May 2013 CSE recommended—similar to the August 2012 CSE—a 12:1+2 special class placement, together with related services; annual goals; management needs; supplemental aids and services, program modifications, and accommodations; support to school personnel on behalf of the student; and assistive technology devices and services (compare Dist. Ex. 12 at pp. 1, 7, 9-12, with Dist. Ex. 10 at pp. 1, 5, 7-11). In addition, the May 2013 CSE recommended ICT services for mathematics instruction (see Dist. Ex. 12 at p. 9). According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class "shall minimally include a special education teacher and a general education teacher," and each class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

In reaching the decision to recommend a 12:1+2 special class placement and ICT services for instruction in mathematics, the evidence in the hearing record demonstrates that the May 2013 CSE considered the following updated evaluative information in the development of the May 2012 IEP: a November 2012 psychological update (November 2012 adaptive behavior assessment) (see Dist. Ex. 40 at pp. 1-20 [evaluating adaptive skills relevant to the student's ability to function in a "school setting, in the community and at home;" assessing "practical, everyday skills" needed to function and "meet environmental demands;" and finding that the student's behavior adaptive skills to be "diverse and complex," with ratings ranging from average to extremely low]); a November 2012 assistive technology evaluation (see Dist. Ex. 39 at pp. 1-6 [assessing the student's reading, writing, spelling, and keyboarding skills]); a November 2012 Level 1 assessment (Student Interview and Parent Profile) (see Dist. Exs. 37 at pp. 1-2; 38 at p. 6 [assessing the student's career interests, strengths, and preferences]); a November 2012 OT reevaluation (see Dist. Ex. 38 at pp. 1-5 [assessing the student's fine motor and visual perceptual skills]); an April 2013 classroom observation (see Parent Exs. L at pp. 1-2; CC at pp. 70-72 [taking place at the student's then-current nonpublic school]); and Franklin Academy progress reports (see Parent Exs. CC at 25, 31-33; JJ at pp. 1-4 [referred to as "Intersession 2 Progress Report," "Quint 4 & Intersession II," and "Quint 4 Progress Report"]) (see Dist. Ex. 12 at pp. 3-5).

Similar to the August 2012 IEP, a review of the May 2013 IEP reveals that the CSE incorporated the student's updated testing results obtained from the administration of the

November 2012 evaluations, and continued to report the testing results from the August 2012 IEP (compare Dist. Ex. 12 at pp. 3-4, with Dist. Ex. 10 at pp. 3-4). In addition, a review of the May 2013 IEP reflects that the CSE included updated descriptions of the student's present levels of academic achievement, functional performance and learning characteristics (see Dist. Ex. 12 at pp. 5-7). As reported in the Franklin Academy progress reports, the May 2013 CSE noted that the student made "satisfactory progress in all classes with satisfactory effort" (id. at p. 6). The May 2013 CSE also reported that in the area of mathematics, previous evaluations revealed that the student obtained average scores in mathematics calculation and broad mathematics skills, with significantly weaker performance in math fluency (id. at p. 5). In addition, the May 2013 IEP reflected that the student was currently passing an applied math course with satisfactory effort, completing work in a timely manner, and was expected to take an advanced pre-calculus mathematics course the following year (id.).¹⁷

The May 2013 IEP included the testing results from the administration of the November 2012 assistive technology evaluation, which determined that the student comprehended best when he read material to himself and he could type more quickly than he could write in most cases (see Dist. Ex. 12 at p. 6). As a result, the May 2013 CSE recommended word prediction software and graphic organizer software to address the student's difficulty with writing, and the CSE further noted in the IEP that the student could use the software with minimal adult assistance (id.; see also Tr. pp. 1103-06). Based upon the Franklin Academy progress reports, the May 2013 CSE indicated in the IEP that the student completed "all homework and in-class assignments" in his Greek mythology class (see Dist. Ex. 12 at p. 6). With respect to the student's social development, the May 2013 IEP reflected information from the student's report card comments and Franklin Academy progress reports, which indicated that the student interacted appropriately; he made a "very good adjustment to his boarding school;" and when compared to his peers at the Franklin Academy, the student was described as a leader, friendly, cooperative, kind, and well-liked (id. at pp. 6-7). However, the May 2013 IEP continued to note that he had "superficial" relationships with peers and adults, and the student needed to "develop the ability to reach out to support staff when he fe[lt] stressed" (id. at p. 7). Regarding the student's physical development, the May 2013 CSE summarized the November 2012 OT evaluation, which found that the student demonstrated average to above average fine motor skills and visual perceptual skills, but exhibited difficulty with graphomotor skills (id.; see Tr. pp. 1083-91).

At the impartial hearing, the district school psychologist who attended the May 2013 CSE meeting testified that the student's social/emotional needs would be addressed in the 12:1+2 special class (see Tr. pp. 784-85). She explained that "three teachers" in a structured classroom "with maximum of 12 students" would allow for the student to receive a "lot of personal attention" or "personal instruction" if the student required individual support due to social/emotional issues, and moreover, it allowed the student to be educated with and to interact with "students with some similar profiles, [and] similar needs" in terms of "social/emotional sensitivities" (id.). The district school psychologist further testified that the ICT services for mathematics instruction would address the student's social/emotional needs as it would allow the student to recognize his strength in mathematics and build his self-esteem (see Tr. pp. 785-86).

¹⁷ The May 2013 IEP also indicated within the section for parents' concerns, however, that the student's "current performance also suggest[ed] concerns with performance in math" (see Dist. Ex. 12 at p. 6).

To meet the student's reading and writing needs identified in the November 2012 assistive technology evaluation and the November 2012 OT evaluation, in addition to providing a structured environment with clear expectations, the May 2013 IEP included approximately three annual goals that targeted the student's reading comprehension and writing skills, and provided strategies to address his management needs, such as extended time for written assignments, access to a word processor and spell check, and test accommodations for local exams (see Dist. Exs. 12 at pp. 5, 9, 12-13; 38-39). As previously mentioned, the May 2013 IEP also included supplemental aids and services, program modifications, and accommodations that would address the student's executive functioning deficits and that were consistent with the finding in the April 2012 neuropsychological assessment that the student required consistent support to complete tasks and structure his time; the May 2013 IEP also included approximately three annual goals that targeted the student's study skills (see Dist. Exs. 12 at pp. 9-11; 36 at p. 4; see also Tr. pp. 715-19).

At the impartial hearing, testimonial evidence reflected that the May 2013 CSE recommended ICT services for mathematics instruction because the Franklin Academy staff described mathematics as an area of strength for the student, and the student intended to take advanced pre-calculus in the next school year (see Tr. pp. 108-09; 399-400, 405, 544, 794-95, 841, 843, 852-53). In addition, testimonial evidence at the impartial hearing explained that the May 2013 IEP addressed the student's social/emotional needs by including approximately two annual goals that targeted his coping skills and the development of relationship skills with peers and adults, as well as the related services of individual and group psychological counseling, parent counseling, and psychological counseling services consultation to school personnel on behalf of the student (see Tr. p. 405-06, 545, 785-89, 854-56; Dist. Ex. 12 at pp. 6-7, 9-12).

Similar to the August 2012 IEP, the May 2013 IEP included the following supports for school personnel on behalf of the student: one 30-minute session per quarter of assistive technology consultation services, one 40-minute team meeting per week, and one 30-minute session per month of psychological counseling services consultation (compare Dist. Ex. 10 at p. 10, with Dist. Ex. 12 at p. 12). In addition, the May 2013 IEP included the following supplemental aids and services, program modifications, and accommodations: preferential seating, refocusing and redirection, writing process instruction, support for long-term assignment organization, cueing and prompting, directions clarified and repeated, monitoring organization and time management, and additional time to complete assignments (see Dist. Ex. 12 at pp. 10-11). The May 2013 CSE also recommended assistive technology devices and services, such as access to a word processor, word prediction software, and access to writing and reading support software (id. at p. 11). Finally, the May 2013 CSE recommended testing accommodation, including preferential seating; extended time; waiving spelling requirements; access to a word processor; questions clarified; a separate location; a flexible schedule; the use of break periods; and test passages, questions, items and multiple choice responses read to the student (id. at pp. 12-13).

Based upon the evidence in the hearing record, the IHO appropriately determined that the May 2013 IEP was reasonably calculated to enable the student to receive educational benefits for the 2013-14 school year.

D. Challenges to the Assigned Public School Sites

The parents continue to argue that neither the district middle school (2012-13 school year) nor the district high school (2013-14 school year) was appropriate. More specifically, the parents assert that the student would not be appropriately functionally grouped at the district middle school. For the 2013-14 school year, the parents assert that the IHO erred in finding that district high school was not too large for the student. For the reasons explained more fully below, such claims are speculative and not supported by the evidence in the hearing record.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"])).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, 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]).¹⁸ When the Second Circuit spoke recently with regard to the topic of

¹⁸ 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., 584 F.3d 412 at 420; 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

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., 533 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the August 2012 IEP and the May 2013 IEP because a retrospective analysis of how the district would have implemented the student's August 2012 IEP and the May 2013 IEP at the assigned public school sites was not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected both of the assigned public school sites 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 August 2012 IEP and the May 2013 IEP (see Dist. Exs. 10 at p. 2; 12 at p. 2; 73; 75; 78; 106). Therefore, the arguments asserted by the parents with respect to the assigned public school sites 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 parents' 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 parents cannot prevail on their claims that the assigned public school site would not have properly implemented the May 2012 IEP.¹⁹

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.

¹⁹ 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 270, 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]; Ganije v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended programs at the assigned public school sites, 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 IEPs 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 Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 and 2013-14 school years, 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 Franklin Academy was an appropriate placement or whether equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 February 4, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

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., 2012 WL 4571794, at *11).