The University of the State of New York

The State Education Department
State Review Officer
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No. 13-140

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

Appearances:
Susan Luger Associates, Inc., Special Education Advocates for petitioner, Lawrence D. Weinberg, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at Chapel Haven for the 2011-12 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which ordered the district to reimburse the parent for the costs of the student's related services. The appeal must be dismissed. The cross-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

In November 2010, the parent placed the student at Chapel Haven in the Residential Education at Chapel Haven (REACH) Program, and executed an enrollment contract with Chapel Haven for the student's attendance from November 2, 2010 through June 30, 2012 (see Tr. p. 643; Parent Ex. L; see also Parent Ex. B at pp. 1-8).[1] On March 23, 2011, the CSE convened to conduct

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

the student's annual review and to develop an IEP for the 2011-12 school year (see Dist. Exs. 12 at pp. 1-2; 13 at p. 1). Finding that the student remained eligible for special education and related services as a student with autism, the March 2011 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school (see Dist. Exs. 12 at pp. 1-2; 13 at pp. 1-3).[2] In addition, the March 2011 CSE recommended related services consisting of two 45-minute sessions per week of individual counseling, two 45-minute sessions per week of counseling in a small group, one 45-minute session per week of individual occupational therapy (OT), two 45-minute sessions per week of individual speech-language therapy, and three 45-minute sessions per week of speech-language therapy in a small group (see Dist. Ex. 12 at p. 18). The March 2011 CSE also developed annual goals and corresponding short-term objectives, as well as a transition plan (id. at pp. 8-15, 19; see Dist. Ex. 13 at pp. 2-3).

In a letter dated June 1, 2011, the parent requested that the CSE reconvene to review a May 2011 OT assessment of the student (see Dist. Ex. 6 at p. 1). By final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education and related services recommended in the March 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 5).[3]

On June 22, 2011, the CSE reconvened pursuant to the parent's request and reviewed the May 2011 OT assessment of the student (see Dist. Exs. 4 at pp. 1-2; 6 at pp. 2-8; 15 at pp. 1-2). As a result, the June 2011 CSE continued all of the recommendations set forth in the March 2011 IEP within the June 2011 IEP; however, the June 2011 CSE increased the frequency of the student's OT services from one 45-minute session per week of individual OT to two 45-minute sessions per week of individual OT and the June 2011 CSE created an additional annual goal with short-term objectives related to OT (see Dist. Ex. 4 at pp. 2, 15, 18; compare Dist. Ex. 12 at pp. 1-19, with Dist. Ex. 4 at pp. 1-19).[4]

For the 2011-12 school year, the student attended Chapel Haven in the REACH program beginning on or about July 11, 2011 (see Tr. pp. 365; Parent Exs. J at p. 1; K-L; Y at pp. 1-2).

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in November 2010, the student attended a "small classroom (6:1:1) in a residential setting" located in another state since September 2008 (Dist. Ex. 11 at p. 1; see Tr. pp. 501-04).

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The parent testified that she received the FNR in the "first week of July"—on "July 7th"—and noted that the address on the FNR had been her "address for a short period of time before" moving to a new address, which she verbally shared with the March 2011 CSE (see Tr. pp. 634-37). The parent could not recall whether she advised the district of her new address in writing (see Tr. p. 654).

[4] For the purpose of clarity, the March 2011 IEP was superseded as a result of the June 2011 CSE meeting and the resulting June 2011 IEP—which modified the March 2011 IEP as indicated above—and thus the June 2011 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (see Tr. pp. 69-70; Dist. Exs. 4; 12; see also McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215). Consequently, this decision will refer to the June 2011 IEP as the IEP at issue.

