



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-065

**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, Alexander M. Fong, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Todd Silverblatt, Esq., and Dalit Paradis, 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 respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. The parent cross-appeals from that portion of the IHO's decision which allowed the district to enter evidence into the hearing record that had not been disclosed to the parent five school days prior to the commencement of the impartial hearing. The appeal must be sustained. The cross-appeal must be dismissed.

#### II. Overview—Administrative Procedures

The decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The CSE convened on May 29, 2012, to formulate the student's IEP for the 2012-13 school year (Dist. Ex. 1 at p. 9). The parent disagreed with the 12:1+1 special class recommendation contained in the May 2012 IEP, and, because she was unable to visit the particular public school site to which the district assigned the student to attend for the 2012-13 school year, notified the district, on August 22, 2012, of her intent to unilaterally place the student at Mary McDowell (Parent Ex. G). In a letter dated October 1, 2012, the parent notified the district that after visiting the assigned school, she found it "totally inappropriate" to meet the student's needs (Parent Ex. H). The letter further informed the district that the parent had reenrolled the student in Mary McDowell and that she would seek an order from an IHO directing public funding of the student's tuition and fees for the 2012-13 school year (Parent Ex. H). In a due process complaint notice dated November 19, 2012, the parent asserted that the May 2012 IEP annual goals were inadequate, that a 12:1+1 special class placement was not appropriate to meet the student's needs, and also that the assigned public school was inappropriate (see Dist. Ex. 4 at p. 2).<sup>1</sup>

After a prehearing conference on December 20, 2012, the impartial hearing commenced on January 24, 2013 and concluded on February 26, 2013 after 2 days of proceedings (Tr. pp. 1-120). In a decision dated March 19, 2013, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that Mary McDowell was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 7-8). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Mary McDowell for the 2012-13 school year (id. at p. 8).

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

The following issues presented on appeal must be resolved in order to render a decision in this case:

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<sup>1</sup> The due process complaint notice was not entered into the hearing record during the impartial hearing (see IHO Decision at p. 10; Tr. pp. 1-120; Dist. Exs. 1-3; Parent Exs. A-I). On appeal, the district attaches the due process complaint notice to the petition as proposed District Exhibit 4 (Pet. ¶ 3 n.2). In her answer with cross-appeal, the parent does not object to the district's attachment to the petition, and further "respectfully refers the SRO to the [due process complaint notice] itself for a complete and accurate account of its contents" (Answer ¶ 3). In the absence of any objection to the inclusion of the due process complaint notice into the hearing record, and in the exercise of my discretion, I will accept this document as necessary to complete the hearing record (8 NYCRR 279.10[d]; see 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]).

1. whether the IHO erred in allowing the district to enter evidence into the hearing record that had not been disclosed to the parent five school days prior to the commencement of the impartial hearing;
2. whether the IHO erred in determining that the 12:1+1 special class recommended in the May 2012 IEP was not appropriate to address the student's needs;
3. whether the IHO erred in determining that the particular public school site to which the district assigned the student was inappropriate.

## 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]).

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. Five Day Disclosure**

With respect to the IHO's decision to accept evidence into the hearing record from the district notwithstanding that such evidence had not been disclosed to the parent five business days before the first day of hearings, the hearing record shows that the parties and the IHO discussed this issue on the record (see Tr. pp. 9-12, 15, 17-18, 27, 37, 108-11). At the January 24, 2013 hearing date, the IHO stated that the district acknowledged the disclosure requirements were not met and for that reason, she did not admit the district's documents into evidence on that day (Tr. p. 11). She further stated on the record that should the documents be disclosed "as required by law," the district could resubmit the evidence on a subsequent hearing date, and if there were no objections or the objections were not sustained, she would admit the documents at that time (id.). The IHO indicated that any testimony regarding documents not eventually entered into evidence would be disregarded (id.; IHO Interim Decision at p. 2). The United States Education Department has opined that a hearing officer may exercise his or her discretion to permit the introduction of evidence not disclosed five business days prior to the first day of hearing, if the evidence was disclosed five business days prior to the hearing date at which the evidence was admitted (Letter to Steinke, 18 IDELR 739 [OSEP 1992]). Furthermore, the department indicated that with respect to "evidence that previously had been disclosed to the opposing party during another point in the educational decision-making process, the 'five-day' rule requirement has already been met" (id.). In this instance, where the parent is not asserting that she did not receive the documents in dispute—namely, the May 2012 IEP and the August 13, 2013 Final Notice of Recommendation—and the IHO provided the parties with the opportunity to discuss this issue on the record and a written decision explaining her determination, the hearing record supports the IHO's exercise of her discretion in allowing the district to enter evidence into the hearing record on a subsequent hearing date (IHO Interim Decision at p. 2; see Dist. Ex. 4 at pp. 1-2).

### **B. 12:1+1 Special Class**

In her decision, the IHO determined that "the student would not have received sufficient support services in the recommended class" that consisted of 12 students (IHO Decision at p. 7). She further found that the hearing record established that the student had recently attended classes with 10 and 11 students and "had great difficulty" (id.). To the extent that the IHO's decision can be interpreted as a finding concerning the 12:1+1 special class placement recommended in the IEP—which the parent raised as an issue in the due process complaint notice—and not a finding limited to the specific 12:1+1 special class at the assigned public school site, the hearing record supports a finding that the district offered the student a FAPE. Accordingly, the IHO's conclusion on this issue must be reversed.

According to the district school psychologist, who also served as the district representative at the May 2012 CSE meeting, the CSE relied on a Mary McDowell school report and the

participation of the classroom teacher from Mary McDowell when developing the student's May 2012 IEP recommendations (Tr. pp. 12, 16; Dist. Ex. 1 at p. 11). The hearing record does not contain any Mary McDowell school reports for the student, nor did the student's classroom teacher who participated in the May 2012 CSE meeting testify at the impartial hearing (see Tr. pp. 1-120; Dist. Exs. 1-3; Parent Exs. A-I). Although the hearing record does not contain any evaluative information about the student, the parent's due process complaint notice did not raise any issues regarding the adequacy of the information the CSE relied upon to develop the May 2012 IEP, or the resultant present levels of performance contained in the May 2012 IEP (Dist. Ex. 4). As such, the analysis of the 12:1+1 special class placement recommended by the May 2012 CSE presumes the present levels of performance contained in the IEP are an accurate reflection of the student's skills and needs at the time of the May 2012 CSE meeting, and a brief description of that information is warranted here.

According to the May 2012 IEP, then-current classroom teacher reports indicated that academically the student independently functioned at a mid-first grade level in encoding, decoding, reading comprehension, writing, calculation, and applied problems—grade levels with which the parent agreed at the time of the CSE meeting (Tr. p. 101; Dist. Ex. 1 at p. 1). The IEP further reflected teacher reports that indicated the student's performance during reading and math was inconsistent, his attention to tasks affected his academic performance, and that he required extensive repetition and review of previously learned skills, noting that his difficulty with working memory and language affected his ability to master academic concepts (Dist. Ex. 1 at p. 1). The IEP also indicated that the teacher reported the student had "made slow, but gradual progress in school thus far" (id.). In addition to endorsing the teacher's view of the student's academic skills, the IEP also reflected the parent's statement that the student "needs a lot of one on one support throughout the school day," and that he "therefore requires a very small group to manage frustrations and teach to his strengths" (id.).

In the social/emotional present levels of performance, the May 2012 IEP indicated that the teacher reported the student was an active part of the classroom, was well liked and sought out as a partner by his peers, that he sought out teachers for assistance, and participated regularly in class discussions, often having interesting information to add (Dist. Ex. 1 at pp. 1-2). Needs reflected in the May 2012 IEP included that the student "must learn to accept limits set by his teachers, increase his frustration tolerance, and voice his feelings/thoughts" (id. at p. 1). The parent reported and the IEP indicated that the student received weekly "outside therapy" with a behavioral therapist, and that he received daily medication for "anger management concerns" (id.).

The May 2012 IEP reflected that the CSE considered and rejected an integrated co-teaching "class" due to the student's academic deficits, and also rejected a 12:1 special class in a community school due to the student's "need for consistent redirection/prompts/check-ins" (Dist. Ex. 1 at p. 10). The CSE ultimately recommended a 12:1+1 special class placement in a community school (id. at p. 6). State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). The district school psychologist testified that "typically" in 12:1+1 special classes the special education teacher and/or teaching assistant deliver the lessons and then

work with students in both "small" groups and one on one (Tr. pp. 19-21).<sup>2</sup> In addition to reflecting the student's need for one-to-one support and small group instruction, the IEP also provided management supports including a multisensory approach to learning and teacher redirection as needed, and indicated that the student benefitted from breaks from class when frustrated (Dist. Ex. 1 at p. 2). Testing accommodations provided in the IEP included extended time on all tests, administration in a location with minimal distractions, directions and questions read and reread aloud, and arithmetic tables as needed (*id.* at p. 7). Annual goals in the May 2012 IEP—which according to the district school psychologist were developed with the student's classroom teacher—addressed the student's need to improve his decoding, reading comprehension, encoding, written language, mathematics calculation and problem solving, receptive language and auditory processing, expressive language, and small group social/pragmatic language skills (Tr. pp. 16-17; Dist. Ex. 1 at pp. 3-5).<sup>3</sup> The IEP further provided the student with two sessions per week of individual speech-language therapy, one session per week of individual occupational therapy, and one session per week of counseling in a group of three (Dist. Ex. 1 at p. 6).

As described above, a review of the May 2012 IEP shows that the given the student's needs as identified in the present levels of performance, the May 2012 CSE developed annual goals and recommended management supports, testing accommodations, and related services to address those needs, which in conjunction with a 12:1+1 special class placement, was reasonably calculated to enable the student to receive educational benefits and provide him with a FAPE.<sup>4</sup>

### **C. Assigned School**

With respect to the parent's challenges and the IHO's findings as to the assigned public school site and, in particular, questions regarding the functional grouping of students in the 12:1+1 special class and the ability of the district to implement the student's testing accommodations in the school, challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be

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<sup>2</sup> Often what is considered "small" in terms of class size is very much in the eye of the beholder who opts to use such imprecise terms. To the extent that the dispute in this case is that a district 12:1+1 special class is "larger" and therefore not appropriate when compared to the Mary McDowell class the student attended during the 2012-13 school year, consisting of seven students and two teachers, the student's reported success in that environment was not information available to the CSE at the time of the May 2012 CSE meeting (*see* Tr. pp. 75-79; Dist. Ex. 4 at pp. 1-3). Although the IHO indicated that the hearing record established that the student had "recently attended classes with ten and eleven students and had great difficulty," testimony to this effect was provided by the associate head of Mary McDowell, who did not participate in the May 2012 CSE meeting (Tr. pp. 77-78; Dist. Ex. 1 at p. 11).

<sup>3</sup> The parent testified that she understood the annual goals and did not have any objections to the May 2012 IEP at the time it was developed (Tr. pp. 107-08).

<sup>4</sup> In the decision, the IHO concluded without analysis that the "recommended class" was not the student's least restrictive environment (LRE) (IHO Decision at p. 8). The district correctly points out that this claim was not raised in the parent's due process complaint notice. Additionally, the May 2012 CSE recommended a 12:1+1 special class placement at a community school, and the IEP indicated that—except for receiving instruction in the 12:1+1 special class placement and receiving related services—the student would otherwise fully participate in activities with his regular education peers (Dist. Ex. 1 at pp. 6, 8). Mary McDowell does not provide instruction to regular education students (Tr. pp. 78-79).

determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; 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, 2014]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2013]). 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]).<sup>5</sup> 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

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<sup>5</sup> 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, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79 [2d Cir. Mar. 4, 2013]). 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.



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 claims regarding implementation of the May 2012 IEP because a retrospective analysis of how the district would have implemented the student's May 2012 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 parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the May 2012 IEP (see Dist. Ex. 1 at p. 6; Parent Ex. G). Therefore, the district is correct that the issues raised and the arguments asserted by the parent 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 a 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 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 parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on claims that the assigned public school site would not have properly implemented the May 2012 IEP and the IHO's findings on this issue must be reversed.

## **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Mary McDowell was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parent's request for relief.

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated March 19, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and directed the district to fund the costs of the student's tuition at Mary McDowell.

**Dated:**           **Albany, New York**  
                          **November 25, 2014**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**