



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-054

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

Appearances:

Lawrence D. Weinberg, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent,
Cynthia Sheps, Esq., of Counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student has continuously attended the Rebecca School since September 2010 (see Tr. p. 240).¹ During the 2011-12 school year, the student attended a classroom at the

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

Rebecca School that consisted of nine students, one "head teacher, three teaching assistants, and one para-professional" (Parent Ex. C at p. 1).

On March 7, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 2 at pp. 1, 7-8, 10-12). Finding that the student remained eligible for special education and related services as a student with autism, the March 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school, as well as the following related services: five 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual physical therapy (PT); three 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of OT in a small group (id. at pp. 1, 7-8, 11).² In addition, the March 2012 CSE recommended the services of a full-time, 1:1 health paraprofessional and special transportation services for the student (id. at pp. 8, 10).

In a letter dated March 14, 2012, the parent notified the district that at the March 2012 CSE meeting, she and the student's then-current teacher advocated for the student's placement in a "classroom" with a "1 to 1" student-to-teacher ratio due to the student's needs (Parent Ex. B at p. 1). The parent indicated that the March 2012 CSE advised her that the district did not have "any schools/classes functioning with a one to one, teacher to student ratio" and that the 6:1+1 special class placement recommended by the March 2012 CSE was the "only recommendation that the CSE could make" (id.). The parent further indicated that the district did not have the "appropriate classroom environment to adequately address [the student's] multi-facet delays and deficits," and the March 2012 CSE should have deferred the student to the "Central Based Support Team (CBST)" for placement in an appropriate nonpublic school (id. at pp. 1-2). At that time, the parent requested a deferral to the CBST, as well as notification of an assigned public school site so that she could immediately visit the site to determine if it was appropriate (id. at p. 2).

On June 10, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year beginning July 2, 2012 (see Parent Ex. I at pp. 1, 4).

On July 25, 2012, the parent visited the assigned public school site, and in a letter of the same date, notified the district that it was not appropriate for the student (see Parent Ex. E).³ The parent rejected the assigned public school site because the methodology used at the site had not "work[ed]" for the student in the past, the assigned public school site could not adequately address the student's sensory needs, and the 6:1+1 "setting" was not appropriate because the student required a "1:1 setting" in order to address her sensory issues (id.). The parent also notified the district of her intentions to "return" the student to the Rebecca School for the 2012-

² The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ According to the parent's due process complaint notice, she received a final notice of recommendation (FNR) dated June 11, 2012, which identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. A at pp. 5-6).

13 school year and to seek funding for the costs of the student's tuition, but noted that she would be "happy to visit" any "additional public school sites" (id.).⁴

By due process complaint notice dated May 7, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school years based upon deficiencies in the March 2012 CSE process, the March 2012 IEP, and the parent's determination that the assigned public school site was not appropriate (see Parent Ex. A at pp. 1-6; see also Application of the Dep't of Educ., Appeal No. 14-030). On July 23, 2013, the parties proceeded to an impartial hearing, and in a decision dated January 21, 2014 (January 2014 decision), the IHO (IHO 1) concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at the Rebecca School was appropriate, and equitable considerations weighed in favor of the parent's requested relief (see Application of the Dep't of Educ., Appeal No. 14-030). The district appealed IHO 1's decision and alleged that IHO 1 erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that the Rebecca School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (id.). After challenging the particular findings and conclusions upon which IHO 1 concluded that the district's failed to offer the student a FAPE for the 2012-13 school year in its petition, the district then advanced arguments related to the parent's allegations in the due process complaint not otherwise addressed by IHO 1 in the January 2014 decision (id.). In response, the parent neither admitted nor denied the district's allegations pertaining to the unaddressed issues in the answer (id.).

After resolving the issues of whether the March 2012 CSE was properly composed, whether the district impermissibly predetermined the 6:1+1 special class placement recommendation, whether the March 2012 CSE deprived the parent of the opportunity to meaningfully participate at the meeting, and whether the March 2012 CSE's failure to recommend parent counseling and training in the IEP resulted in a failure to offer the student a FAPE for the 2012-13 school year, the undersigned remanded the matter to the same IHO (IHO 1) (see Application of the Dep't of Educ., Appeal No. 14-030). On remand, IHO 1 was instructed to reach a final decision with respect to whether the district offered the student a FAPE for the 2012-13 school year based upon the remaining unaddressed issues set forth in the parent's due process complaint notice, unless otherwise agreed to by the parties (id.).

A. Impartial Hearing Officer Decision on Remand

On January 6, 2015, an IHO (IHO 2) conducted a prehearing conference, and on February 6, 2015, reconvened the impartial hearing (see Feb. 6, 2015 Tr. pp. 1-36).⁵ At the

⁴ By letter dated February 7, 2013, the parent requested a copy of the March 2012 IEP for her "records," as she had "never received" it (Parent Ex. F at p. 1).

impartial hearing, the parties discussed and agreed to the issues to be resolved by IHO 2 in accord with the SRO's instructions on remand (*id.* at pp. 4-35). In a decision dated April 22, 2015, IHO 2 determined that the district offered the student a FAPE for the 2012-13 school year, and accordingly, IHO 2 denied the parent's request for relief (Apr. 22, 2015 IHO Decision at pp. 5-8).

Initially, IHO 2 enumerated 14 issues to be resolved in this matter (*see* Apr. 22, 2015 IHO Decision at pp. 2-3). Turning to the sufficiency of the evaluative information, IHO 2 indicated that although the description of the student within the present levels of performance section of the March 2012 IEP was "somewhat incomplete, it capture[d] the level of this student's functioning" (Apr. 22, 2015 IHO Decision at pp. 5-6). IHO 2 then concluded that the evaluations were "adequate" and "provide[d] appropriate information regarding the student's level of functioning" (*id.*). IHO 2 further noted that given the district's obligation to reevaluate the student at "least once every three years," the student's evaluations fell within the "statutory period" (*id.* at pp. 6-7). Next, IHO 2 found that the use of "Teacher/Provider Observation" was an appropriate method of measurement with regard to the annual goals in the March 2012 IEP (*id.* at p. 7). In addition, IHO 2 noted that "observation" was appropriate method of measurement for this student, who presented as "unable to be tested," "non-verbal and mostly non-communicative except for occasional gestures" (*id.*). Finally, IHO 2 determined that the annual goals in the March 2012 IEP appropriately addressed "skill areas" the student needed to work on, the annual goals were appropriate for "implementation at school," and the annual goals were not "pre-written" or "vague" (*id.*).

Next, IHO 2 found that the 6:1+1 special class placement with a 1:1 health paraprofessional addressed the student's needs (*see* Apr. 22, 2015 IHO Decision at p. 7). In addition, IHO 2 further noted that based upon a "McCarton School evaluation," the student required a "small class environment" and the "1:1 paraprofessional" was "just as critical" to address the student's "safety" and her "limited ability to communicate" (*id.* at pp. 7-8). Therefore, IHO 2 concluded that the district offered the student a program that addressed her "academic, social and emotional needs" (*id.* at p. 8).

Regarding the parent's contention that the March 2012 IEP recommendation for the 2012-13 school year failed to include the student's progress after March 2012, IHO 2 noted, initially, that although the parent had the "right to refer the student to the CSE" if she believed the "program" was not appropriate, the parent did not request another CSE meeting (Apr. 22, 2015 IHO Decision at p. 8). In addition, IHO 2 indicated that the student's "then current teachers and providers at the Rebecca School" provided the March 2012 CSE with "[a]ll of the updated information" about the student (*id.*). Next, IHO 2 rejected the parent's contention that the district did not provide the parent with "information regarding [the] class size," noting that the March

⁵ A different IHO (IHO 2) presided over the impartial hearing on remand (*compare* Tr. p. 1, with Feb. 6, 2015 Tr. p. 1). In addition, the parties waived their right to present further testimonial or documentary evidence for IHO 2's consideration, and agreed to rely upon the testimonial and documentary evidence previously entered into the hearing record related to the impartial hearing (*see* Feb. 6, 2015 Tr. pp. 34-35). Therefore, in this case, the hearing record includes consecutively paginated transcripts developed at the first impartial hearing before IHO 1; for clarity, citations to the transcript testimony before IHO 1 will refer directly to the page numbers of the consecutively paginated transcripts and any citations to the impartial hearing held before IHO 2 will include the date of the transcript in addition to the page numbers.

2012 IEP specifically indicated a "6:1+1 class" and a "1:1 paraprofessional" (*id.*). Finally, IHO 2 addressed the parent's allegation that she did not receive a copy of the March 2012 IEP "until one year" after the March 2012 CSE meeting (*id.*). IHO 2 found that this allegation was "unsubstantiated" since the parent did not testify (*id.*).

Having concluded that the district offered the student a FAPE for the 2012-13 school year, IHO 2 indicated that it was unnecessary to determine if the unilateral placement selected by the parent was appropriate (*see* Apr. 22, 2015 IHO Decision at p. 8).

IV. Appeal for State-Level Review

The parent appeals, arguing that the evidence in the hearing record supports a finding that the district did not offer the student a FAPE for the 2012-13 school year.⁶ In particular, the parent asserts that the evidence in the hearing record supported IHO 1's finding that a "6:1:1 environment" was not appropriate for the student because the student was "very anxious" and required "a lot of support to be a part of the school environment," as well as to transition. In addition, the parent argues that IHO 1 properly concluded that the March 2014 CSE impermissibly predetermined the 6:1+1 special class placement recommendation, which was based upon "administrative convenience," and that the March 2012 CSE did not consider the Rebecca School teacher's "disagreement" regarding the "level of support in the program." The parent also argues that because the March 2012 CSE had "no knowledge" about the specific public school site the district would assign the student to attend for the 2012-13 school year, the March 2012 CSE had "no knowledge" whether the student would be placed "with an appropriate functional peer group." Next, the parent contends that the evidence in the hearing record supported IHO 1's finding that the March 2012 IEP did not provide the student with sufficient sensory supports and that the "sensory goal" was "vague" and did not address the student's "specific sensory difficulties." In addition, the parent asserts that the hearing record lacked evidence to establish that the assigned public school site could implement the appropriate sensory supports for the student. The parent further asserts that the March 2012 IEP lacked parent counseling and training, the March 2012 CSE failed to consider a transition plan to move the student from a nonpublic school to a public school placement, the CSE failed to provide prior written notice and failed to provide the parent with a copy of the March 2012 IEP before the start of the school year. The parent argues that while each aforementioned procedural violation, alone, constitutes a failure to offer the student a FAPE, the parent also argues that the procedural violations, cumulatively, result in a determination that the district failed to offer the student a FAPE. With respect to the assigned public school site, the parent argues that the district failed to present evidence that the assigned public school site could "implement the student's diet" or otherwise "implement the IEP." The parent also argues that the district did not present evidence to establish that the student would be functionally grouped.

⁶ In the petition, the parent affirmatively alleged that the March 2012 IEP was not appropriate based upon the following: the IEP failed to address the student's sensory needs; the 6:1+1 special class placement was not sufficiently supportive for the student; the IEP was predetermined; the IEP failed to include parent counseling and training; the IEP lacked management needs; and the IEP lacked sufficient evaluative information and was inaccurate (Pet. ¶ 12).

With respect to IHO 2's decision, the parent affirmatively notes that IHO 2 addressed issues pertaining to "evaluations, methods of measurement, IEP goals, and IEP recommendation[s]." ⁷ However, the parent alleges that IHO 2 failed to address issues regarding the "functional levels of performance, unique needs and sensory needs, or the failure of the district to provide [the] parent with a copy of the IEP." In addition, the parent argues that the March 2012 CSE did not have sufficient evaluative information to develop the IEP, the IEP failed to include a "statement" of the student's functional levels, and the annual goals failed to identify an "objective" method of measurement.

Finally, the parent contends that the Rebecca School program was an appropriate unilateral placement, the student made progress at the Rebecca School, and she cooperated with the CSE. As relief, the parent seeks to reverse IHO 2's decision and to direct the district to reimburse the parent for the costs of the student's tuition at the Rebecca School for the 2012-13 school year.

In an answer, the district responds to the parent's allegations, and generally argues to uphold IHO 2's decision in its entirety. In addition, the district asserts that the parent's arguments that the assigned public school site could not implement the March 2012 IEP were speculative and the Rebecca School was not an appropriate unilateral placement for the student.

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

⁷ To the extent that the parent does not appeal IHO 2's findings that annual goals in the March 2012 IEP were not "pre-written" or vague," the annual goals appropriately addressed the student's needs, and the annual goals were appropriate for "implementation at school," these determinations are final and binding and will not be further 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]).

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things,

the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Preliminary Matters—Res Judicata

The parent asserts that March 2012 CSE impermissibly predetermined the 6:1+1 special class placement recommendation and the March 2012 IEP failed to include a recommendation for parent counseling and training. In response, the district argues that these particular allegations must be dismissed based upon the doctrine of res judicata.

The principles of res judicata and collateral estoppel, more aptly described in this matter as law of the case, bars the district from asserting an issue that has been previously decided within this matter. "The law of the case doctrine 'is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.'"

Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013], appeal dismissed [Dec. 10, 2013]) citing U.S. v. Quintieri, 306 F.3d 1217, 1226 [2d Cir. 2002]) The doctrine of law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by a State Review Officer would not be reopened during the proceeding once it was decided]). Once an issue is decided within a proceeding, a party is generally precluded from reopening a matter which has been decided and must adhere to the decision for the duration of the proceeding (Evans, 94 N.Y.2d at 502-04).⁸ Like res judicata and collateral estoppel, "preclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination" (*id.*).

In the instant matter, the evidence in the hearing record supports an application of the law of the case doctrine. Here, the same parties to the instant appeal fully litigated the issues of whether the March 2012 CSE impermissibly predetermined the 6:1+1 special class placement recommendation and whether the March 2012 IEP failed to include a recommendation for parent counseling and training, and the undersigned adjudicated the merits of both issues prior to remanding the matter for further administrative proceedings on other unaddressed issues (see Application of the Dep't of Educ., Appeal No. 14-030). Cogent and compelling reasons that militate relitigating these two issues are not present. Therefore, the parent's assertions are barred by the doctrine of law of the case and will not be addressed further in this decision.

B. March 2012 CSE Process

1. Evaluative Information

Turning to the dispute regarding the evaluative information, the parent asserts that the April 2011 psychoeducational evaluation report noted the completion of only "one test," and the Rebecca School progress report did not include an "assessment" of the student's functional level in mathematics and did not include a "statement" of the student's reading level.⁹ The district generally denies these allegations. In this case, while the parent's assertions may be supported by the evidence in the hearing record, this inadequacy, alone, does not result in a finding that the March 2012 CSE did not have sufficient evaluative information upon which to develop the March 2012 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not

⁸ This principle does not preclude a party from seeking judicial review (34 CFR 300.516; 8 NYCRR 200.5[k][3]).

⁹ For clarity, while titled "Psychological Educational Evaluation," this evaluation report will be referred to as the April 2011 psychoeducational evaluation in this decision (Dist. Ex. 4 at p. 1).

conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

At the impartial hearing, the district school psychologist who attended the March 2012 CSE meeting testified that the CSE had the following evaluative information available in order to develop the March 2012 IEP: a December 2011 Interdisciplinary Report of Progress Update from the Rebecca School (December 2011 Rebecca School progress report) and the student's educational "file," which included the student's IEP from the 2011-12 school year (Tr. pp. 66-68, 92; see Parent Ex. C at pp. 1-10).¹⁰ In addition, the March 2012 CSE considered and relied upon input from the parent and the student's then-current Rebecca School teacher (Rebecca School teacher) who attended the CSE meeting to develop the March 2012 IEP (Tr. pp. 66-70, 76-78; see Dist. Exs. 2 at p. 13; 8 at pp. 1-4).

In this case, a review of the April 2011 psychoeducational evaluation report supports the parent's allegation that while the evaluator attempted to administer three formal assessments to the student to measure her intellectual and cognitive functioning, the student's lack of cooperation and compliance with the testing procedures precluded these efforts (see Dist. Exs. 4 at p. 1).¹¹ However, in light of the student's inability to comply with formal testing procedures,

¹⁰ When asked whether the student's educational file included particular documents already entered into evidence at the impartial hearing—such as a December 2010 classroom observation, an April 2011 psychoeducational evaluation, an April 2011 social history update, a February 2009 follow-up neurologic evaluation, a May 2011 speech-language evaluation, and a May 2009 PT evaluation—the district school psychologist testified that he did not have a "specific recollection" of the "documents" included in this student's educational file available to the March 2012 CSE (Tr. pp. 171-72; see Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1; 6; 7 at p. 1; 9 at p. 1). Generally, however, the district school psychologist explained that a student's educational file typically contained "all" of a student's "past educational documents" (Tr. p. 172).

¹¹ A review of the May 2011 speech-language evaluation report similarly reveals an evaluator's inability to administer formal assessments to the student due to the student being "non-verbal and non-compliant" (Dist. Ex.

the evaluator conducting the April 2011 psychoeducational evaluation administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), with the parent as informant, to assess the student's functional levels in the areas of receptive, expressive, and written communication skills; daily living skills (personal, domestic, and in the community); interpersonal relationships, play and leisure skills, and coping skills (i.e., socialization skills); and fine and gross motor skills (see Dist. Ex. 4 at pp. 1-2). As noted in the April 2011 psychoeducational evaluation report, the parent described the student as "very inattentive," the student was not toilet trained and would "scream" when uncomfortable (*id.* at p. 2). In addition, the parent reported that the student did not "'bite or hit' any more" (*id.*). The evaluator further indicated that the student could not "recognize familiar objects within her environment" or "differentiate between textures and shapes" (*id.*). At that time, the student did not have "appropriate gross and fine motor coordination;" she did not attend to her own hygiene needs or feed herself; she was "nonverbal;" she did not recognize "printed letters" or her own name; and the student could not count items (*id.*). Based upon the results of the Vineland-II, the evaluator indicated that the student exhibited "delayed" activities of daily living (ADL) skills across "all domains;" others had to attend to the student's "wants and needs;" and the student did not know her colors, shapes, numbers or letters (*id.*).

Similarly, a review of the December 2011 Rebecca School progress report reveals that rather than reporting formal assessment results or measures about the student's functional levels in mathematics or reading, the Rebecca School staff who contributed to the progress report described the student's functional levels in various developmental domains—including education and functional emotional developmental levels; curriculum, noting in particular the areas of reading, symbol recognition, comprehension, mathematic, number sense and 1:1 correspondence, measurement, time and space, social studies, and science and exploration (see Tr. p. 70; Dist. Ex. 8 at p. 1; Parent Ex. C at pp. 1-3). For example, the December 2011 Rebecca School progress report indicated that the student showed a "real interest" in reading, she referenced "pictures and text often" and looked to "adults warmly during these times;" at that time, the student was working on learning to "hold a book appropriately" (Parent Ex. C at p. 2). In mathematics, the December 2011 Rebecca School progress report noted that the student showed an "emerging understanding of numbers one, two, and three;" and while she demonstrated an understanding of the concepts of "'empty' and 'full,'" she did not consistently identify a "full container of juice" with moderate adult support (*id.* at pp. 2-3). At the impartial hearing, the district school psychologist testified that at the March 2012 CSE meeting, the Rebecca School teacher in attendance confirmed that the December 2011 Rebecca School progress report accurately reflected the student's performance at the time (see Dist. Ex. 8 at p. 1; see also Tr. pp. 70, 172-73).

Notwithstanding the absence of formal assessments or testing results, the March 2012 CSE—consistent with the evaluative information noted above—identified the student's needs related to both reading and mathematics in the IEP and described the student's instructional and functional levels in both mathematics and reading in the IEP as a prekindergarten level (see Dist. Ex. 2 at p. 11; compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. C at pp. 1-3). At the impartial hearing, the district school psychologist testified that the March 2012 CSE had sufficient

7 at pp. 2-4). The May 2009 PT evaluation noted the following assessment methods to conduct the evaluation: chart review, clinical observation, and a "HELP-checklist" (Dist. Ex. 9 at p. 1).

evaluative information about the student at the time of the meeting to make an "appropriate recommendation" for the student (see Tr. pp. 172-74). In addition, the district school psychologist testified that if the March 2012 CSE did not have an "accurate picture of the student" or if the CSE needed more information about the student, the CSE could—depending upon what further information was needed—"engage in further discussion" with "follow up questions," obtain additional reports from the Rebecca School or the parent, or reevaluate the student if necessary (Tr. pp. 173-74).

Based on the foregoing, even if the evidence in the hearing record supported a conclusion that neither the April 2011 psychoeducational evaluation nor the December 2011 Rebecca School progress report included testing results from the administration of formal assessments to the student, the parent does not advance any arguments regarding how such inadequacy, alone, should overcome the evidence showing that the March 2012 CSE had sufficient evaluative information to identify the student's needs related, in particular, to reading and mathematics, and which was otherwise sufficient to develop the March 2012 IEP. Consequently, the parent's assertions relating to the sufficiency of the evaluative information must be dismissed.

2. Prior Written Notice

The parent argues that the district failed to provide prior written notice. In addition, the parent asserts that the district failed to provide her with a copy of the March 2012 IEP before the start of the 2012-13 school year, which, alone, constituted a "major procedural violation" that resulted in the district's failure to offer the student a FAPE for the 2012-13 school year. Finally, the parent contends that the "placement letter" did provide a "full description of the program." The district generally denies these allegations, but argues that the alleged non-receipt of the March 2012 IEP, as a procedural violation, did not rise to the level of a failure to offer the student a FAPE. While the evidence in the hearing record supports the parent's contentions as to the procedures employed, the district correctly argues that its failure to comply with these procedures did not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year.

With regard to the untimely receipt of the March 2012 IEP, to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement ... for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).

In this case, it is undisputed that the district had an IEP in place for the student at the start of the 12-month school year beginning in July 2012 (see Dist. Ex. 2 at pp. 1, 7-8). The evidence reveals that the parent attended and participated in the March 2012 CSE meeting (id. at p. 13; see Dist. Ex. 8 at pp. 1-4). In addition, the evidence demonstrates that within one week following

the March 2012 CSE meeting, the parent wrote a letter dated March 14, 2012, notifying the district about her concerns with the March 2012 IEP—the parent did not, however, indicate that she had not received the IEP (see Parent Ex. B at pp. 1-2). On or about June 10, 2012, the parent executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year beginning July 2, 2012 (see Parent Ex. I at pp. 1, 4). Then, on July 25, 2012, the parent visited the assigned public school site, and in a letter of the same date, the parent notified the district that it was not appropriate for the student—the parent did not, however, indicate that she had not received the IEP (see Parent Ex. E). Thus, despite having not received the March 2012 IEP until approximately March 2013, and without having a full description of the program recommendations, the parent expressed her concerns about the March 2012 IEP and rejected both the March 2012 IEP and the assigned public school site. Therefore, as the district contends, the hearing record does not contain evidence that the alleged non-receipt of the March 2012 IEP 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.

Next, it is also undisputed that the district failed to provide the parent with prior written notice. Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these safeguards (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

However, similar to the above analysis, the hearing record does not contain sufficient evidence to conclude that the lack of a prior written notice in this instance, while a procedural violation, impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Thus, the parent's allegation that the district's failure to provide prior written notice resulted in a failure to offer the student a FAPE for the 2012-13 school year must be dismissed.¹²

C. March 2012 IEP

¹² To be clear, after the next CSE meeting for the student, the district shall provide the parent with prior written notice consistent with State regulations and on the form prescribed by the Commissioner of Education (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>).

1. Present Levels of Performance

The parent argues that IHO 2 failed to address issues related to the "functional levels of performance" and the student's "unique needs and sensory needs." More specifically, the parent alleges that the March 2012 IEP failed to include statements of the student's functional levels, and the March 2012 IEP failed to explain the student's functional levels in terms of "actual skills." The district generally denies these allegations. Upon review, the evidence in the hearing record does not support the parent's contentions.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments or teacher reports provided by the student's nonpublic school (see S.F., 2011 WL 5419847, at *10 [indicating that a CSE is required to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]).

Here, contrary to the parent's allegations, the March 2012 CSE described the student's functional levels in reading and mathematics in terms of "actual skills" within the present levels of performance and individual needs section of the March 2012 IEP (see Dist. Ex. 2 at pp. 1-2). For example, consistent with the December 2011 Rebecca School progress report, the March 2012 IEP indicated that the student was "very interested" in reading, and at that time, the student was working on learning "how to hold a book independently" and could attend for the "duration" of a familiar story (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at p. 2). The March 2012 IEP reflected that the student was also working on choosing a book when presented with two choices and identifying the student's own picture from a field of two pictures (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at pp. 2, 6, 8). With regard to mathematics, the March 2012 IEP reflected that the student was working on "1:1 correspondence" during snack and "attendance times," she

could identify the concepts of "full/empty," she could communicate "more," and she responded to "over" and "under" (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at pp. 3, 6).

Also consistent with the December 2011 Rebecca School progress report, the March 2012 IEP reflected the student's functioning related to ADL skills, indicating that with assistance the student was able to "put food to her mouth," and she required "1:1 assistance" to use a fork and to take off her coat (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at p. 7). In addition, the March 2012 IEP indicated that the student required a diet "free of gluten, casein, and soy," and the student was not fully toilet trained (Dist. Ex. 2 at p. 2). With regard to communication needs, the March 2012 IEP noted that the student communicated through "non-verbal communications such as gestures or gazing" and that the student could communicate with "all the adults in the classroom" (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at pp. 1-2, 4). Socially, the March 2012 IEP indicated the student "enjoy[ed] interacting with familiar adults in calm, familiar environments;" the student showed an "increased interest in her peers;" and although she began initiating interactions, the student continued to require "additional adult support to expand the interaction past the initial engagement or eye gaze" (compare Dist. Ex. 2 at p. 1 with Parent Ex. C at p. 1). The March 2012 IEP also indicated that the student enjoyed playing with toys, such as dolls and animals, and would seek out these toys (compare Dist. Ex. 2 with Parent Ex. C at p. 1).

With regard to physical development, the March 2012 CSE described the student's sensory needs within this section of the March 2012 IEP (see Dist. Ex. 2 at pp. 1-2). Consistent with the December 2011 Rebecca School progress report, the March 2012 IEP reflected that the student required "moderate to maximum visual, tactile, and verbal support to attend to her environment" and to "navigate through a busy school environment," noting additionally that the student was "gravitationally insecure" and exhibited "poor body awareness, particularly in large open spaces" (compare Dist. Ex. 2 at p. 1, with Parent Ex. C at p. 7). Based upon the information in the December 2011 Rebecca School progress report, the March 2012 IEP also indicated that "large, open spaces" caused the student anxiety, and she "re-regulate[d] by pacing the perimeter of the room" and by "seek[ing] out small, confined spaces" (id.). In addition, the March 2012 IEP reflected—as noted in the December 2011 Rebecca School progress report—that the student "avoid[ed] elevated or uneven surfaces," and she benefited from "deep proprioceptive input to regulate and improve her body organization" (id.). The March 2012 IEP further indicated that the student wore a "bear hug vest on a 30 minute on, [30] minute off schedule throughout the day" (id.).

Finally, the March 2012 CSE recommended strategies to address the student's management needs, including the use of visual, verbal, and tactile prompts and cues; providing the student with sensory breaks and the use of sensory tools; providing the student with a sensory diet, including "joint compression, brushing, and compression vest;" individual time with a preferred adult; and the services of a full-time, 1:1 paraprofessional for ensuring the student's safety when navigating through the school environment and monitoring the student's diet (compare Dist. Ex. 2 at p. 2 with Parent Ex. C at pp. 1-9).¹³

¹³ The parent is not permitted to simply speculate that the district would fail to adhere to the student's IEP mandates, which noted the student's dietary restrictions (M.O. v. New York City Dep't of Educ., 2015 WL 4256024, at *7 (2d Cir. July 15, 2015))

With respect to the student's sensory needs, the parent argues that based upon testimonial evidence adduced at the impartial hearing, the March 2012 IEP failed to mention the student's "aversion to light," and the March 2012 IEP failed to "discuss or address" the student's difficulty with "proprioceptive input, vestibular input, and gravitation insecurity." However, the testimonial evidence referenced in support of the parent's assertions was elicited from the student's then-current occupational therapist at the Rebecca School during the 2012-13 school year and from the director of the Rebecca School—neither of whom attended or participated in the March 2012 CSE meeting (see Tr. pp. 241, 245, 299-303; compare Dist. Ex. 2 at p. 13, with Parent Ex. C at p. 4, and Tr. pp. 221, 297-99). Notably, the December 2011 Rebecca School progress report—which the March 2012 CSE relied upon, in part, to develop the March 2012 IEP and which the Rebecca School teacher attending the March 2012 CSE meeting confirmed as an accurate picture of the student at that time—did not indicate that the student had an "aversion to light," difficulties with vestibular input, or that the student required "'deep breathing' and 'deep pressure'" (see Dist. Ex. 8 at p. 1; Parent Ex. C at pp. 1-9).^{14,15} Contrary to the parent's allegations and as noted above, the March 2012 CSE noted the student's need for proprioceptive input and her gravitational insecurity in the student's present levels of performance and individual needs section of the March 2012 IEP (see Dist. Ex. 2 at p. 1). Based on the foregoing, the March 2012 IEP appropriately identified the student's sensory needs as reflected in the evaluative information available to and relied upon by the March 2012 CSE.¹⁶

2. Annual Goals

The parent argues that the annual goals in the March 2012 IEP failed to include an "objective" method of measurement. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR

¹⁴ While the December 2011 Rebecca School progress report references "deep pressure," it appears that the term described what "brushing" provided to the student, that is, "deep pressure and tactile input to the skin" (Parent Ex. C at p. 7).

¹⁵ In comparison to the December 2011 Rebecca School progress report, a December 2012 Interdisciplinary Report of Progress Update prepared by the student's teachers and related services' providers at the Rebecca School during the 2012-13 school year (December 2012 Rebecca School progress report) noted, specifically, that the student received co-regulation strategies—such as "deep-breathing" and "gentle deep pressure to hands and feet" during OT sessions—and that the student was "over-responsive to processing her vestibular sense" (compare Parent Ex. C at pp. 1-7, with Parent Ex. K at pp. 1-5). The December 2012 Rebecca School progress report was not available to the March 2012 CSE.

¹⁶ Whereas here, when neither the student's then-current occupational therapist at the Rebecca School for the 2012-13 school year nor the director of the Rebecca School attended or otherwise participated at the March 2012 CSE meeting, the parent cannot rely upon retrospective evidence—here, the occupational therapist's testimony or the director's testimony at the impartial hearing—to attack the appropriateness of the March 2012 IEP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "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"]).

300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. § 1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).¹⁷

Upon review, the March 2012 CSE developed approximately 15 annual goals with approximately 28 corresponding short-term objectives to address the student's identified needs in the following areas: academic and speech-language skills, interaction/engagement, regulation, attention, sensory integration, ADL skills, visual-spatial skills, and her ability to navigate the school environment (see Dist. Ex. 2 at pp. 2-7). A review of the annual goals reveals that each annual goal or short-term objective included an evaluative criteria (i.e., one out of two opportunities, one out of three opportunities, two out of four opportunities), an evaluation procedure (i.e., teacher or provider observations, teacher made materials), and a schedule to measure the student's progress toward meeting the annual goals (i.e., one time per quarter) (id.).

As the parent claims, the March 2012 CSE recommended the same evaluative procedure or "method of measurement" for all but one of the annual goals and short-term objectives in the IEP: namely teacher or provider observations (see Dist. Ex. 2 at pp. 2-7). While the parent argues that teacher or provider observations did not constitute an objective method of measurement, neither the IDEA nor State regulations require that a CSE create annual goals or short-term objectives or benchmarks using an "objective" method of measurement to assess the student's progress or create annual goals using more than one type of evaluative procedure upon which to measure the student's progress (see 34 CFR 300.320[a][2]-[3]; 8 NYCRR 200.4[d][2][iii][b]). Moreover, recording information through empirically observable trials is not, as further discussed below, an impermissibly subjective method of measurement.

Relatedly, the evidence in the hearing record describing the student as "non-verbal and mostly non-communicative except for occasional gestures" and "unable to be tested" through formal assessments, as well as the student's anticipated participation in alternate assessments, supports the March 2012 CSE's decision to recommend teacher or provider observations as a method of measurement or evaluative procedure for the annual goals in this case (see Dist. Exs. 2

¹⁷ State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

at pp. 2-7, 9; 4 at pp. 1-2; 7 at pp. 2-4). As noted in the March 2012 IEP, the CSE recommended that the student participate in alternate assessment due to her "[p]ervasive global delays" (Dist. Ex. 2 at p. 9). As part of the State testing program, alternate assessment is a "datafolio-style assessment in which students with severe cognitive disabilities demonstrate their performance toward achieving the New York State P-12 Common Core Learning Standards in English language arts and mathematics" (<http://www.p12.nysed.gov/assessment/nysaa>). Significantly, a student's performance on alternate assessment is "recorded through direct observation and documentation and may include other information such as student work products, photographs, audio and videotapes" (*id.*). As such, there is no reason to disturb IHO 2's finding that teacher or provider observations was an appropriate method of measurement or evaluative procedure to assess the student's progress toward meeting the annual goals and short-term objectives in the March 2012 IEP.

Finally, the parent argues that the March 2012 IEP included only one "vague" "sensory goal," which did not address the student's specific sensory difficulties. In this case, while a review of the annual goal, alone, may support the parent's allegation that the "sensory" annual goal was "vague," the annual goals, overall—and consistent with the aforementioned regulations—nonetheless address the student's identified needs. Moreover, courts generally have been reluctant to find a denial of a FAPE on the basis of deficient annual goals where the corresponding short-term objectives cure the defect by providing sufficient specificity to evaluate the student's progress (*A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; *J.L. v. City Sch. Dist.*, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]). Upon review, all of the annual goals in the March 2012 IEP included between one and three corresponding short-term objectives identifying and targeting specific skills for the student to work on related to the particular annual goal (*see* Dist. Ex. 2 at pp. 2-7). For example, the particular annual goal mentioned by the parent—which targeted the student's ability to integrate sensory information to engage in a variety of daily activities at school and at home—incorporated one short-term objective that required the student to initiate at least two different sensory activities during one OT session, with minimal gestural and visual cueing in three out of five opportunities, provided the necessary specificity on which to focus the student's efforts (*id.* at p. 5). Furthermore, contrary to the parent's argument, the March 2012 IEP included three additional annual goals with corresponding short-term objectives to address the student's difficulties with sensory regulation and specifically targeted the student's ability to maintain regulation, to share attention with familiar adults, and to participate in classroom activities (*see id.* at pp. 2-4). As such, the student's annual goals and short-term objectives addressed improving the student's sensory regulation skills. Therefore, the annual goals and short-term objectives are sufficient to guide a teacher in providing the student with instruction and any deficiencies do not rise to the level of a denial of a FAPE (*B.P. v. New York City Dep't of Educ.*, 2014 WL 6808130, at *11 [S.D.N.Y. Dec. 3, 2014]; *N.S. v. New York City Dep't of Educ.*, 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; *B.K. v. New York City Dep't of Educ.*, 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; *R.B. v. New York City Dep't of Educ.*, 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]).

Thus, overall, the evidence in the hearing record and a review of the March 2012 IEP demonstrates that the annual goals in the March 2012 IEP, combined with the corresponding short-term objectives, addressed the student's sensory difficulties and provided for an appropriate

method of measurement or evaluative procedure (see e.g., *P.K. v. New York City Dep't of Educ.*, 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011], *aff'd*, 526 Fed. App'x 135 [2d Cir. May 21, 2013] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify annual goals or methods of measuring progress]).¹⁸

3. 6:1+1 Special Class Placement

The parent contends that the 6:1+1 special class placement was not appropriate for the student because the student would not receive sufficient support and the program did not provide the student with sufficient sensory supports.¹⁹

In this case, the March 2012 CSE recommended a 6:1+1 special class placement— together with the services of a full-time, 1:1 paraprofessional; annual goals; related services; and strategies to address the student's management needs—for the 2012-13 school year (see Dist. Ex. 2 at pp. 7-9). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii]). At the time of the March 2012 CSE meeting, the student exhibited significant deficits in cognition; pre-academic skills; language and communication skills; social interaction skills; fine and gross motor skills; sensory processing skills, including attention, regulation, and visual-spatial skills; and ADL skills (see Dist. Exs. 2 at pp. 1-7; 4; 5; 7; 8 at pp. 1-2; Parent Ex. C at pp. 1-9). According to information provided by the Rebecca School teacher and the December 2011 Rebecca School progress report, the student required adult support ranging from minimal verbal or gestural prompting to modeling, and maximum physical support in order to attend to and participate in classroom activities, to interact with others, and to navigate the school environment (see Dist. Ex. 2 at p. 1; Parent Ex. C at pp. 1-9).

In reaching the decision to recommend a 6:1+1 special class placement, the evidence in the hearing record demonstrates that the March 2012 CSE considered other placement options for the student for the 2012-13 school year (see Dist. Ex. 2 at pp. 7-9, 11-12; see also Tr. pp. 164-69). In particular, the March 2012 CSE considered but rejected a special class in a community school because it was "too challenging" for the student, it did not offer the student a

¹⁸ Under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology or their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Here, there is nothing in the hearing record to indicate that the annual goals and short-term objectives in the March 2012 IEP could not be implemented in a district public school program (see Dist. Ex. 2 at pp. 2-7; cf. *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. 2014]; *A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]).

¹⁹ In the petition, the parent does not "clearly indicate the reasons for challenging" IHO 2's decision with respect to the 6:1+1 special class placement recommendation in the March 2012 IEP, by "identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]). Instead, the parent argues that the evidence in the hearing record supports IHO 1's conclusion that the 6:1+1 special class placement was not appropriate for the student (Pet. ¶¶ 42, 44).

12-month school year program, and it did not offer the student the support she required (*id.* at pp. 11-12; see Tr. pp. 83-85; Dist. Ex. 8 at p. 3). The March 2012 CSE also considered but rejected both an 8:1+1 special class placement and a 12:1+4 special class placement at a specialized school because neither placement offered the student appropriate opportunities for communication, socialization, or functional peer groupings (see Dist. Exs. 2 at p. 12; 8 at p. 3; see also Tr. pp. 83-85).

At the impartial hearing, the district psychologist described the recommended 6:1+1 special class placement at a specialized school as a program that offered students a 12-month school year program, "intensive support," and the opportunity to work on the students' "academic skill levels, their cognitive functioning, their communication skills, [and] their socialization skills" (Tr. p. 80). He added that the 6:1+1 program was appropriate to meet this particular student's needs because, at the time of the March 2012 CSE meeting, the student "display[ed] needs in those areas," the student required "more support than would be provided for within a more typical community school setting," and the student would "benefit from a more intensive program with a more supportive student teacher ratio that could address more specifically her needs" (Tr. pp. 80-81). The district psychologist also testified that March 2012 CSE described the 6:1+1 special class placement to the parent at the CSE meeting as a "full-time, special education program" developed by the district to support students who demonstrated needs in "developing their academic skills, their social skills, their communication skills, and cognitive skills" (Tr. pp. 121-22). In addition, the March 2012 CSE also indicated to the parent at the CSE meeting that the program would "provide instruction in various small groups with more intensive attention, and instruction [than] would be provided in more typical educational settings" (*id.*).

According to the March 2012 CSE meeting minutes, both the parent and the Rebecca School teacher expressed concerns about the student-to-teacher ratio of the recommended special class, noting that a "lower student to teacher ratio [was] more appropriate" for the student (Dist. Ex. 8 at p. 3). In addition, the parent expressed that the student required "1:1 assistance" (*id.* at pp. 3-4). As a result, the March 2012 CSE recommended the services of a full-time, 1:1 paraprofessional to support the student throughout the course of the school day, to ensure the student's safety when navigating through the school environment, and to monitor the student's diet (see Dist. Ex. 2 at pp. 2, 8; see also Tr. p. 74).

In addition to the 6:1+1 special class placement and the services of a full-time, 1:1 paraprofessional, the March 2012 CSE—as discussed previously—identified the student's sensory needs in the present levels of performance and individual needs section of the March 2012 IEP, and recommended, in part, the following sensory-based strategies to help the student function in the classroom: the use of visual, verbal, and tactile prompts and cues; providing the student with sensory breaks and the use of sensory tools; providing the student with a sensory diet, including "joint compression, brushing, and compression vest;" and individual time with a preferred adult (compare Dist. Ex. 2 at p. 2 with Parent Ex. C at pp. 1-9). The parent argues, however, that although the March 2012 IEP provided that the student would receive "sensory breaks and sensory tools, joint compression, brushing, and a compression vest," the IEP did not include a "schedule for joint compression or brushing" or a schedule for the use of a

"compression vest" with the student and failed to provide for "staff training" to implement the student's sensory diet.²⁰

At the impartial hearing, the district psychologist testified that the March 2012 CSE included specific sensory tools, such as "joint compression, brushing, and the compression vest," in the IEP as "part of the types of sensory tools that might be needed" for the student (Tr. pp. 74-75).²¹ However, he further testified that the March 2012 CSE intentionally structured the IEP to "allow for flexibility in the classroom setting, in this case the future classroom setting that would go into effect, to not necessarily tie the hands of the teachers or service providers into a limited set of specific tools" (Tr. pp. 73-75). The district school psychologist further explained the need for "flexibility in the IEP" due to the "unpredictable" nature of a student's progress and that a student's needs "change[d] over time" (Tr. p. 75). In addition, the district school psychologist testified that "[p]art of good instruction and good professional practice" entailed the ability to be "flexible and to respond to the needs" at the time they arise (Tr. pp. 75-76). In light of the foregoing, although the March 2012 IEP did not include a "schedule for joint compression or brushing" or for "staff training" to implement the student's sensory diet, overall, the evidence in the hearing record demonstrates that the March 2012 IEP included sufficiently specific information about the student's sensory needs—and how to address the student's sensory needs—such that the absence of this particular information did not result in a finding that the March 2012 IEP failed to provide the student with sufficient sensory supports.

In summary, the March 2012 CSE's decision to recommend a 6:1+1 special class placement—together with the services of a full-time, 1:1 paraprofessional; annual goals; related services; and strategies to address the student's management needs—for the 2012-13 school year was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE for the 2012-13 school year.

4. Transition Plan

The parent asserts that the March 2012 CSE did not consider a transition plan to move the student to a "public school placement" and that testimony adduced at the impartial hearing indicated that the student exhibited difficulty with "transitions." The district contends that the parent did not raise the March 2012 CSE's failure to consider a transition plan for the student in the due process complaint notice, the parties did not agree to expand the scope of the impartial hearing on remand to include the absence of a transition plan as one of the "unaddressed issues" to be resolved by IHO 2, and further, neither the IDEA nor State law or regulations require any such plan to assist a student's transition from a nonpublic school to a public school. As

²⁰ Contrary to the parent's contention, the March 2012 IEP indicated that the student used a compression vest according to a "30 minute on, [30] minute off schedule throughout the day" (Dist. Ex. 2 at p. 1). In addition, the evidence in the hearing record indicates that the student only began using an "astronaut board" at the Rebecca School after the March 2012 CSE meeting and during the 2012-13 school year (see Tr. pp. 298-99, 311-12; compare Parent Ex. C at pp. 1-9, with Parent Ex. K at pp. 1-5).

²¹ Moreover, the specific sensory tools included in the March 2012 IEP as part of the student's sensory diet were the same strategies used with the student at the Rebecca School, as indicated in the December 2011 Rebecca School progress report: namely, joint compression, brushing, and a compression vest (compare Dist. Ex. 2 at p. 2, with Parent Ex. C at p. 7).

explained more fully below, even if the parent raised the March 2012 CSE's failure to consider a transition plan for the student in the due process complaint notice, the CSE was not obligated to create such a plan.

Here, the district correctly argues that neither the IDEA nor State law or regulations required the March 2012 CSE to create a "transition plan" to assist the student's transition from one school to another as part of a student's IEP (see A.D., 2013 WL 1155570, at *8; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

Moreover, while the parent alleges that the hearing record included evidence that the student exhibited difficulty with transitions, the parent points only to two pages of testimony from the director of the Rebecca School (director), who did not attend the March 2012 CSE meeting, in support of this assertion (see Tr. pp. 261-62; Dist. Ex. 2 at p. 13). At the impartial hearing, the director testified that when moving the student into a new classroom environment, the Rebecca School staff worked slowly with the student and prepared the student by providing her with "pictures" and by "visiting the new classroom" (Tr. pp. 261-62). Based upon the December 2011 Rebecca School progress report that the March 2012 CSE relied upon to develop the IEP, the student understood "transition" and only needed a "minimal amount of verbal and gestural support from an adult to transition in and out of the classroom as well as to different activities within the classroom" (Parent Ex. C at p. 2). In addition, the December 2011 Rebecca School progress report indicated that the student transitioned to the "bathroom with no difficulty and with a minimal showing of anxiety" (id. at p. 3). At the impartial hearing, the district school psychologist testified that the March 2012 CSE recommended the services of a full-time, 1:1 paraprofessional based on reports that the student "needed adult facilitation in terms of being able to safely and successfully navigate through the school building" and the CSE recommended the paraprofessional services, in part, for the "purposes of safety and support in that area" (Tr. pp. 73-74; see Dist. Ex. 2 at pp. 1-2, 7-8). Therefore, even if the student exhibited transition needs, the March 2012 IEP identified and addressed those needs (compare Tr. pp. 73-74, 261-62, and Parent Ex. C at pp. 2-3, with Dist. 2 at pp. 1-2, 7-8). Consequently, given that no legal obligation exists with respect to the type of transition plan contemplated by the parent—in addition to no particular transition needs of the student that the parent contends the March 2012

CSE failed to address—the absence of a transition plan in the March 2012 IEP cannot result in a failure to offer the student a FAPE for the 2012-13 school year.²²

C. Challenges to the Assigned Public School Site

Finally, while the parent continues to advance arguments pertaining to the assigned public school site's ability to implement the March 2012 IEP, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has explained that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E.,

²² Furthermore, the hearing record is devoid of evidence that the March 2012 CSE was required to recommend transitional support services in this case. State regulation requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). Here, even assuming that a change in restrictiveness would occur with the student's transition from the Rebecca School to the 6:1+1 special class placement at a specialized public school—which the parent does not argue—there is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of a highly intensive class settings, such as the 6:1+1 special class placement recommended in this case. Instead, it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher).

694 F.3d at 187 n.3).²³ Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3).

In view of the foregoing, the parent cannot prevail on claims regarding the implementation of the March 2012 IEP at the assigned public school site. Accordingly, as the student never attended the assigned public school site pursuant to the March 2012 IEP, any conclusion that the district would not have implemented the student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).²⁴

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it 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 the Rebecca School was an appropriate placement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 July 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

²³ The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

²⁴ With respect to the parent's assertion that the student would not be functionally grouped at the assigned public school site, this alone is not sufficient to support the unilateral placement of the student (see B.K., 12 F.Supp.3d at 371 [holding that the plaintiffs' functional grouping argument in that case fell "squarely within the realm of impermissible 'speculative' objections to an unimplemented IEP, which the court need not and will not entertain as grounds for establishing the denial of a FAPE"]; R.B., 2013 WL 5438605, at *17; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. 2013]).