On July 13, 2011, the parent visited the assigned public school site, and in a letter of the same date, the parent rejected it because the "building" was very large, and the other students appeared "lower functioning" than the student (see Parent Ex. V at p. 1). The parent also indicated that "few" students had graduated from the "program" since 2005, and the assistant principals could not "say which class or program" would be appropriate for the student (id.). In addition, the parent advised that she disagreed with and rejected the "placement and program recommended" for the student for the 2011-12 school year because it was not sufficient to meet his needs (id. at pp. 1-2). According to the parent—and as "discussed at the [March 23, 2011] CSE meeting"—the student required a "12 month residential placement in a special school" due to his educational and emotional needs, (id. at p. 2). The parent also maintained that the CSE members familiar with the student believed he required a "residential placement in order to make progress academically" and to "acquire social and behavioral and living skills" necessary for self-sufficiency and independence (id.). As a result, the parent advised the district that the student would remain at Chapel Haven for the 2011-12 school year and that she would seek tuition reimbursement from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 14, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at pp. 1-2). More specifically, the parent asserted that the CSE ignored concerns she voiced at the meetings, which deprived her of the opportunity to meaningfully participate (id. at p. 2). The parent also alleged that the CSE was not properly composed with respect to the attendance of the special education teacher, the general education teacher, and the absence of an additional parent member (id. at p. 3). The parent further alleged that the annual goals did not meet "all" of the student's "unique educational, social and emotional" needs and were not prepared at the CSE meeting (id. at p. 2). Next, the parent asserted that the CSE did not develop an appropriate transition plan for the student because it did not conduct "assessments in environments that resemble[d] actual vocational training, employment, independent living, or community environments" (id. at pp. 2-3). Moreover, the parent alleged that the CSE failed to conduct an "ongoing process of collecting data on the [student's] needs, preferences, and interests" in accordance with the IDEA (id. at p. 2). The parent further alleged that the CSE failed to invite agency representatives who would be responsible for the provision or payment of the student's transition services to the CSE meetings (id. at p. 3). Moreover, the parent asserted that the CSE failed to develop the transition plan and transition goals at the CSE meeting, which deprived the parent of "input into its development" (id.). Generally, the parent asserted that the recommended program was not appropriate because it failed to include sufficient "supports, supervision, instruction or services" that would allow the student to make progress, and further, that the student required "residential schooling" (id.).

Next, the parent contended that upon information and belief, the assigned public school site could not implement the student's IEP or related services, and the student would not be functionally grouped at the assigned public school site (see Parent Ex. A at p. 3). The parent also alleged that the CSE did not offer the student an "appropriate placement" in a "timely manner" (id.). In addition, the parent asserted that the assigned public school site was not appropriate for the same reasons set forth in her letter dated July 13, 2011 (compare Parent Ex. A at pp. 3-4, with Parent Ex. V at pp. 1-2). The parent further alleged that the student required "24/7 supervision and support" (Parent Ex. A at p. 4).

With respect to the parent's unilateral placement of the student at Chapel Haven, the parent indicated that it provided the student with the "instruction, supports, supervision and services" specially designed to meet the student's needs (Parent Ex. A at p. 4). The parent also maintained that equitable considerations weighed in favor of the requested relief (id.). As a remedy, the parent requested reimbursement for the costs of the student's tuition at Chapel Haven for the 2011-12 school year, in addition to reimbursement for the costs of related services (id.).

B. Impartial Hearing Officer Decision

On September 25, 2012, the parties proceeded to an impartial hearing, which concluded on May 8, 2013, after five days of proceedings (see Tr. pp. 1-690). In a decision dated June 25, 2013, the IHO concluded that the district offered the student a FAPE for the 2011-12 school year, and, accordingly, denied the parent's request for reimbursement of the costs of the student's tuition at Chapel Haven for the 2011-12 school year (see IHO Decision at pp. 12-13).

Initially, the IHO determined that the district offered the student a program that was "reasonably calculated to enable the student to obtain meaningful educational benefit" (IHO Decision at p. 12). The IHO further noted that the district was not obligated to "'maximize' the [student's] educational growth;" however, in this instance, the district offered the student a program where he would receive academic instruction in a classroom with a staffing ratio of 6:1+1, which the IHO characterized as "better than that offered at the residential school" (id.). The IHO also noted that the recommended program was "likely to provide progress and not regression," and the curriculum at the "public school program" developed the student's "daily living skills, provide[d] vocational opportunities, travel skills safety training, [did] assessments and provide[d] the necessary related services and counseling on site" (id.).

Next, the IHO determined that the parent's assertions concerning the transition plan lacked merit (see IHO Decision at p. 12). Specifically, the IHO concluded that when the CSE developed the transition plan, the student had already acquired a "backlog of training in daily living and vocational skills" from his enrollment at Chapel Haven since 2010 (id.). Moreover, the IHO found that the student made progress in these "skills (id.). The IHO also found that any alleged delay in the receipt of the FNR was "procedural," "without impact," and caused, in part, by the parent's request for an OT evaluation of the student at the close of the March 2011 CSE meeting (id.). The IHO similarly found that the absence of an additional parent member at "one" of the CSE meetings did not adversely affect the parent's "participation" or the "final placement" (id.). More specifically, the IHO concluded that the parent had a "full opportunity to participate," and the IEP included information from the "documents and teachers" from Chapel Haven (id.). In addition, the CSE reconvened to review the student's OT evaluation pursuant to the parent's request (id.). Turning to the parent's allegations pertaining to the assigned public school site, the IHO found that the student's ability to "function in the proposed placement" was speculative in nature and not substantive (id. at p. 13).

Having determined that the district offered the student a FAPE for the 2011-12 school year, the IHO indicated there was no need to consider the appropriateness of the unilateral placement at Chapel Haven or whether equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at p. 13). However, the IHO also noted that the student had a right to receive the related services he would have otherwise received under the IEP (id.). Therefore,

notwithstanding the determination that the district offered the student a FAPE for the 2011-12 school year, the IHO ordered the district to reimburse the parent for the costs of the student's related services obtained by the parent (id.).

IV. Appeal for State-Level Review

The parent appeals, and argues that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 school year. Initially, the parent argues that the June 2011 IEP was not appropriate because the student required a residential placement, the district did not consider a residential placement, and moreover, the district predetermined the 6:1+1 special class placement recommendation.[5] Generally, the parent argues that the hearing record contained overwhelming evidence that the student required a residential placement for the 2011-12 school year. More specifically, the parent alleges that the student required a residential placement in order to gain skills, make progress, and generalize skills. Next, the parent alleges that the June 2011 IEP was not appropriate because it did not include a transition plan to move the student from a residential program to a day program. Additionally, the parent asserts that the transition plan was vague, generic, and lacked an adequate transition plan for post-secondary life. Moreover, the parent asserts that the CSE did not discuss any vocational assessment. The parent also asserts that the FNR did not provide her with timely, prior written notice of the change in the student's placement by July 1, 2011, the start of the school year. Finally, the parent argues that the district failed to establish that the assigned public school site could implement the June 2011 IEP or that the student would be functionally grouped at the assigned public school site.

With regard to the unilateral placement, the parent contends that Chapel Haven was appropriate for the student because it addressed his needs and the student made progress. With regard to equitable considerations, the parent asserts that she cooperated with the CSE, she visited the assigned public school site, and she was not obligated to provide the district with a 10-day notice of unilateral placement because the student already attended a nonpublic school. Consequently, the parent seeks to reverse the IHO's determination and to direct the district to reimburse her for the costs of the student's tuition at Chapel Haven for the 2011-12 school year.

In an answer, the district responds to the parent's allegations, and generally argues to uphold the IHO's conclusion that it offered the student a FAPE for the 2011-12 school year. Initially, the district also contends that the parent's petition fails to comply with regulations pertaining to pleading requirements. In addition, the district argues that the parent did not sustain her burden to establish the appropriateness of the student's unilateral placement at Chapel Haven, and in this case, equitable considerations precluded an award of tuition reimbursement. In a cross-appeal, the district asserts that the IHO erred in directing it to reimburse the parent for the costs of the student's related services.

[5] The parent did not allege that the district predetermined the 6:1+1 special class placement recommendation in the due process complaint notice (see Parent Ex. A at pp. 1-7). Allegations in the parent's petition raised for the first time on appeal are outside the scope of review and, therefore, this allegation will not be considered (N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

In an answer to the cross-appeal, the parent generally argues that the district was required to provide the student with related services during the 2011-12 school years.[6]

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]).

[6] Since neither party appeals the IHO's findings that the absence of an additional parent member at "one" of the CSE meetings did not result in a failure to offer the student a FAPE, and the parent had an opportunity to meaningfully participate in the development of the IEP, these determinations are final and binding on the parties and will not be further addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that

Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Sufficiency of Petition

The district contends that the parent's petition fails to specifically articulate how the IHO erred in concluding that the district offered the student a FAPE for the 2011-12 school year, other than asserting general objections to the IHO's ultimate conclusions. As such, the district argues that the petition is insufficient. State regulation requires a party appealing to an SRO to "clearly indicate the reason for challenging the [IHO's] decision" and to identify the findings, conclusions, and orders of the IHO with which the party disagrees in its petition for review (see 8 NYCRR 279.4[a]). SRO's have exercised their discretion and dismissed petitions that failed to comply with 8 NYCRR 279.4(a) (see e.g. Application of the Dep't of Educ., Appeal No. 13-236; Application of a Student with a Disability, Appeal No. 12-016; Application of a Student with a Disability, Appeal No. 09-110; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-004).

The function of a State-level administrative review is not simply to conduct a do over of the impartial hearing process. Although not a model of clarity with regard to the reasons for challenging the IHO's decision or in identifying the particular findings or conclusions with which the parent disagrees, the allegations in the parent's petition are not so unduly vague or ambiguous as to preclude a meaningful review or to preclude the district from preparing responses in its answer, and therefore, as a matter within my discretion, I will not, in this instance, dismiss the petition for failure to comply with State regulations. However, the parent's attorney is reminded to comply with 8 NYCRR 279.4[a] in the future at the risk of dismissal for failing to clearly identify in the petition which of the IHO's finding of fact or conclusions on specific issues that were erroneous.

B. June 2011 IEP

1. Evaluative Information and Present Levels of Performance

In this instance, although the sufficiency or adequacy of the evaluative information available to the June 2011 CSE and the student's present levels of performance in the June 2011 IEP are not in dispute, a discussion thereof provides background context for the issues to be

resolved—namely, whether the 6:1+1 special class placement and the transition plan set forth in the June 2011 IEP were appropriate.

A review of the hearing record indicates that in developing the June 2011 IEP, the CSEs relied, in part, upon the following: a March 2011 Chapel Haven IEP, March 2011 Chapel Haven speech-language progress notes, annual goals proposed by the student's cognitive behavior therapist and annual goals proposed by the student's private psychologist, March 2011 Chapel Haven "45-Day Review" (March 2011 Chapel Haven progress report), and a May 2011 OT assessment (see Tr. pp. 58-69, 138-39; Dist. Exs. 6-10; 13; 15). Furthermore, an April 2009 psychoeducational evaluation of the student was available to the CSE in the student's file, which the district special education teacher reviewed prior to the meeting in order to "refresh [her] memories" of the student (Tr. pp. 58-61; see Dist. Ex. 11 at pp. 1-9). In addition, the following individuals attended either the May 2011 or the June 2011 CSE meeting (and in some cases, both meetings) and provided input into the development of the June 2011 IEP: a district special education teacher (who also served as the district representative), a district school psychologist, an additional parent member, the student's then-current Chapel Haven teacher, the Chapel Haven supervisor of residential education, the Chapel Haven director of education, the student's speech-language pathologist, the occupational therapist who conducted the May 2011 OT assessment, the student's educational consultant/attorney, the student, and both parents (see Tr. pp. 57-58; 500-01; 665-66; Dist. Exs. 4 at p. 2; 12 at p. 2; 13; 15).

The June 2011 IEP detailed the student's strengths and weaknesses within the present levels of academic performance and learning characteristics section of the IEP, and indicated that the student's academic and language skills remained similar to his ability levels during the 2010-11 school year (see Dist. Ex. 4 at pp. 3-4). With respect to the student's academic performance, the June 2011 IEP indicated that the student read books written "between a third and fourth grade level;" however, he demonstrated inconsistency when responding to comprehension questions based on the books he read (id. at p. 3). The June 2011 IEP further indicated that the student demonstrated strengths in decoding and describing the main idea of a chapter (id.). At that time, the student's decoding weaknesses were addressed through a "phonemic awareness program" (id.). The June 2011 IEP further reflected that the student had difficulty with written expression, and used a word processor when asked to write his own ideas (id.). With regard to mathematics, the student demonstrated computation skills and problem solving skills at an early second grade level (id.). At that time, the student was working on skills "necessary for independent living," such as learning how to properly "write a check" using numbers and words and developing money skills (id. at pp. 3-4). In addition, the June 2011 IEP described the student's handwriting legibility as an "issue," and indicated that the student needed continued work on his letter sizing and spacing (id. at p. 4). The student also participated and was making progress in a writing program, which supported his penmanship difficulties (id.).

In addition, the present levels of academic performance and learning characteristics section of the June 2011 IEP reflected information obtained from the March 2011 speech-language progress notes and input from the student's speech-language pathologist, noting in part, that the student exhibited deficits in pragmatic language and difficulties in conversational skills (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 8 at p. 1 and Dist. Ex. 13 at p. 1). The June 2011 IEP also indicated that the student was working on turn-taking during conversations; higher-level language

skills, such as identifying parts of speech and idioms; and following directions (compare Dist. Ex. 4 at p. 4, with Dist. Ex. 8 at pp. 1-2 and Dist. Ex. 13 at p. 1). Additionally, the June 2011 IEP noted that the student was working on listening to others in order to obtain information and understand the thoughts and needs of others (id.). Finally, the June 2011 IEP indicated that the student had improved his ability to appropriately interact with peers (see Dist. Ex. 4 at p. 4).

Consistent with information provided in the March 2011 Chapel Haven progress report, the present levels of social/emotional performance section in the June 2011 IEP indicated that the student had friends in class, and in class, he was cooperative and demonstrated a willingness to learn (compare Dist. Ex. 4 at p. 5, with Dist. Ex. 10 at p. 1). In addition, the June 2011 IEP characterized the student as compliant with staff; however, the IEP also reflected that the student could become easily distracted and required frequent redirection (id.). The June 2011 IEP further revealed that the student needed to improve his timeliness and punctuality, and when the student needed help or wanted company, he had "great self-advocacy skills"—consistent with the information in the March 2011 Chapel Haven progress report (id.). Additionally, consistent with the March 2011 Chapel Haven progress report, the June 2011 IEP indicated that the student had been participating in "transition planning" to prepare for "post secondary life" and that he had been learning about "community service, travel training, money management, and pre-employment skills" (compare Dist. Ex. 4 at p. 5, with Dist. Ex. 10 at pp. 2-4). With regard to the student's daily living skills—and consistent with the March 2011 Chapel Haven progress report—the June 2011 IEP noted that the student's personal hygiene had improved, and he was also working on safety and how to handle emergency situations and household management (compare Dist. Ex. 4 at p. 5, with Dist. Ex. 10 at pp. 2-3). The June 2011 IEP further indicated that the student had been working on increasing his self-awareness, decreasing his need to be in control in all situations, and learning coping mechanisms for when he felt out of control (see Dist. Ex. 4 at p. 5). Although the June 2011 IEP indicated that the student wanted to be helpful and that he would assume the role of "staff," it also reflected that the student needed to focus on his own needs and responsibilities and "not get involved in others' responsibilities" (id.).

In addition to the foregoing, the March 2011 and June 2011 CSE meeting minutes reflected the CSEs' discussions specific to the student during the meetings (see Tr. pp. 65-66; Dist. Exs. 13; 15). The meeting minutes also reflected the parents' input during the CSE meetings and information regarding the student's speech-language, social/emotional and transition needs as set forth in the June 2011 IEP (compare Dist. Ex. 13 at pp. 1-3 and Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 4 at pp. 3-5). The meeting minutes generated from the June 2011 CSE meeting also reflected the discussion about the May 2011 OT assessment, and the June 2011 CSE's determination to increase the frequency of the student's weekly OT sessions (see Tr. p. 67; Dist. Ex. 15 at pp. 1-2; compare Dist. Ex. 4 at p. 18, with Dist. Ex. 12 at p. 18).[7]

2. 6:1+1 Special Class Placement

Generally, the parent argues that the June 2011 IEP was not appropriate because the student required a residential placement, and furthermore, the district did not consider a residential placement for the student. The district rejects these contentions, and asserts that the 6:1+1 special

[7] Although the June 2011 CSE meeting minutes are undated, the district special education teacher identified the document as the June 2011 CSE meeting minutes in testimony (see Tr. pp. 67-69; Dist. Ex. 15 at pp. 1-2)

class placement was appropriate for the student, given his needs. Upon review of the hearing record, there is no reason to disturb the IHO's conclusion and the parent's arguments must be dismissed.

According to State regulation, a 6:1+1 special class placement is designed for those students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6 [h][4][ii][a]). In reaching the decision to recommend a 6:1+1 special class placement, the June 2011 IEP reflects that the CSEs considered other placement options, including a 15:1 special class in a community school, but rejected this option because it would not provide the student with the "level of support" he required (see Dist. Exs. 4 at p. 17; 12 at p. 17). Additionally, the CSE considered a 12:1+1 special class placement, an 8:1+1 special class placement, and a 12:1+4 special class placement—all within specialized schools—but opted against these placements because they would not meet the student's "academic and social/emotional needs" (id.). At the impartial hearing, the district special education teacher testified that the CSE recommended the 6:1+1 special class placement because the student needed a program that focused on his particular areas of need, such as "interaction skills, the language skills, [and] the social skills," and the student required a "small class with one teacher and one paraprofessional for that type of visual and small-group attention" (Tr. p. 74). The district special education teacher also testified that near the conclusion of the meeting, the "advocates for the parent" asked the CSE to consider a "residential placement" for the student (Tr. pp. 74-75). She testified that "we discussed it," but determined that a "residential setting" was "too restrictive" and the student required a "less restrictive environment," and the 6:1+1 special class placement would meet the student's needs (Tr. p. 75).

Upon review of the June 2011 IEP, the CSE also recommended multiple strategies to address the student's academic management needs and to support his ability to access the curriculum, including the following: using multisensory teaching techniques, providing visual and auditory cues, repeating and rephrasing directions as needed, retelling instructions for accuracy and comprehension, preferential seating, reducing distracting stimuli, providing prompts and redirection, teacher modeling, and braking down tasks into small sequential steps (scaffolding) (see Dist. Ex. 4 at p. 3). At the impartial hearing, the district special education teacher testified that the CSE recommended multisensory teaching because the student was easily distracted, and she explained that it would help the student access information through the use of "more than one modality at a time and to reinforce it for him" (Tr. pp. 77-78). The district special education teacher also testified that the CSE recommended the provision of visual and auditory cues to aid with classroom management and to help the student organize himself within the classroom (see Tr. p. 78). Further, the CSE recommended repeating and rephrasing directions as needed due to the student's attention issues and difficulty following directions (see Tr. pp. 78-79). The district special education teacher further explained that by repeating and rephrasing directions, it helped the student understand the teacher's expectations (id.). In addition, the CSE recommended that the student retell instructions for accuracy and comprehension in order to reinforce his understanding of expectations (see Tr. p. 79). Finally, the CSE recommended preferential seating for the student and the reducing distracting stimuli in order to assist the student in maintaining physical eye contact with the classroom teacher, reduce the student's distraction levels, and prevent overstimulation (see Tr. pp. 79-80).

Additionally, the June 2011 IEP contained approximately 14 annual goals with approximately 64 corresponding short-term objectives to improve the student's skills for transition to post-secondary life, his ability to self-monitor and self-regulate, interactions with peers and teachers, pragmatic language, expressive language, speech intelligibility, reading comprehension, mathematics, handwriting, time management and organizational skills, motor planning and executive functioning skills, and fine motor skills (see Dist. Ex. 4 at pp. 8-15). Finally, as detailed below, the CSE created a transition plan, which included long-term adult outcomes reflecting the student's plan to integrate into the community with maximum support, attend a vocational training program, and to live independently and be employed with maximum support (id. at p. 19).

As to the parent's preference for a residential placement for the student, the evidence in the hearing record does not support that the CSE should have recommended that the student be provided services in a residential placement in order to receive educational benefits. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22).[8] Here, there is no indication in the hearing record that the student's special education needs were so severe that they could only be appropriately addressed in a residential placement. Furthermore, with regard to the parent's contention that the student required a residential placement for the purpose of generalization, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly in cases such as here, where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]; see also K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012] [upholding the administrative determination that home-based ABA services that were desired to generalize skills and improve the student's custodial care in the home were not required], aff'd, 530 Fed. App'x 81; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17 [E.D.N.Y. Oct. 30, 2008]; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. April 21, 2008]). Even assuming, for the sake of argument, that the student could have made greater progress in a residential setting if he was removed from the public school and placed in a private residential setting, that is not sufficient to overcome the district's obligation under the IDEA to offer a less restrictive alternative within the public school system in which he is likely to experience more than trivial advancement.

Based upon the foregoing, the evidence in the hearing record demonstrates that in light of the student's academic, language, and social/emotional needs, the CSE's decision to recommend a 6:1+1 special class placement—together with the academic management needs and related

[8] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

services—was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

3. Transition Plan

Next, the parent argues that the June 2011 IEP was not appropriate because it did not include a transition plan to address moving the student from a residential program to a day program.[9] Additionally, the parent asserts that the transition plan was vague, generic, and lacked an adequate transition plan for post-secondary life. Moreover, the parent asserts that the CSE did not conduct or discuss any vocational assessment.[10] The district contends that the transition plan in the June 2011 IEP is appropriate and includes transition services and transition goals. As discussed more fully below, a review of the evidence in the hearing record does not support the parent's contentions.

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[9] To the extent that the parent asserts for the first time on appeal that the June 2011 IEP was not appropriate because it failed to include a plan to facilitate the student's transition from a residential program to a day program—i.e., transitional support services—such allegation is outside the scope of review and, therefore, this allegation will not be considered (compare Parent Ex. A at pp. 1-7, with Petition ¶¶ 16, 33; see N.K., 961 F. Supp. 2d at 584-86; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611). Even assuming the parent raised the issue of "transitional support services" in the due process complaint notice, the hearing record does not contain evidence indicating that such services were required pursuant to State regulation, which requires that in instances when a student with autism has been "placed in programs containing students with other disabilities, or in a regular class placement, a special education teacher with a background in teaching students with autism shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). The Office of Special Education issued a guidance document, updated in April 2011, entitled "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents" which describes transitional support services for teachers and how they relate to a student's IEP (see http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). To the extent that it could be argued that there was any change at all in the restrictiveness of the settings between Chapel Haven and the public school program, such change from residential setting to a special class in a specialized public school—with no change in access to regular education peers—would appear to have been minimal, which further diminishes a need to recommend transitional support services in the student's IEP. Second, there is no suggestion that the State regulation regarding transition support services for teachers was intended for certified special education teachers of highly intensive special class settings, such as the 6:1+1 special class placement recommended in this case. Instead, it is much more likely that an individual with such experience would be the provider of transitional support services to another teacher having either less familiarity or formal training in working with a student with autism (e.g., a regular education teacher). Finally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

[10] To the extent that the parent may be contending that the district failed to conduct an annual vocational assessment of the student, a review of the due process complaint notice indicates that the parent did not raise this issue below (see Parent Ex. A at pp. 1-7). In any event, neither the IDEA nor State regulation imposes such an annual requirement on districts.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401 [34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1 [fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401 [34][B]-[C]; 8 NYCRR 200.1 [fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414 [d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4 [d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

In this case, a review of the transition plan in the June 2011 IEP demonstrates that it incorporated the required areas, as mentioned above (see Dist. Ex. 4 at p. 19). According to the June 2011 IEP, the long-term adult outcomes outlined in the transition plan provided that the student would integrate into the community with maximum supports, attend a post-secondary vocational training program, live independently with maximum supports, and be employed with maximum supports (id.).

Consistent with regulations, the student's transition services described the student's instructional activities, which included participating in academic activities that supported post-secondary vocational goals and independent living (see Dist. Ex. 4 at p. 19). In the area of community integration, the transition services indicated that the student would participate in community service experiences to develop personal interests, and he would learn about community agencies (id.). Post high school service needs for the student included attending a vocational training program, and with the "school's aid," he would formulate a career plan by "exploring and contacting relevant agencies" (id.). In the area of independent living, the transition services included learning about personal money management, meal preparations, and travel training (id.). Finally, in the area of daily living skills, the transition services specified that the student would attend to his personal activities of daily living skills (ADLs), such as combing his hair, brushing his teeth, and dressing appropriately with less prompts (id.). Additionally, the June 2011 IEP indicated that the parent, the school, and the student would share responsibility for the student's transition services (id.).

To further support the student's needs in transitioning to post-secondary activities, the June 2011 IEP contained two annual goals with corresponding short-term objectives to assist the student in developing skills that would benefit him in post-secondary activities (see Dist. Ex. 4 at pp. 8, 14). Specifically, the first annual goal targeted the student's ability to acquire skills and attitudes necessary for post-secondary education and vocational opportunities (id. at p. 8). Corresponding short-term objectives targeted the student's abilities to participate in community service to teach

him about the agencies and services available to him within his community; increase his knowledge and skills related to safe and independent urban travel; identify behaviors and attitudes that effect job retention and advancement; develop the student's knowledge of his personality, values, skills, and preferred work environment in preparation for employment; articulate skills, interests, and other personal information as it would pertain to a job interview; write a resume; and demonstrate safety and mobility skills necessary to live independently (id.). The second transition goal in the June 2011 IEP was designed to improve the student's ability to independently perform tasks of daily living, such as shopping, cooking, and housekeeping (id. at p. 14). Related short-term objectives targeted the student's ability to buy groceries to cook a meal, and to use appliances safely and appropriately to prepare it; his ability to adhere to appropriate health and safety procedures when preparing meals; to contact emergency personnel when needed; and to demonstrate knowledge of appropriate ways to deal with household emergencies and protocol (id.). Furthermore, a comparison of the annual goals in the June 2011 IEP with the 2010-11 Chapel Haven IEP indicated that the annual goals directly reflected similar goals that the student had been working on and making progress with during the 2010-11 school year (compare Dist. Ex. 4 at pp. 8, 14, with Dist. Ex. 7 at pp. 1-7, 10-12, 14-15).

Based on the above information, the hearing record does not support a finding that the post-secondary transition planning in the IEP was not appropriate; rather, a review of the June 2011 IEP reflects that the transition plan adequately set forth the student's transition needs and goals consistent with federal and State regulations.

4. Prior Written Notice

Next, the parent contends that the FNR did not provide her with timely, prior written notice of a change in the student's placement by July 1, 2011—the start of the school year. Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

In this case, near the conclusion of the impartial hearing the parties stipulated July 6, 2011 as the first day of the 2011-12 school year at the district public school, and the parent testified that she received the June 2011 FNR on July 7, 2011 (see Tr. pp. 654-55, 687-88).[11] In addition, when the parent visited the assigned public school site on July 13, 2011, the student had already started

[11] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

attending Chapel Haven for the 2011-12 school year beginning on July 11, 2011 (Tr. pp. 643, 656; Parent Ex. L). Therefore, while the hearing record suggests that the parent did not receive June 2011 FNR prior to the beginning of the 2011-12 school year, even assuming for the sake of argument that the district committed a procedural violation by sending the June 2011 FNR to an incorrect address and ultimately delaying transmittal of the FNR to the parent, the evidence in the hearing record does not show that such a delay resulted in a procedural violation that rose to the level of a denial of a FAPE.

However, the hearing record does not include evidence that the district provided the parent with prior written notice in conformity with the State and federal regulations described above (see Tr. pp. 1-690; Dist. Exs. 1-15; Parent Exs. A-O; R-T; V-BB). In addition, any assertions that the June 2011 FNR satisfied the regulatory requirements of prior written notice are not substantiated by the hearing record (see Dist. Ex. 5). In this case, even if the parent received the June 2011 FNR before the start of the school year, the June 2011 FNR otherwise failed to include information required in a prior written notice, as described above (compare Dist. Ex. 5, with 34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

As I have cautioned in previous decisions, the district is obligated to provide parents with prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html). In this instance, however, this procedural violation would not result in a denial of FAPE as the parent did not allege that the failure to provide prior written notice impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).[12]

C. Challenges to the Assigned Public School Site

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

[12] In some cases, a prior written notice in conformity with the federal and State regulations (which is a notice very unlike the FNR in this case), may be critical in establishing what information the CSE considered and its rationale for its decision; however, in this case, as noted above, the parent has not challenged the IHO's determination that the parent was afforded the opportunity to participate in the development of the student's IEP and, therefore, that would not be a particular basis for finding a denial of a FAPE in this case.

9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [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]).

While 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 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. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [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]), I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, 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 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187 [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 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]).[13]

[13] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular 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

As explained most 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 Dep't 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. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [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"']). 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., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on the claims 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 parent rejected the program recommended by the CSE and instead chose to enroll the student in a nonpublic school of her choosing (see Tr. p. 643; see also Parent Ex. L). 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, 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 at the particular public school site to which to student was

at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

assigned by the district 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 parent cannot prevail on her claims that the assigned public school site would not have properly implemented the June 2011 IEP or that the student would not have been functionally grouped at the assigned public school site.

D. Cross-Appeal

As a final matter, with regard to the district's cross-appeal of the IHO's order directing it to reimburse the parent for the cost of the student's related services, the district correctly argues that absent a determination that it failed to offer the student a FAPE, the IHO had no basis upon which to predicate an award of relief in the form of tuition reimbursement in this case (see 34 CFR 300.148[a]; see also Application of a Student with a Disability, Appeal No. 11-032; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 08-078). "Should parents believe that the [district] has not provided their child with a FAPE, they may unilaterally place their child in a private school at their own financial risk and seek tuition reimbursement" (M.L., 2014 WL 1301957 at *1 [emphasis added] [citing M.W. v. New York City Dep't. of Educ., 725 F.3d 131, 135 [2d Cir. 2013]). There was no other reason articulated in the hearing record for providing the student with related services at the unilateral placement at public expense. Accordingly, the IHO's order directing the district to reimburse the parent for the costs of the student's related services obtained during the 2011-12 school year must be reversed and the cross-appeal must be sustained.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 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 Chapel Haven was an appropriate placement or whether equitable considerations support the parent's request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; M.L., 2014 WL 1301957 at *8).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED THAT the IHO's decision, dated June 25, 2013, is modified by reversing that portion of the IHO's order that directed the district to reimburse the parent for the costs of the student's related services obtained during the 2011-12 school year.

Dated: **Albany, New York**
May 23, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER