The University of the State of New York

The State Education Department
State Review Officer
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No. 12-229

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Educational Advocacy Services, attorneys for respondents, Jennifer A. Tazzi, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Adelphi Academy of Brooklyn (Adelphi) for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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 in this case, the hearing record shows that the student attended a general education setting in a nonpublic parochial school through the sixth grade and began attending Adelphi in September 2010 for his seventh grade year (Tr. pp. 89, 91, 98-99; see Dist. Exs. 3 at pp. 1, 5; 4 at p. 2).[1]

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

On June 20, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 1 at pp. 1-2). [2] Finding the student eligible for special education as a student with a learning disability, the June 2011 CSE recommended integrated co-teaching (ICT) services in a 12:1 ratio in a general education classroom and one 30-minute group counseling session per week (id. at pp. 1-2, 9, 11).[3, 4] Additionally, the June 2011 CSE recommended support for the student's academic and social/emotional management needs (repetition and rephrasing, instructions broken down into discrete units of learning, use of multi-sensory materials, and praise and encouragement), nine annual goals, and testing accommodations (id. at pp. 3-4, 6-8, 11).

By final notice of recommendation (FNR) dated June 28, 2011, the district summarized the ICT and counseling services recommended in the June 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 6).

By letter dated August 22, 2011, the parents notified the district of their intention to place the student at Adelphi for the 2011-12 school year and to seek public funding for the costs of the student's tuition (Parent Ex. C). The parents stated that the letter "serve[d] as a 10 day notice letter" (id.). The parents asserted that the district failed to conduct a timely annual review, develop an IEP, and offer the student a "placement" (id.).

On September 8, 2011, the parents signed an enrollment contract with Adelphi for the student's attendance during the 2011-12 school year (see Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated August 1, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Parent Ex. A at pp. 1-2). Specifically, the parents asserted that the June 2011 CSE: (a) was not properly constituted; (b) failed to consider the information provided by the parents and student's then current special education teacher; and (c) failed to provide them with reports considered by the CSE and minutes of the June 2011 CSE meeting (id. at p. 2). In addition, the parents asserted that the annual academic and related services goals included in the June 2011 IEP were not appropriate for the student (id.).

Next, the parents asserted that the district deprived them of an opportunity to participate in the selection of the school site to which the student would be assigned, in that they were not given an opportunity to speak with the placement personnel responsible for such a decision (Parent Ex.

[2] Although the June 2011 IEP indicates that the CSE convened for the student's annual review, the evidence in the hearing record is unclear as to whether or not the CSE developed an IEP for the student for the 2010-11 school year at some point following the student's initial evaluation in October 2010 (see Dist. Exs. 1 at pp. 1-2; 3 at p. 1; see also Tr. pp. 98-99).

[3] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (Tr. pp. 5-6, 13; see 34 CFR 300.8 [c][10]; 8 NYCRR 200.1 [zz][6]).

[4] The term collaborative team teaching (CTT), rather than ICT, is used throughout the hearing record (see Tr. pp. 7, 13, 35-36, 44, 47, 90; Dist. Exs. 1 at p. 1; 5); however, for the purpose of consistency with State regulations, the term ICT will be used in this decision (see 8 NYCRR 200.6[g][1][i][ii]).

A at p. 2). The parents further asserted that the district erred in allowing the student's assigned school site to be chosen by "a clerical staff member . . . not familiar with the student's educational needs (id.). With respect to the assigned public school site, the parents asserted "upon information and belief" that the school could not provide the student with his mandated levels of related services and that the student would not be functionally grouped with the other students in the proposed classroom, in terms of academic and social functioning (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 7, 2012 and concluded on October 5, 2012 after two days of proceedings (Tr. pp. 1-101). In a decision dated November 8, 2012, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year; that Adelphi was an appropriate unilateral placement for the student; and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 6-10).

With respect to the June 2011 CSE meeting, the IHO found that the district representative did not testify credibly with respect to the June 2011 CSE meeting since the witness had no "independent recollection of the meeting" and provided contradictory statements as to who attended the CSE meeting and who created the IEP goals (IHO Decision at p. 9). The IHO also determined that the June 2011 CSE was not properly composed, as it lacked a special education teacher (id.). With respect to the June 2011 IEP, the IHO found that the recommendation for ICT services in a general education classroom did not address the student's significant attentional deficits, impulsivity, and need for frequent prompting, which the IHO surmised could not "be addressed in a large class setting" (id.). The IHO further found that the assigned public school site was inappropriate because the district "did not present any testimony or documentary evidence" regarding the particular school site and "whether it could have implemented" the student's IEP (id.).

The IHO also determined that the parents satisfied their burden to establish that Adelphi was an appropriate unilateral placement for the 2011-12 school year, finding that Adelphi's "Project Succeed" provided the student with support from special education teachers and related services providers who collaborated with the student's classroom teachers regarding program modifications, classroom techniques, and appropriate supports (IHO Decision at p. 9). The IHO also found that the teachers provided the student with tutoring and study skills support individually and in a small group (2:1) (id.). The IHO noted that Adelphi offered individualized programing for the student, using multi-sensory instruction, the breaking down of information into manageable chunks, repetition and practice, graphic organizers, and testing accommodations to address the student's attention, impulsivity, and learning deficits (id. at pp. 9-10). The IHO also found that Adelphi offered small classes, an inclusionary student body, a standard curriculum, and communication amongst the staff and parents (id. at p. 10). Finally, the IHO determined that the student made progress while attending the school (id.).

With regard to equitable considerations, the IHO determined that the parents cooperated and communicated appropriately with the district, the due process complaint notice was timely, and the amount of tuition reimbursement sought was reasonable (IHO Decision at p. 10). Consequently, the IHO ordered the district, upon receipt of proper proof of payment, to reimburse the parents for the student's tuition costs at Adelphi for the 2011-12 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year, that Adelphi was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief. Initially, the district asserts that the IHO's credibility determination regarding the testimony of the district representative was not supported by the hearing record. Specifically, the district argues that the district representative properly used documents to refresh his memory regarding the CSE meeting, which had taken place over a year prior to the impartial hearing, and did not testify in contradiction with regard to the CSE composition or the development of the IEP goals.

With regard to CSE composition, the district asserts that the IHO erred in reaching the question of the attendance of the special education teacher, since the parents' due process complaint notice alleged only broadly that the CSE was improperly composed. In the alternative, the district asserts that the Adelphi representative, who participated in the June 2011 CSE meeting, satisfied the requirement that a special education teacher or provider of the student attend. With respect to the recommended ICT services, the district again asserts that the IHO erred in reaching the issue since the parents did not include it in their due process complaint notice. In the alternative, the district asserts that the recommendations in the June 2011 IEP, as a whole, including strategies to address the student's management needs, counseling, annual goals, and testing accommodations, targeted the student's needs with respect to attention and impulsivity. As to the class size of such a setting, the district also asserts that, given the student's academic achievements and the other supports recommended on the student's June 2011 IEP, the June 2011 CSE properly concluded that an ICT setting was appropriate, notwithstanding the larger classroom setting, and constituted the student's least restrictive environment (LRE). With respect to the assigned public school site, the district asserts that the IHO misapplied the law and that, since the student did not attend , the district was not required to demonstrate at the impartial hearing that the public school site was appropriate.

The district also asserts that the IHO erred in his determination that Adelphi was an appropriate unilateral placement for the student because the student received instruction in his core academic subjects by a regular education teacher and, aside from the special education teacher's role in helping the general education teacher develop lesson plans, received instruction from a special education teacher in areas of difficulty for only seven periods during the school week. As such, the district asserts that the instruction at Adelphi was not tailored to meet the student's special education needs. Further, the district asserts that only one of the student's two special education teachers was certified. In the alternative, the district asserts that, since only approximately 13.5 percent of the student's school week was attributable to Project Succeed (the special education program at Adelphi), at most, the parents should only be entitled to that percentage of the student's tuition costs at Adelphi.

With respect to equitable considerations, the district asserts that the parent's August 22, 2011 letter constituted an insufficient 10-day notice because it did not contain any specific allegations of purported defects in the June 2011 IEP. The district also asserts that the parents testified that they had no intention of sending the student to a public school, and, further, the parents did not visit the assigned public school site. Finally, the district notes that the parents never

voiced their objection to the size of an ICT setting at the June 2011 CSE meeting. Consequently, the district seeks an order reversing the IHO's decision in its entirety.

In an answer, the parents respond to the district's petition by denying the material allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Adelphi was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition.

More specifically, the parents assert that their due process complaint notice provided the district with sufficient notice that they challenged the composition of the June 2011 CSE based on the absence of a special education teacher and the appropriateness of the recommended general education class with ICT services. With regard to the latter, the parents point to an allegation in their due process complaint notice that "the [district] failed to draft an IEP for [student] that is is [sic] reasonably calculated to confer educational benefit." The parents also assert that the IHO correctly applied the legal standard in determining that the district failed to demonstrate that the assigned public school site was appropriate and argue that the district misinterprets the legal precedent cited in the petition. With respect to equitable considerations, the parents assert that, contrary to the district's allegation, they provided the district with a timely 10-day notice of their intent to unilaterally place the student, that the district had notice of the dispute relating to the class size in an ICT setting, by virtue of the information before the CSE, as well as the parents' vocalizations, and that, in any event, because the student was not attending a public school at that time, such notice was not necessary.

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 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. Scope of Impartial Hearing and Review

The district asserts that the IHO exceeded the scope of the impartial hearing by addressing the issues of whether the CSE lacked a special education teacher and whether a general education class placement with ICT services was appropriate for the student because the parents did not raise these issues in their due process complaint notice. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). In addition, a due process complaint must contain "a description of the nature of the problem . . . including facts relating to such problem" (20 U.S.C. § 1415[b][7][A][ii][III]; see 34 CFR 300.508[b][5]; 8 NYCRR 200.5[i][1][iv]).

In this case, a review of the due process complaint notice shows that the parents' allegation in their due process complaint notice regarding the composition of the June 2011 CSE ("The IEP team was not duly constituted"), while not specifying the facts underlying such allegation, was

enough, in this instance, to place the district on notice that the presence of a special education teacher at the June 2011 CSE was an issue capable of being adjudicated because the allegation, by its nature, could only be interpreted to assert the absence of one or more of the few mandated attendees (Parent Ex. A at p. 2; see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

However, contrary to the parents argument, language in the due process complaint notice alleging that "[t]he [district] failed to draft an IEP for [the student] that [was] reasonably calculated to confer educational benefit" cannot be reasonably read to include a claim that the general education class placement with ICT services was inappropriate for the student, as the assertion broadly addresses the overall plan, which could encompass a variety of different claims (Parent Ex. A at p. 1).

To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M., 2013 WL 1972144, at *5-*6), a review of the hearing record does not reveal that the district raised the issue of the appropriateness of the ICT setting at the impartial hearing with the objective of defeating the parents' claim that FAPE was not offered to the student (see Tr. pp. 35-37; see also M.H., 685 F.3d at 250-51). The district's direct examination appears more targeted to soliciting background information about the recommended program as a part of routine questioning, as opposed to the district's effort to obtain a strategic advantage (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). Nonetheless, out of an abundance of caution, I have reviewed the entire hearing record and provide alternative findings on the merits of the parties' assertions relating to the recommended ICT services.

In addition, to the extent that the IHO did not address certain claims included in the parents in their due process complaint notice, such as parent participation and appropriateness of the annual goals (see IHO Decision; Parent Ex. A at p 2), and, although the parents' answer includes some content that peripherally alludes to these issues, such statements, alone, without any legal or factual arguments or further identification of or explanation as to why the unaddressed issues would rise to the level of a denial of a FAPE are insufficient to resurrect any issues in the parents' due process complaint notice for a determination in this appeal (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton,

AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). Therefore, except to the extent that such issues are related to the matters addressed below, they will not be further discussed.[5]

B. June 2011 CSE Composition

With regard to the IHO's determination that the June 2011 CSE was not properly composed because it lacked a special education teacher, the district asserts that the Adelphi representative, who attended the June 2011 CSE meeting, satisfied the requirement for the presence of a special education teacher or provider of the student and that the district representative was also a certified special education teacher.

The IDEA requires a CSE to include, among others, "not less than [one] special education teacher or, where appropriate, not less than [one] special education provider of [the student]" (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see also 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services . . . to the student"]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[6]

In this case, attendees at the June 2011 CSE meeting included a district representative (who also served as a general education teacher), a district social worker, a district school psychologist, and by telephone, the parents and a staff member from Adelphi, whose name appears on the CSE attendance sheet in the space designated for a special education teacher or related services provider

[5] As to the IHO's determination regarding the credibility of the district representative (IHO Decision at pp. 8-9), an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 515-16 [S.D.N.Y. 2013]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, I note that the IHO did not cite any evidence from the hearing record to support his credibility finding and review of the IHO's reasoning raises at least some question as to whether a contrary conclusion is warranted (see IHO Decision at pp. 8-9; Tr. pp. 17-49). Nonetheless, after a review of the entire hearing record, including the documentary evidence, I find that, even if the district representative's testimony is deemed unreliable, reliance thereon is not necessary in order to resolve the disputed issues. To the extent the testimony of the district representative is cited herein, it is to the extent it is consistent with other evidence in the hearing record and is not considered dispositive relative to any issue.

[6] The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

(Dist. Ex. 1 at p. 2).[7] The Adelphi representative who attended the meeting was the assistant head of school and testified regarding her role as the supervisor of teachers and of the Adelphi's special education program (Tr. pp. 61, 63). She further testified that she was not a special education teacher (see Tr. p. 78).[8] Moreover, to the extent that the district argues that the Adelphi representative attended as a special education provider, nothing in the hearing record indicates that her role at Adelphi included the provision of related services (see Tr. pp. 1-101; Parent Exs. A-C, E-L; Dist. Exs. 1-6). The hearing record indicates that the district representative was a licensed special education teacher (Tr. p. 17), but this does not support a finding that, in addition to acting as the regular education teacher, the district representative also fulfilled the role of special education teacher at the June 2011 CSE meeting. Moreover, the hearing record reflects that the district did not establish that the district representative was a special education teacher "of the student." (see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]).

Based on the foregoing, the absence of a special education teacher at June 2011 CSE meeting constitutes a procedural violation. However, the parents have not articulated and the hearing record does not demonstrate how the absence of a special education teacher at the June 2011 CSE meeting, standing alone, (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) otherwise 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, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720).

The hearing record shows that the parents attended the meeting by telephone (Tr. pp. 90, 93; see also Tr. p. 29; Dist. Exs. 1 at p. 2; 5 at p. 2). Contemporaneous minutes of the June 2011 CSE meeting indicate that the parents expressed that they "no longer want[ed an] advocate to represent" the student and expressed that they were "happy with the present program" (Dist. Ex. 5 at p. 2). The minutes further indicate that discussion at the June 2011 CSE meeting "centered around [the student's] academic delays and behavioral programs" (id.). The June 2011 IEP includes "teacher estimates" of the student's present levels of performance and specifies that information was provided by "teacher verbal reports," which, based on the placement of her name on the attendance sheet as a special education teacher, likely referred to information provided by the Adelphi representative (Dist. Ex. 1 at pp 2-3). While there was some question raised during the impartial hearing regarding whether the annual goals were drafted during the June 2011 CSE meeting or afterwards (see Tr. p. 29), "there is no 'requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting'" (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y Sept. 29, 2012], quoting S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011]). Finally, as discussed below, the

[7] The district school psychologist did not sign the attendance page at the June 2011 CSE meeting; however, the meeting minutes indicate that she attended in this capacity (see Dist. Ex. 5). Attendance of the district school psychologist is not at issue in this appeal.

[8] The Adelphi representative testified that she attended the June 2011 CSE meeting because the school was closed and none of the teachers were available (Tr. p. 78). While not participating as a special education teacher, she did indicate that she had completed coursework toward becoming a licensed special education teacher (Tr. p. 62).

hearing record reveals that the June 2011 CSE developed an appropriate educational program for the student for the 2011-12 school year. As such, the evidence in the hearing record demonstrates that the procedural inadequacy, standing alone, did not rise to the level of a denial of FAPE.

C. 12:1 Integrated Co-Teaching Services

The June 2011 CSE recommended a general education class placement with ICT services in a 12:1 ratio (Dist. Ex. 1 at p. 1). The parents assert that the IHO correctly determined that the size of the classroom would not allow the student to receive educational benefit, whilst the district asserts the recommended program constitutes the student's LRE. As noted above, I find that this issue was outside the scope of the impartial hearing. Nonetheless, a review of the ICT services, in conjunction with the June 2011 IEP as a whole, further supports the finding that the procedural violation arising from the absence of a special education teacher at the June 2011 CSE meeting did not rise to the level of a denial of a FAPE.

Initially, while the description of the student's present levels of performance in the IEP are not at issue, a review thereof facilitates that discussion of the issue to be resolved—the appropriateness of the recommended ICT services. In the academic present levels of performance section, the June 2011 IEP indicated that the student was at the end of sixth grade level for decoding skills, at the mid sixth grade level for reading comprehension, at the seventh grade level for computation and word problems, and at the fifth grade level for writing skills (id. at p. 3).[9] The June 2011 IEP further indicated that the student was able to use context clues to derive meaning of new vocabulary within a reading passage and that his math calculation skills were better than his problem solving skills (id.). According to the June 2011 IEP, the student solved three and four digit multiplication and division problems (id.). The June 2011 IEP indicated that, although the student was able to solve simple word problems, higher order word problems were a challenge to him (id.).

According to the social/emotional performance section of the June 2011 IEP, the student made friends and seemed to be well respected and cooperative with school personnel and classmates alike (Dist. Ex. 1 at p. 4). The June 2011 IEP also reflected teacher reports that the student enjoyed learning (id.). The June 2011 CSE determined that the student's behavior did not seriously interfere with instruction and, therefore, that he did not require a behavior intervention plan (BIP) (id.). The health and physical development present level of performance indicated that the student wore glasses and was healthy (id. at p. 5).

In addition, the Adelphi representative, who attended the June 2011 CSE meeting, testified that the student struggled with organizational skills, and demonstrated "great difficulty with written expression"; but, she also described the student as "a great listener" and indicated that he "really compensates well, if he is given the proper tools" (Tr. pp. 70, 76).

The hearing record indicates that, in an ICT setting such as that recommended for the student, both the regular and special education teachers were in the classroom at the same time, with one teacher directly teaching the class while the other teacher was circulating around the room

[9] The June 2011 IEP also provided "teacher estimates" of the student's academic "instructional" levels (Dist. Ex. 1 at p. 3).

providing individual assistance to students who need it (Tr. pp. 36-37). According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities who receive ICT services within a class may not exceed 12 students and an ICT classroom must be staffed, at a minimum, with a special education teacher and a regular education teacher" (8 NYCRR 200.6[g][1]-[2]).

The IHO determined that "the ICT program recommendation was not appropriate" due to the student's "significant attention problems," impulsivity, and need for frequent prompting, which he determined could not be addressed in a "large class setting" (IHO Decision at p. 9). The hearing record contains a May 2011 classroom observation of the student that reported that the student exhibited "difficulty curbing his impulsivity," that he needed reminders to raise his hand and prompts, and that, despite the small class size, the student had difficulty paying attention (Dist. Ex. 2). The observation further noted that the teacher provided the student with "time and direction to get him back on task" (id.). Aside from the classroom observation, the hearing record does not otherwise indicate that, based upon information available to the June 2011 CSE, the student exhibited "significant" attention difficulties and/or impulsivity (compare Dist. Ex. 2, with Dist. Exs. 3 at pp. 1, 3-4; 4; see Tr. p. 20). During the October 2010 psychoeducational evaluation, the school psychologist reported that, although the student "appeared immature" for his age, he was "attentive and cooperative during testing," responded well to praise and encouragement, and demonstrated "consistent attention and concentration" (Dist. Ex. 3 at pp. 1, 4). Cognitive assessment results in the area of working memory—which, according to the school psychologist, measured, in part, the ability to sustain attention—revealed that the student's performance was in the average range (id. at p. 3). On a processing speed task, also described by the school psychologist as measuring, in part, the student's "attentional skills," the student performed in the low average range (id.). A review of the social history completed in October 2010 shows that the parents did not report any concerns regarding the student's attention or impulsivity; rather, they described the student as "having great behavior" (Dist. Ex. 4 at p. 2).[10] Furthermore, as described below, the June 2011 IEP provided for additional supports and strategies that would address any attentional or impulsivity behaviors the student exhibited (see Dist. Ex. 1 at pp. 3-4, 6, 11).

According to the June 2011 IEP, the CSE also considered a general education class placement with related services but determined that such an environment was not sufficient to meet the student's academic and emotional needs (Dist. Ex. 1 at p. 10). The June 2011 CSE also considered a special class but determined that it was too restrictive for the student (id.). The district representative testified that the June 2011 CSE recommended ICT services for the student "based upon LRE considerations" (Tr. p. 44). He further testified that the student's academic levels contributed to the CSE's decision (Tr. p. 47). While the classroom observation indicated that the student exhibited attentional and impulsivity behaviors (see Dist. Ex. 2), the evidence in the hearing record also reflects that the student exhibited certain academic strengths and social skills and that, prior to the 2010-11 school year, the student attended a general education program (see Tr. pp. 98-99; Dist. Exs. 1 at pp. 3-4; 3 at pp. 3-4; 4 at p. 3). The CSE is required to properly

[10] Although not dispositive, I further note that information from Adelphi prepared during the 2011-12 school year does not indicate that the student exhibited significant attention problems and/or impulsivity to the extent he was unable to be redirected (Parent Exs. I; J; K).

balance the IDEA's requirement of placing the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]). In this instance, it was appropriate for the district to attempt a program that provided special education supports in a less restrictive setting prior to segregating the student from nondisabled peers.

Moreover, in addition to the full time ICT services in the classroom, the June 2011 CSE also recommended strategies to address the student's management needs, including repetition and rephrasing, instruction broken down into discrete units of learning, use of multi-sensory materials, praise and encouragement, and structure in the classroom (Dist. Ex. 1 at pp. 3-4; see Tr. pp. 36-37). In conjunction with the ICT supports available in the classroom, the June 2011 CSE further addressed the student's social/emotional needs by recommending one session per week of counseling services (Dist. Ex. 1 at p. 11). Testing accommodations recommended for the student included extended time, separate location, questions read aloud to the student, answers recorded in any manner, use of a calculator, and directions read and reread aloud (Dist. Ex. 1 at p. 11).

Additionally, the June 2011 CSE developed nine annual goals to address the student's needs related to social/emotional skills, classroom behavior, mathematics computation, word problems, fractions, reading comprehension, and writing (Dist. Ex. 1 at pp. 6-8). Specifically, the CSE developed two social/emotional annual goals and one classroom behavior goal to address the student's need to understand and express his feelings, improve self-esteem, and demonstrate acceptable means of gaining positive attention (id. at p. 6). The June 2011 CSE developed two reading comprehension annual goals, to address the student's needs through sequencing events and writing about a favorite character (id. at p. 7). To improve the student's written language skills, the June 2011 IEP provided annual goals to increase the student's ability to take notes to organize facts and ideas, as a pre-writing activity (id. at p. 8). To address the student's mathematics needs, the June 2011 CSE developed math computational goals for recognizing and converting mixed numbers into improper fractions, improving division skills with a three to four digit dividend and a two digit divisor, as well solving word problems involving money relationships (id. at pp. 6- 7).

Based on all of the foregoing, the evidence contained in the hearing record establishes that the district's recommended educational program, consisting of ICT services together the additional accommodations and supports recommended by the June 2011 CSE, was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

D. Assigned Public School Site

The district contends that the IHO erred in his determination that the district was obligated to present evidence at the impartial hearing about the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New

York City Dep't of Educ., 553 Fed. App'x 2, 8, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; 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]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014] [finding that parents have the right to "evaluate" the assigned public school site in order to determine whether the school is appropriate for the student's IEP]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that the IDEA provides parents with a right to acquire "relevant information" about an assigned public school classroom]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. 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. (Region 4), 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 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if

it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see B.K., 2014 WL 1330891, at *20-*22; R.B., 2013 WL 5438605, at *17; 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] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K., 961 F. Supp. 2d at 588-89 [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"'] 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] [finding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]). When the Second Circuit spoke most 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 8, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents cannot prevail on their claim that the district would have failed to implement the June 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 2011 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 (see Parent Exs. C; E). 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 parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events

and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claim that the assigned public school site would not have properly implemented the June 2011 IEP.

VII. Conclusion

Having determined, based on considerations relating to the scope of the impartial hearing, as well as the evidence in the hearing record, that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Adelphi was an appropriate placement or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that that portion of the IHO's decision dated November 8, 2012, which determined that the district failed to offer the student a FAPE for the 2011-12 school year, is reversed.

Dated: **Albany, New York**
July 9, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER