The University of the State of New York

The State Education Department
State Review Officer
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No. 12-193

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioners, Lauren A. Baum, Esq., of counsel

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

DECISION

I. Introduction

Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Rebecca School for the 2010-11 school year and for an IEE with an appropriate evaluator. The appeal must be sustained in part.

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

With regard to the student's educational history, she received diagnoses including attention deficit hyperactivity disorder-combined subtype (ADHD), anxiety disorder-not otherwise specified, nonverbal learning disorder, multiple developmental delays, and expressive/receptive language disorder (Parent Ex. G at p. 6). According to the hearing record, the student began receiving early intervention services at the age of fourteen months to address her difficulties with speech-language, fine and gross motor, sensory integration, organizational, and motor planning (id. at p. 1; Parent Ex. U at p. 1). Prior to transitioning to school-age programs, the student continued to receive services through the Committee on Preschool Special Education (CPSE) and was classified as a preschool student with a disability (Parent Exs. F at p. 1; U at p. 1). After reaching age five, the student aged out of special education services through the CPSE and she was referred to the CSE, which found her eligible for special education as a student with an other health-impairment with a recommended placement in a special class in a community school, with related services of speech-language, occupational therapy (OT), physical therapy (PT), and

counseling (Parent Ex. U at p. 1).[1] The student attended nonpublic parochial schools for kindergarten through sixth grade (Tr. pp. 807-08). In Spring 2008 (seventh grade), the parents enrolled the student at the Rebecca School, where she continued to attend through and including the 2010-11 school year, the year in dispute in this proceeding (Tr. pp. 808-09).

On April 14, 2010, the parents executed an enrollment contract with the Rebecca School for the student's attendance for the 2010-11 twelve-month school year (Parent Ex. M).

On April 29, 2010, the CSE convened to develop the student's IEP for the 2010-11 school year (Parent Ex. E). Finding the student eligible for special education as a student with an emotional disturbance, the April 2010 CSE recommended a 12-month program in a 8:1+1 special class placement in a specialized school with the following related services: two 45-minute sessions per week of speech-language therapy in a group (3:1); one 45-minute session per week of individual speech-language therapy; three 45-minute sessions per week of individual OT; one 45-minute session per week of counseling in a group (3:1); and two 45-minute sessions per week of individual counseling (id. at pp. 1, 17).[2] The CSE also recommended adapted physical education, testing accommodations and a 1:1 crisis management paraprofessional to address the student's aggressive behaviors (id. at pp. 4-5, 17). By final notice of recommendation (FNR) dated June 11, 2010, the district summarized the special education and related services recommended in the April 2010 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2010-11 school year (Dist. Ex. 2).

The parents visited the assigned public school site on June 18, 2010 and, in a letter dated June 21, 2010, the parents rejected the assigned school because the school was not an appropriate environment for the student, given the student's anxiety and sensory issues (Parent Ex. D at pp. 1, 3). According to the parents, the school would be unable to provide the student with her mandated services in a timely manner (id. at p. 3). More specifically, the parents expressed concern that the student's exposure to the significant number of students with behavioral issues at the assigned school would be difficult for the student to process because the student required a calm and orderly environment (id. at p. 1). The parents also noted that the presence of security guards at the front entrance of the school, and that such uniformed security personnel could increase the student's anxiety at the start of the school day (id.). The parents further noted that the assigned school staff did not include an OT provider or a room to provide OT for the student and there was a possibility that the school would be unable to provide the student with speech-language services as the speech-language provider at the assigned school would be retiring (id. at p. 2). The parents also indicated concern that the student's knowledge of the school's procedure in calling 911 if a student experiences prolonged meltdowns, would add to the student's anxiety and would be difficult to regulate her through the day (id.). Additionally, the parents requested information regarding the class to which the student would be assigned, including class profiles and credentials of the assigned school teachers and the student's 1:1 crisis management paraprofessional (id. at pp. 2-3). According to the parents' letter, the school could not guarantee that the student would receive a 1:1

[1] The hearing record reflects that the March 2005 CSE recommended that the student's classification be changed from a student with an other health-impairment to a student with an emotional disturbance (Parent Ex. U at p. 1). The March 2005 CSE further recommended a change in the student's program from a special class in a community school with related services to a special class in a specialized school with related services (id.).

[2] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute in this proceeding (Tr. p. 15; see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

paraprofessional when the student enrolled into the school and that this issue would have to be discussed with the school's administration (id. at p. 3). Lastly, the parents informed the district of their intention to continue the student's enrollment at the Rebecca School and seek tuition reimbursement for the 2010-11 school year; however, the parents would "reassess" their decision if the school provided them with additional information regarding their concerns (id. at p. 3).

On September 15, 2010, the district conducted a psychoeducational evaluation of the student as part of the student's three-year reevaluation (Parent Ex. U). By letter dated May 5, 2011, the parents informed the district that the September 2010 psychoeducational evaluation conducted by the district had been discussed at a CSE meeting in February 2011, was "inaccurate" and "conducted under conditions that were not appropriate" for the student (Parent Ex. FF at p. 1). In addition, the parents attached a letter from the student's psychiatrist which described the student's issues regarding the testing process (id. at pp. 2-3). Based on these concerns, the parents requested an independent educational evaluation (IEE) at public expense (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 15, 2011, the parents alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A at p. 4). Initially, without elaboration, the parents alleged that the April 2010 CSE was not properly constituted (id. at p. 1). The parents further alleged that the CSE deprived the parents the opportunity to meaningfully participate in the development of the student's IEP (id.). Additionally, the parents alleged that the district failed to consider sufficient, and appropriate evaluative information on which to base its recommendations (id.).

Relative to the April 2010 IEP, the parents asserted that it did not accurately reflect the student's present levels of performance and it failed to address the student's needs (Parent Ex. A. at p. 2). The parents further asserted that the IEP did not address the student's academic, social/emotional or sensory needs (id.). With respect to the annual goals, the parents contended that the IEP had an insufficient number of appropriate, measurable goals to address the student's needs and allow the student to make progress (id.). Next, the parents alleged that the behavioral intervention plan (BIP) developed by the district was insufficient to allow the student to make progress and that the functional behavioral assessment (FBA) was neither conducted nor used in developing the student's BIP (id.). The parents also contended that the IEP contained inappropriate promotion criteria (id.). Additionally, the parents argued that the IEP contained an insufficient "postsecondary transition plan" because the long term outcomes were vague and generic (id.). The parents further argued that there were no transition services in the IEP and it failed to identify the party responsible for providing the recommended transition services to transition the student to postsecondary activities (id.). In addition, the parents reiterated their concerns about the assigned public school site, which had been set forth in their previous letter, dated June 21, 2010 (compare Parent Ex. A at pp. 3-4, with Parent Ex. D at pp. 1-3). Additionally, the parents argued that the CSE failed to appropriately address the parents' request for an IEE, and therefore an IEE was not provided to the parents (Parent Ex. A at pp. 1, 4).

Lastly, the parents alleged that the student's unilateral placement at the Rebecca School was appropriate because the program at the Rebecca School was tailored to meet the student's needs and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 5). As relief, the parents sought reimbursement for the student's tuition at the Rebecca School for the 2010-11 school year, as well as the costs of related services and transportation (id.). The

parents also requested an IEE with an appropriate evaluator and invoked the student's right to a stay put (pendency) placement at the Rebecca School (id. at pp. 5-6).[3]

B. Impartial Hearing Officer Decision

On October 24, 2011, the parties proceeded to an impartial hearing, which concluded on May 30, 2012 after seven days of proceedings (Tr. pp. 1-1019). In a decision dated August 21, 2012, the IHO determined that the district offered the student a FAPE for the 2010-11 school year (IHO Decision at p. 16). Initially, the IHO found that the parents did not meet their burden of proof for tuition reimbursement at the Rebecca School (id. at p. 17). Next, the IHO found that, contrary to the parents' arguments, all attendees of the April 2010 CSE meeting, including the parents and the Rebecca staff participated during the CSE meeting and were not deprived of an opportunity to meaningfully participate in the development of the student's April 2010 IEP (id. at p. 16). The IHO further found that student's present levels of performance were discussed during the CSE meeting and that the CSE worked diligently to understand the student's functioning levels in all areas to develop an appropriate IEP (id. at pp. 16-17). With respect to the assigned public school site, the IHO found that the teacher at the assigned public school site would have ensured that the student's goals and needs were met by the student, paraprofessional and/or the related services providers (id. at p. 17). Lastly, with respect to the parents' request for an IEE, the IHO found that the parents "knowingly and intentionally" declined the district's offer to conduct the psychoeducational evaluation and denied their request for an IEE with an appropriate evaluator as the parents failed to establish that the evaluator that they deemed not suitable was inappropriate (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parents appeal and contend that the IHO erred in finding that the district offered the student a FAPE for the 2010-11 school year. Initially, the parents argue that the IHO applied an incorrect legal standard in determining that the parents did not meet their burden of proof for tuition reimbursement at the Rebecca School. Next, the parents maintain that the April 2010 IEP was substantively inadequate because the April 2010 CSE failed to review sufficient, current evaluative information and deprived the parents of a meaningful opportunity to participate during the April 2010 CSE meeting. More specifically, the parents contend that the CSE failed to discuss the most recent psychoeducational evaluation, speech-language, or OT evaluation and instead relied upon evaluative information that was "four months old." The parents further contend that the April 2010 IEP failed to describe the student's present levels of performance because it failed to note all of the student's diagnoses, failed to specify the student's inability to sustain attention if dysregulated, and failed to describe the intensity or frequency of the student's dysregulation and its impact on her academic and social/emotional performance. With respect to the annual goals, the parents maintain that the IEP failed to include a sufficient number of appropriate and appropriately measurable goals to assess the student's progress as many of the goals were derived from the Rebecca School Progress Report which had been outdated, had already been mastered by the student or didn't specify grade levels. The parents further argue that the CSE failed to include

[3] On the last day of the impartial hearing on May 30, 2012, the parents' attorney advised the impartial hearing officer (IHO) that the student did not have pendency rights (Tr. p. 1014).

transition goals with respect to the student's transition to a new school.[4] Additionally, the parents contend that the CSE failed to conduct a FBA prior to developing a BIP and therefore lacked sufficient information to develop an appropriate BIP to address the student's needs. The parents further contend that the CSE modified the student's related services without reviewing any new evaluations or consulting with the student's related service providers.

With respect to the assigned public school site, the parents argue that the IHO erred in finding that the assigned school would have been able to implement the student's IEP and address the student's needs. The parents further argue that the district failed to establish that the assigned classroom discussed during the impartial hearing was the same assigned classroom that was offered to the student. The parents also argue that the student would not have been appropriately grouped with similar functioning students, appropriate peer groups or appropriate peer models. Additionally, the parents argue that the student would not have been provided with sufficient individual support and that the assigned classroom would not have allowed the student to make progress. Next, the parents assert that the assigned classroom would not have provided the student with the student's sensory and emotional regulation needs. In addition, the parents assert that the number of students entering the building would have been overwhelming for the student and the security presence throughout the school would have increased the student's anxiety. The parents further assert that the assigned school would be unable to provide the student with appropriate related services. More specifically, the parents argue that the assigned school would have failed to address the student's OT needs because the assigned school did not have a sensory gym and there was no OT provider available on site. The parents also assert that the assigned school would not be able to provide the student with a 1:1 crisis paraprofessional as mandated in the student's IEP.

Relative to the unilateral placement, the parents argue that the IHO failed to determine whether the Rebecca School was appropriate. The parents assert that the Rebecca School was appropriate for the student because the program at the Rebecca School addresses the student's needs and provides a significant amount of support. The parents also argue that the Rebecca School staff is properly trained and qualified. Additionally, the parents argue that the student is appropriately grouped and received her mandated related services at the Rebecca School. The parents further argue that the Rebecca School addresses the student's social and emotional issues, sensory and daily living skills. The parents also argue that the student had access to sensory equipment at the Rebecca School which appropriately addressed the student's OT and speech-language needs. With respect to equitable considerations, the parents argue that the IHO erred in finding that equitable considerations did not favor the parents because the parents cooperated with

[4] The parents alleged in their due process complaint notice that the "post-secondary transition plan" is insufficient; however, on appeal the parents argue that the IEP lacked transition goals to assist the student in a new school environment. First, the parents failed to challenge on appeal the appropriateness of the "post-secondary transition plan" and have therefore abandoned any such argument (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10). Next, the parents' argument that the IEP lacked transition goals to assist the student in a new school environment may not be raised now for the first time on appeal because the parents failed to raise this allegation in their due process complaint notice (R.E., 694 F.3d at 187 n.4 [2d Cir. 2012]). Moreover, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; 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).

the district during the development of the student's IEP and notified the CSE regarding the inappropriateness of the assigned public school site. Lastly, the parents argue that the IHO erred in finding that the parents knowingly and intentionally declined the district's offer to conduct the psychoeducational evaluation and denied the parents request for an IEE.

In an answer, the district responds to the parent's petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district offered the student a FAPE for the 2010-11 school year. With respect to the parents' argument that the IHO applied an incorrect legal standard regarding the appropriateness of the district's recommended program, the district asserts that although the IHO's language may have been "inartful[]", the IHO correctly placed the burden on the district to provide that it offered the student a FAPE. Next, the district argues that the IHO correctly found that the parents and the Rebecca School staff participated during the April 2010 CSE meeting. The district further argues that the CSE considered and had access to sufficient evaluative information when developing the student's IEP. Additionally, the district asserts that the CSE had sufficient information related to the student's present levels of performance in order for the CSE to develop an IEP that accurately reflected the student's needs. The district further argues that the parents' contention with respect to the CSE failing to conduct an FBA prior to developing a BIP is without merit because the hearing record reflects that the CSE conducted an informal FBA during the CSE meeting. Additionally, the district contends that contrary to the parents' contention, the April 2010 IEP contained sufficient and appropriate goals to address the student's needs.

The district argues that the parents' claims surrounding the appropriateness of the assigned public school site were speculative as the student never attended the school. With respect to the appropriateness of the unilateral placement, the district argues that although the IHO did not make a finding, the parents did not establish their burden that the Rebecca School was appropriate. More specifically, the district argues that the hearing record strongly weighs against a finding that the Rebecca School program met the student's needs and the Rebecca School does not provide the student with the related services as identified in the April 2010 IEP. The district further argues that although the IHO did not make a finding regarding equitable considerations, they do not favor the parents because the parents did not establish that they were generally interested in having the student attend the district public school, they cooperated with the CSE, or that equitable considerations favored the parents. Lastly, the district contends that the IHO correctly found that the parents are not entitled to an IEE.

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]).

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. Burden of Proof

Initially, I will address the parents' argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]). Although the IHO may have used less than optimal language in her decision to describe her conclusion that the district offered the student a FAPE (see IHO Decision at p. 17), a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together,

demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE. Moreover, the parties agreed during the impartial hearing that the district has the burden of proof at an impartial hearing to demonstrate that it offered the student a FAPE and the parents have the burden of proof regarding the appropriateness of the unilateral placement (see Tr. pp. 621-22). Furthermore, even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). However, assuming for the sake of argument that the IHO misapplied the burden of proof, I have nevertheless independently examined the hearing record and, as more fully described below, I find that the evidence favoring the district is sufficient to support the IHO's ultimate determination that the district offered the student a FAPE (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 336 [E.D.N.Y. June 13, 2012]).

B. Parent Participation

The parents assert that the IHO erred in finding that all participants at the April 2010 CSE meeting meaningfully participated during the April 2010 CSE meeting. Specific to this claim, the parents allege that the CSE failed to meaningfully discuss with the parents and the Rebecca School staff the proposed 8:1+1 special class recommendation and related services for the student. For the reasons set forth below, the evidence does not show that the parents and the Rebecca School staff were denied any opportunities to participate in the development of the student's IEP.

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 & Communication 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, 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]).

In this case, the hearing record reflects meaningful and active parental participation as well as participation from the Rebecca School staff in the development of the student's April 2010 IEP.

The student's mother and the student's social worker from the Rebecca School attended the CSE meeting in person and the student's teacher from the Rebecca School participated via telephone (Parent Ex. E at p. 2).[5] Additional attendees included a district special education teacher, who also served as the district representative, a district school psychologist, and an additional parent member (id.). During the impartial hearing, the student's mother testified that she participated during the CSE meeting and discussed the student's Rebecca School progress report and the development of the student's annual goals (Tr. pp. 809-810, 812). The Rebecca School social worker also testified that she participated during the CSE meeting (Tr. p. 754). Although the Rebecca School special education teacher did not testify during the impartial hearing, the district special education teacher testified that the Rebecca School special education teacher participated at the CSE meeting and assisted the CSE in identifying the student's needs, discussing the student's goals and assisting in the development of the student's BIP (Tr. pp. 142-43). Moreover, the April 2010 CSE minutes reflect that the parent and the Rebecca School staff provided input and actively participated during the CSE meeting (Dist. Ex. 4).

The parents assert that the April 2010 CSE failed to ask the student's mother and the Rebecca school social worker whether the proposed 8:1+1 special class recommendation with a 1:1 crisis management paraprofessional was appropriate. The hearing record demonstrates that, according to the district representative, all participants of the CSE meeting determined that the 8:1+1 special class recommendation with a 1:1 crisis management paraprofessional was appropriate for the student (Tr. p. 172). Moreover, the April 2010 meeting minutes reveal that that a 8:1+1 special class recommendation with a 1:1 crisis management paraprofessional was discussed at the CSE meeting and that no one from the CSE meeting objected to the recommendation (Dist. Ex. 4). Furthermore, consistent with the April 2010 IEP, the district representative and the student's mother testified that the CSE considered other placement options for the student including a 12:1+1, which was rejected as being too large of a classroom to meet the student's needs (Tr. pp. 172, 812; Parent Ex. E at p. 16). The CSE also considered a 6:1+1 special class placement which was rejected as being overly restrictive for the student (id.). With respect to the parents contention that the student's related services were not discussed during the CSE meeting, the district special education teacher testified that the "[student's mother] requested the [CSE] to continue all of [the student's] services" and all participants of the CSE meeting, including the Rebecca staff agreed to the related services (Tr. p. 173). Based upon my review of the totality of evidence in the hearing record, the parents and the Rebecca staff were afforded an opportunity to participate in the IEP development process and supports the IHO's finding that all participants of the April 2010 CSE had an opportunity to meaningfully participate in the development of the student's April 2010 IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

C. April 2010 IEP

1. Sufficiency of Evaluative Information and Present Levels of Performance

I turn next to the parents' assertion that CSE reviewed insufficient or outdated evaluative data and that the present levels of academic performance set forth in the April 2010 IEP were deficient because it failed to address all of the student's diagnoses and the specifics of the student's

[5] According to the hearing record, the student's father did not attend the April 2010 CSE meeting (Parent Ex. E at p. 2).

dysresgulation, as well as their impact on her academic and social/emotional performance. An 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]; 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. §1414vc[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and 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][3]; 8 NYCRR 200.4[b][6][ix]. 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 request a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). 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]).

Among the 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]).[6] However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z., 2013 WL 1314992, at *8; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 582 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

In the present case, the April 2010 CSE considered the following in its review: the student's IEP from the preceding school year, an October 2009 classroom observation at the Rebecca School

[6] 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 (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

that was completed by the district school psychologist, a December 2009 Rebecca School progress report, and input from the parent and staff from the Rebecca School (Tr. pp. 142-44, 147-150, 177-78; Dist. Exs. 1; 4; Parent Exs. E; X). In addition to the evaluative data considered by the CSE, diagnostic information and programmatic recommendations that were presented in the 2008 privately obtained psychological and psychiatric evaluation reports were also reflected in the April 2010 IEP (Parent Exs. E at pp. 1, 3-5; F at pp. 2, 4-5; G at pp. 5-6).

A review of the hearing record reveals that based upon the evaluative information available to the April 2010 CSE, the present levels of performance in the April 2010 IEP included information regarding the student's diagnoses, and noted the student's challenges regarding dysregulation and its impact on her academic and social/emotional performance. More specifically, the academic performance section of the IEP's present levels of performance delineates the student's diagnoses of ADHD, anxiety disorder and [nonverbal] learning disorder, which were provided in the 2008 psychiatric evaluation (Parent Exs. E at p. 3; G at p. 6). In addition, aspects of the student's December 2009 progress report from Rebecca School were highlighted in the April 2010 IEP, including the student's ability to sustain attention when she is "regulated," and the conditions her teachers felt were important for her to succeed in the classroom, such as individualized support in a quiet setting when she becomes "dysregulated" (Parent Exs. E at p. 3; X at p. 1). The present levels of performance also included a description of the impact the student's anxiety had on her ability to maintain her composure and availability to learn, a topic about which the parent expressed concern at the CSE meeting and which was echoed in the Rebecca School December 2009 progress report (Tr. pp. 155, 815-16; Dist. Ex. 4; Parent Exs. E at p. 3; X at p. 1).

Consistent with the 2008 psychoeducational evaluation, the 2010 IEP indicated that the student's cognitive functioning stretched between the average range to the borderline range, with expressive language deficits and retrieval difficulties (Parent Exs. E at p. 3; F at pp. 2, 4).[7] While grade equivalent scores were not used to describe the student's academic achievement, narrative descriptions of the student's strengths, weaknesses, and challenges were depicted in the nonpublic school's progress report and are reflected in the April 2010 IEP (Parent Exs. E at p. 3; X at pp. 3-5).[8] For instance, the IEP describes the early level skills the student demonstrated in reading, writing, and math, including basic decoding of real and nonsense words, and her expanding

[7] While not contested, it is noteworthy that during the course of three individualized administrations of the same standardized test of overall cognitive functioning, the student earned significantly disparate scores. Specifically, in 2006, the testing resulted in a full scale IQ of 73, in 2008, a full scale IQ of 87, and in September 2010 (and therefore not available to the April 2010 CSE), a full scale IQ of 46 (Tr. pp. 699-704, 708-710; Parent Exs. F at p. 2; U at p. 3). The 2006 evaluation report was not included in the hearing record; rather, the 2006 scoring was described in the September 2010 evaluation report (Parent Ex. U at p. 3).

[8] When queried why the IEP included narrative information only, the district special education teacher/district representative testified the student's Rebecca School teacher informed [the CSE team], "the school is ungraded…there's no like first grade curriculum, second grade curriculum…and she [the student's teacher] doesn't feel comfortable to give us a grade level, even for instructional purpose" (Tr. pp. 153-54; Dist. Ex. 4).

comprehension skills (Parent Exs. E at p. 3; X at pp. 1, 4).[9] The IEP also noted the student's use of manipulative objects when solving addition and subtraction problems (Parent Exs. E at p. 3; X at p. 5).

Management needs related to academic performance as described in the April 2010 IEP are in keeping with strategies described in the student's Rebecca School progress report, as well as 2008 psychological evaluation report (Parents Exs. E at p. 3; F at p. 5). For example, the April 2010 IEP noted the student benefited from the provision of verbal and visual prompts, as well as sensory breaks, all of which appeared in the student's Rebecca School progress report (Parent Exs. E at p. 3; X at p. 11).

In the social/emotional portion of the present levels of performance, the student's psychiatric diagnoses were reiterated, but with the more specific language that was used in 2008 privately obtained psychiatric evaluation (Parent Exs. E at p. 4; G at p. 6). This portion of the IEP also included anecdotal information from "a teacher report" regarding the student's progress in terms of remaining "regulated" for longer periods per day, although she continued to experience periods of emotional dysregulation, which were evidenced by loud yelling, pounding on furniture or grabbing others (Parent Ex. E at p. 4).[10] The management needs associated with the student's social/emotional challenges mirror strategies identified in the student's nonpublic school progress report, as well as being in line with the parent's description of the student's anxiety during periods of unpredictability (Tr. pp. 809, 815-16; Parent Exs. E at p. 4; X at pp. 8, 10). The provision of support by a speech/language therapist, occupational therapist, and school counselor, is consistent with the recommendations of the student's private psychiatrist and private psychologist (Parent Exs. E at p. 4; F at pp. 4-5; G at p. 6).

The health and physical development section of the present levels of performance include references to the student's multiple diagnoses, including information regarding the student's need for daily medication to "stabilize her mood," information drawn directly from the 2008 psychiatric evaluation report (Parent Exs. E at p. 5; G at pp. 2-3). The IEP also recommended the provision of adaptive physical education in a small group (6:1+1) setting, which is generally consistent with the Rebecca School program the student was receiving at the time the December 2009 progress report was authored (Parent Exs. C at p. 5; X at p. 1).

Based on the above, the hearing record shows that the April 2010 CSE had sufficient evaluative information upon which to develop the student's April 2010 IEP, and furthermore, that the April 2010 IEP adequately and accurately reflected evaluation results and incorporated information directly from the student's IEP from the preceding school year, an October 2009 classroom observation at the Rebecca School, the December 2009 Rebecca School progress report, the 2008 privately obtained psychological and psychiatric evaluation reports, as well as the input

[9] I note that while there is consistency between the April 2010 IEP and the minutes recorded during the CSE meeting with regard to the reading comprehension assessment data, there is a misalignment between these two documents and the Rebecca School progress report (Dist. Ex. 4; Parent Exs. E at p. 3; X at p. 4). It is unclear whether the difference is "significant," as there are few details regarding the assessment tool(s). For example, the December 2009 Rebecca School progress report indicated the student was "reading at the second level," while the IEP and meeting minutes indicate the student was "working on Level 1" (Parent Exs. E at p. 3; X at p. 4).

[10] The exact teacher report to which the IEP refers is not identified (Parent Ex. E at p. 4). However, the description of the student's behaviors when experiencing "dysregulation," closely parallels information presented in the nonpublic school progress report (Parent Ex. X at pp. 1, 6, 8-10).

of CSE participants (see Dist. Ex. 3 at pp. 1-2; compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 5 at pp. 1-7 and Dist. Ex. 7 at pp. 1-5). Accordingly, the evaluative reports considered by the April 2010 CSE, coupled with input from the CSE participants, provided the CSE team with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011].

Finally, regarding the parents' assertion that the April 2010 IEP failed to discuss all of the student's diagnoses, including, her ADHD diagnosis, I note that federal and State regulations do not require the district to set forth the student's diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). In the instant case, several of the student's behaviors that had been attributed to ADHD, paralleled a number of those characterized as evidence of the student's anxiety; examples include the student talking in an excessively loud voice, acting impulsively, and difficulty focusing/being able to learn, all of which the nonpublic school related to the student being in a "dysregulated state" (Tr. pp. 608-09, 796, 835, 885-86, 954-955, 957-958, 1001; G at pp. 2-3, 5; X at pp. 1, 7-9). Furthermore, the April 2010 IEP addressed the student's behaviors that were identified as manifestations of anxiety and/or ADHD in the present levels of performance, as well as through a set of cross-disciplinary goals as described below, a behavior management plan, and related services and supports that included counseling, OT, and a full-time, 1:1 crisis management paraprofessional (Parent Ex. E at pp. 2-5, 9-13).

2. Annual Goals and Short-term Objectives

Although not addressed by the IHO, the parents assert that the April 2010 IEP failed to include a sufficient number of appropriate and objectively measurable goals and short-term objectives by which to measure the student's progress. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and 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]).

In the instant case, the April 2010 IEP included approximately 16 annual goals and approximately 42 short-term objectives (Parent Ex. E at pp. 6-14). The annual goals targeted the student's reading and writing, math, OT, speech-language, and counseling needs (Parent Ex. E at pp. 6-14). Each goal, with its set of short-term objectives included criteria for determining achievement of that goal, a method for measuring progress, and a schedule for progress

measurement (Parent Ex. E at pp. 6-14). The goals and short-term objectives also stipulate when adult support was to be provided in order to ensure the student's success (Parent Ex. E at pp. 6-14).

With respect to the student's reading and writing skills, the April 2010 IEP included reading goals designed to improve the student's decoding/word identification skills and comprehension strategies such as identifying sequence of events, as well as expand the number of words the student was able to identify on sight (Parent Ex. E at pp. 7-8). Further, the IEP included two writing goals, one that targeted the basic mechanics of writing such as writing "3 to 5 cohesively connected sentences about one topic," and another that focused on writing connected text for a variety of purposes, such as a personal letter or personal narrative (Parent Ex. E at pp. 7, 14). While the hearing record indicates that the student's special education teacher offered limited input regarding the student's writing skills during the April 2010 CSE meeting, the writing goal and short-term objectives in the IEP are consistent with those indicated in the Rebecca School progress report before the CSE (Dist. Exs. 1 at pp. 1-2; 4; Parent Exs. E at p. 3; X at p. 11).

To address the student's math skills, the April 2010 IEP presented one annual goal with seven short-term objectives that focused on identifying place value, addition/subtraction of multi-digit numbers, multiplication with single-digit numbers, coin identification, and telling time (Parent Ex. E at p. 6). The math goal and short-term objectives included in the IEP reflect agreement with the student's abilities as described in the district IEP's present levels of performance and the Rebecca School progress report (Parent Exs. E at p. 3; X at pp. 11-12).

The April 2010 IEP included three OT goals, each with two short-term objectives (Parent Ex. E at pp. 9-10). As noted throughout the present levels of performance section of the April 2011 IEP, the student struggles with remaining regulated when presented with "unpredictable, exciting or novel experiences" and she benefited from sensory breaks, and "a quiet environment" (Parent Exs. E at pp. 3-4; X at p. 6). According to the Rebecca School progress report, organizing sensory input is important so that "an individual can effectively interact with their environment"(Parent Ex. X at p. 6). Each OT goal that appeared in the April 2010 IEP is consistent with those presented in the Rebecca School progress report (Parent Exs. E at pp. 9-10; X at pp. 12-13). One OT goal and its short-term objectives spoke to the student's needs in sensory processing as related to self-regulation and shared engagement with peers (Parent Ex. E at p. 9). A second OT goal and its associated short-term objectives centered on motor planning so that the student would learn to use appropriate muscle force during her interactions with others, and the student's ability to generate a novel idea for play during one OT session per week (Parent Ex. E at p. 9). Finally, a third OT goal was designed to help the student improve her visual-spatial skills, as evidenced by her "appropriate and consistent spacing between words during writing tasks," and a second objective related to "sensory motor play" (Parent Ex. E at p. 10).

The April 2010 IEP also included three speech-language goals designed to enhance the student's self-regulatory skills and in turn, decrease the student's tendency towards "dysregulation" when she is disruptive and unavailable for learning (Tr. pp. 490, 573, 816; Parent Exs. E at pp. 10-11; X at pp. 7-8). Specifically, the goals and the associated short-term objectives target the student's abilities "to maintain an interaction across regulatory states," to engage in problem solving and share her "ideas, thoughts and feelings across a variety of emotional states," and "process information necessary to maintain an interaction across regulatory states" (Parent Ex. E at pp. 10-11).

The student's April 2010 IEP presented four annual goals with eight short-term objectives regarding counseling (Parent Ex. E at p. 12). One goal was intended to improve the student's independent initiation and maintenance of social interactions (Parent Ex. E at p. 12). Another annual goal targeted the student's sensory and emotional regulation, with short-term objectives of to eliminate the student's "screaming when she is dysregulated" and for the student to employ self-regulating strategies across settings (Parent Ex. E at p. 12). The April 2010 IEP also included an annual goal that the student select an appropriate "regulating activity" when "beginning to get excited or nervous" (Parent Ex. E at p. 12). Each of these goals address needs and challenges documented in the social/emotional performance section of the April 2010 IEP, as well as in the student's Rebecca School progress report (Parent Exs. E at pp. 4, 12-13; X at pp. 1-2, 8-10, 14).

A goal dedicated to enhancing the student's "logical thinking by predicting events throughout the day" included a five-week benchmark (Parent Ex. E at p. 14). In the daily application of this goal, the student would predict activities and what they "will be like" in such cases as "field trips, changes in her schedule and special events" (Parent Ex. E at p. 14). As described throughout the hearing record, including in the present levels of performance of the April 2010 IEP, the student struggled to remain regulated "during times of unpredictability, exciting or novel experiences" (Tr. p. 602; Parent Exs. E at p. 4; X at pp. 1-2). As noted in the student's Rebecca School progress report, the goal of encouraging the student to "problem solve about the future" would be to ease her response to novel situations (Tr. pp. 881-82, 886, 926-27; Parent Ex. X at p. 13).

Overall, the annual goals in the April 2010 IEP were sufficiently detailed and measurable, and addressed the student's identified areas of need—as such, the annual goals in the April 2010 IEP were appropriate.

3. Consideration of Special Factors—Interfering Behaviors

The parents assert that the district failed to perform an FBA prior to developing the student's BIP and that the BIP developed was not sufficient to address the student's needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72-73 [2d Cir. 2014]; E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *14 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *9 [S.D.N.Y. Mar. 31, 2014]; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009]; P.K., 569 F. Supp. 2d at 380).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulations provide that "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed /publications/iepguidance/IEPguideDec2010.pdf ["The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP"]).[11]

The special factor procedures set forth in State regulations further require that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (regarding disciplinary action taken against a student as a result of conduct that was a manifestation of the student's disability) (8 NYCRR 200.22[b][1]). As noted above, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . .; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/ specialed/formsnotices /IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]).

[11] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). This is especially true under the circumstances of this case where the hearing record indicates that at the time of the April 2010 CSE meeting, the student was attending the Rebecca School, and thus conducting an FBA to determine how the student's behavior related to the student's school environment at the Rebecca School would have at the very least diminished, or nearly inconsequential, value where, as here, the April 2010 CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli, 2006 WL 3102463, at *3; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]).

Furthermore, implementation of a student's BIP is required to include "regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

In the instant case, the parties do not dispute that the April 2010 CSE did not conduct a "formal" FBA of the student prior to modifying or revising the BIP from the student's previous IEP. However, the district's failure to conduct a formal FBA does not, by itself, automatically render the IEP deficient, and in this instance, the April 2010 IEP must be closely examined to determine whether—in the absence of a formal FBA—the April 2010 IEP otherwise addressed the student's interfering behaviors (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L., 2014 WL 53264, at *3; M.W., 725 F.3d at 139-41).

An independent review of the entire hearing record reflects that although the April 2010 CSE did not complete a formal FBA of the student prior to developing the April 2010 BIP and IEP, the April 2010 CSE did conduct an "informal" FBA of the student (Tr. p. 161; Dist. Ex. 5 at p. 2). At the impartial hearing, the district special education teacher who participated at the April 2010 CSE meeting testified that an informal FBA had been conducted during the CSE meeting because "[the student's] behavior was pretty much established" and the patterns of the student were already known to the CSE (Tr. p. 161). In addition, the district special education teacher further testified that the April 2010 CSE discussed that the student's behavior interfered with her classroom instruction and, after conducting the informal FBA, the CSE prepared and modified a BIP from the student's past IEP (Tr. pp. 161, 164-65).

The April 2010 BIP prepared by the CSE describes the behaviors that interfere with the student's learning, the behavior changes expected through the implementation of the BIP, the strategies to be used to change the student's behaviors, and the supports to be used to help the student change the behaviors (see Parent Ex. E at p. 19). The student's behaviors that interfered with her ability to learn as described in the BIP were generally consistent with those set forth in the present levels of performance section of the April 2010 IEP, information that was largely drawn from the Rebecca School progress report and the student's prior year IEP (Parent Exs. E at pp. 3-4, 19; T at p. 16; X at pp. 1, 6, 8-9). Specifically, the April 2010 BIP noted the student's history of hitting and kicking when "agitated," with concomitant difficulties maintaining a "safe body" and "expressing herself" (Parent Exs. E at pp. 3, 4, 19; X at pp. 1, 6, 8-9). The April 2010 BIP also indicated the student had a history of throwing objects when agitated, information that appeared to be a carryover from the preceding school year's IEP, but which the student's Rebecca School teacher testified she had not observed (Tr. p. 584; Parents Exs. E at p. 19; T at p. 16). Thus, the evidence in the hearing record shows that although the April 2010 CSE did not conduct a formal FBA prior to developing the student's April 2010 IEP or the accompanying BIP, consistent with regulations, the April 2010 CSE had sufficient information to accurately identify the student's behaviors that seriously interfered with her ability to engage in instruction and as detailed below, recommended sufficient supports and services to address these needs.

As indicated by the evidence in the hearing record, in addition to developing a BIP to address the student's behavior needs the April 2010 CSE recommended further behavioral support in the IEP itself to be provided by the student's special education teacher; the provision of OT, speech-language therapy, counseling; and the services of a full-time, 1:1 crisis management paraprofessional (Parent Ex. E at p. 17). The April 2010 CSE also recommended environmental

modifications and human or material resources (social/emotional management needs)—such as providing access to sensory materials and visual cues to assist the student in maintaining regulation; providing the student with a quiet environment outside of the classroom to calm down; and providing clear expectations with minimal language in a supportive direct manner—to address the student's behavior needs (see id. at p. 4). Academic management needs reflected in the April 2010 IEP also provided strategies directed at reducing the student's frustration during academic tasks, including visual and verbal prompts, repetition, sensory breaks and using manipulatives for math activities (id. at p. 3).

Based upon the foregoing, the evidence does not show that the failure to conduct the FBA in strict accordance with the regulatory procedures contributed to a failure to offer the student a FAPE, especially where as here the April 2010 CSE accurately identified the student's behavior needs in the April 2010 IEP and attached BIP, the April 2010 CSE addressed the student's behavioral needs and formulated a BIP based on information and documentation offered by the student's providers, and the April 2010 CSE developed management needs designed to target the student's interfering behaviors.

D. Assigned Public School Site

With regard to the parents' arguments pertaining to the assigned public school site, such challenges are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [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., 746 F.3d at 79). 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]).[12] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the April 2010 IEP because a retrospective analysis of how the district would have implemented the student's April 2010 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the April 2010 IEP (see Parent Ex. M). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C.,

[12] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 887-89 [D. Ariz Mar. 21, 2013]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

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 April 2010 IEP.[13]

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 program at the assigned public school site, the evidence does not support the finding that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

E. Request for IEE

Finally, I turn to the parents' assertion that the IHO improperly denied their request for an IEE at public expense based on her finding that the parents "knowingly and intentionally declined the [district's] offer" to conduct an IEE for the student. The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which are defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a

[13] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 2013 WL 6726899 [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], rev'd on other grounds, 2014 WL 3685943 [2d Cir. July 25, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] ["[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district's criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv] If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]).

In the instant case, the district conducted a psychoeducational evaluation of the student on September 15, 2010 (Parent Ex. U). By letter dated May 5, 2011, the parents notified the district of their request for an IEE based on their disagreement with the results of the September 2010 psychoeducational evaluation (Parent Ex. FF). During the impartial hearing, the parent testified that in May 2011, an independent evaluator contacted the parent offering to perform a psychoeducational evaluation for the student (Tr. pp. 849-50). The parent further testified that after speaking with Rebecca School staff regarding the specific independent evaluator who contacted her, the parent had concerns regarding the appropriateness of the independent evaluator (see Tr. pp. 855-56). Subsequent to receiving this information, the parent testified that on or about the end of May 2011, the parent sent a letter to the district stating she did not want the independent evaluator to conduct the psychoeducational evaluation for the student and requested another independent evaluator to conduct the psychoeducational evaluation (Tr. p. 851). The parent also testified that an IEE was not thereafter conducted (Tr. p. 846).

As stated above, the right of a parent to obtain an IEE at public expense is triggered if the parent disagrees with an evaluation initiated by the district. If the district agrees to provide an IEE at public expense, the district must then provide the parent with a list of independent evaluators from which a parent can obtain an IEE for the student (see Educ. Law § 4402[3]). From the list of independent evaluators, it is the parent, not the district; who has the right to choose which evaluator on the list will conduct the IEE for the student (Wall Twp. Bd. of Educ. v. C.M., 534 F. Supp. 2d 487, 489-490 [D.N.J. 2008]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]; cf. Matter of Chicago Pub. Schs. Dist. No. 299, 110 LRP 70523 [SEA IL 2010]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.).

Here, it is undisputed that the parents disagreed with the results of the September 2010 psychoeducational evaluation conducted by the district and that the district did not disagree with

granting the parents' request for an IEE at public expense (Parent Ex. FF). However, the district did not provide a list of independent evaluators for the parents to choose from, rather, in this instance; the district chose the evaluator that would conduct the IEE for the student. Due to this nonconformity, it was permissible for the parents' to reject the independent evaluator selected by the district as the parents are entitled to choose the evaluator that conducts the IEE for the student. Therefore, based on the foregoing, I agree with the parents and find that the IHO erred in denying the parents' request for an IEE based on the parents' declining the offer of the initial independent evaluator that contacted the parents. Accordingly, the IHO's denial of the parents' request for an IEE must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issues as to whether the Rebecca School was an appropriate unilateral placement for the student or whether equitable considerations support the parents' request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). Additionally, since the parents are entitled to an IEE for the student, they may choose an evaluator to conduct the IEE from a list of independent evaluators provided to them by the district.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision, dated August 21, 2012 is modified, by reversing that portion which denied the parents' request for an IEE, and

IT IS FURTHER ORDERED that, in the event the district has not already done so, the district shall provide the parents with a list of independent evaluators from which a parent can obtain an IEE for the student. If the parties cannot mutually agree on an independent evaluator to conduct the IEE, the district shall provide the parents with information about where IEEs may be obtained, as well as the criteria applicable to IEEs should the parents wish to privately obtain additional evaluations at their own expense by individuals who are not on the district's list of independent evaluators.

Dated: **Albany, New York**
August 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER