The University of the State of New York

**The State Education Department**
**State Review Officer**
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**No. 13-203**

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

**Appearances:**
Law Office of Neal H. Rosenberg, attorneys for petitioner, Neal H. Rosenberg, Esq., of counsel

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

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at Xaverian High School (Xaverian) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determinations assigning the burden of proof to the district regarding equitable considerations and finding that the failure to discuss the annual goals constituted a procedural defect. The appeal must dismissed. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

On May 1, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex 1 at p. 9).[1] Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2012 CSE recommended a 15:1 special class placement in a community

[1] At the time of the May 2012 CSE meeting, the student had continuously attended the Xaverian for three years (see Tr. pp. 113-15, 205).

school with related services consisting of one 30-minute session per week of individual counseling and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 5-6) [2]

On July 20, 2012, the parent executed an private placement enrollment contract with Xaverian for the student's attendance in the Legacy Program for the 2012-13 school year (see Parent Ex. I).[3]

By final notice of recommendation (FNR) dated August 9, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 4).

By letter dated August 22, 2012, the parent expressed concerns about the student's need for a "special education program in a special education school" (Parent Ex. D at p. 1). According to the parent, she attempted to schedule a tour of the assigned public school site, but did not receive a response; assuming, therefore, that the assigned public school site was closed, the parent indicated she would visit the site in September 2012 to determine whether it was appropriate, and she requested a "class profile detailing the functional level of the other students in the 15:1 class" (id.). The parent notified the district that until she could determine whether the assigned public school site was appropriate, the student would attend Xaverian, and she reserved the right to seek reimbursement for the costs of the student's tuition (id.).

On September 25, 2012, the parent visited the assigned public school site (see Parent Ex. E at p. 1). According to an October 3, 2012 letter from the parent to the district, the parent was told during the visit that the student would be "mainstreamed for gym, music and electives into general education classes" (id.). The parent indicated that the assigned public school site was not appropriate because the overall size of the student population was too large, and the size of the "general education classes"—with up to 30 students—was also too large and distracting for the student (id.). In addition, the parent indicated that the classrooms observed during her visit contained either 16 students or 19 students, both of which she described as violating the 15:1 special class placement recommended in the student's IEP (id. at p. 1-2). The parent further noted that she was informed about integrated co-teaching (ICT) classrooms at the assigned public school site and that the student would, at times, receive his speech-language therapy services "individually and 'sometimes in a group'"—neither of which were consistent with the recommendations in the student's IEP (id. at p. 2). The parent also expressed concern about the "behavioral issues" at the assigned public school site and the student's "social and emotional well-being" (id.). As a result, the parent notified the district that the student would continue to attend Xaverian and that she would seek reimbursement for the costs of the student's tuition (id.).

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[2]The student's eligibility for special education programs and related services as a student with speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[3] Students with learning disabilities who attended the Legacy Program received instruction in classrooms with a 15:1+1 student-to-teacher ratio (see Tr. pp. 113-14; Parent Ex. F). The Legacy Program served "high school students of average, or above-average intelligence" with the expectation that these students would "meet the school requirements for a diploma, and go on to a four-year college program" (Parent Ex. F). The Commissioner of Education has not approved the Legacy Program at Xaverian as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

### A. Due Process Complaint Notice

By due process complaint notice dated May 17, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. M at p. 1). More specifically, the parent asserted that the May 2012 CSE was not properly composed, the annual goals and short-term objectives in the May 2012 IEP did not address the student's special education needs, the May 2012 CSE did not follow the proper procedures in conducting the meeting, and the May 2012 CSE did not consider all relevant documentation in making its recommendations (id.). Next, the parent alleged that the assigned public school site was not appropriate, and repeated, nearly verbatim, the concerns set forth in her October 3, 2012 letter to the district (compare Parent Ex. M at pp. 1-2, with Parent Ex. E at pp. 1-2). The parent asserted that the assigned public school site's inability to implement the student's May 2012 IEP resulted in a failure to offer the student a FAPE for the 2012-13 school year (see Parent Ex. M at p. 2). The parent further indicated that the student's unilateral placement at Xaverian was appropriate for the student because it provided him with "small group and individualized special education support" (id.). As relief, the parent requested reimbursement for the costs of the student's tuition at Xaverian for the 2012-13 school year, as well as the provision of related services and transportation (id.).

### B. Impartial Hearing Officer Decision

On June 17, 2013, the IHO conducted a prehearing conference, and on August 8, 2013, the parties proceeded to an impartial hearing, which concluded on August 27, 2013, after two days of proceedings (see Tr. pp. 1-242; IHO Ex. III). In a decision dated September 27, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 5-13). Specifically, the IHO found that the May 2012 CSE was properly composed (id. at pp. 8-9). The IHO also determined that the failure to provide all of the May 2012 CSE participants with "all information reviewed" by the May 2012 CSE, under the circumstances, did not result in a procedural violation that rose to the level of a denial of a FAPE (id. at p. 9). With respect to the annual goals in the May 2012 IEP, the IHO found that while the May 2012 CSE did not discuss the annual goals at the meeting and the academic annual goals did not include "baselines" upon which to measure progress and lacked "specificity," such "procedural defects" did not automatically invalidate the IEP or result in annual goals that were not appropriate (id. at pp. 10-11). More specifically, the IHO noted that the annual goals included in the May 2012 IEP related to counseling, speech-language therapy, and academics were appropriate and adequately addressed the student's needs in these areas (id.). Turning to the 15:1 special class placement recommended in the May 2012 IEP, the IHO concluded that the May 2012 CSE—"based upon the information provided by [Xaverian] as to the student's strengths and weaknesses"—appropriately determined that a "15:1 program would enable the student to make meaningful educational gains" and the hearing record did not contain evidence to the contrary (id. at pp. 11-12). Finally, the IHO noted that the parent's testimony about her "observations and conversations" related to the assigned public school site did not indicate the district could not implement the student's May 2012 IEP (id. at pp. 12-13). Having determined that the district offered the student a FAPE for the 2012-13 school year, the IHO did not reach the issues of whether the student's unilateral placement at Xaverian was appropriate or whether equitable considerations weighed in favor of the parent's requested relief (id. at p. 13).

## IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district offered the student with a FAPE for the 2012-13 school year. The parent argues that IHO erred in finding that the May 2012 CSE was properly composed. In addition, the parent contends that the May 2012 CSE did not possess adequate information upon which to recommend a 15:1 special class placement where the student would not have access to nondisabled peers. The parent also contends that the May 2012 IEP did not reflect the results of any reevaluation (i.e., "triennial evaluation") of the student, the May 2012 CSE did not notify the parent that additional data (such as a "triennial evaluation") was not needed to develop the student's IEP, the May 2012 CSE failed to advise the parent that it intended to rely upon a 2009 evaluation of the student to develop the IEP, and the May 2012 IEP failed to reflect current information about the student's academic functioning or levels. As a result of these errors, the parent alleges that the May 2012 IEP did not appropriately address the student's unique special education needs, indicating further that the May 2012 IEP only included two management needs and failed to include annual goals appropriate to meet the student's needs. Next, the parent asserts that the recommended 15:1 special class placement was not appropriate because it did not provide the student with sufficient support and was overly restrictive. The parent also argues that the IHO erred in finding that the assigned public school site could appropriately implement the student's May 2012 IEP. Finally, the parent asserts that student's unilateral placement at Xaverian was appropriate, and equitable considerations weigh in favor of her requested relief.

In answer, the district responds to the parent's assertions with admissions and denials, and argues to uphold the IHO's determination that the district offered the student a FAPE for the 2012-13 school year. In addition, the district asserts that although not addressed by the IHO, the hearing record does not support findings that the student's unilateral placement at Xaverian was appropriate or that equitable considerations weigh in favor of the parent's request for tuition reimbursement. Although speculative, the district alleges that the IHO properly concluded that the assigned public school site would have adequately implemented the student's May 2012 IEP. The district also alleges that parent raised the following issues for the first time on appeal, and therefore must be dismissed as exceeding the scope of review: the absence of a special education teacher at the May 2012 CSE meeting; the failure to conduct a reevaluation ("triennial") of the student, the failure to advise the parent of its intention to rely upon a 2009 evaluation report in the development of the student's IEP, and the adequacy of the evaluative information available to the May 2012 CSE; and whether the recommended 15:1 special class placement in a community school was appropriate, referring specifically to the assertions that the student would not have an opportunity to interact with his nondisabled peers or that the student required a paraprofessional. As a cross-appeal, the district alleges that the IHO erred in assigning the district with the burden of proof with regard to equitable considerations, and further, that the IHO erred in finding that the annual goals were "procedurally defective" because the May 2012 CSE did not discuss the annual goals.[4]

## 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

[4] In an answer to the cross-appeal, the parent denies the district's allegations.

designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL

465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## VI. Discussion

### A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing in the decision whether the recommended 15:1 special class placement was appropriate because the parent did not raise this as an issue in dispute in the due process complaint notice (compare IHO Decision at pp. 11-12, with Parent Ex. M at pp. 1-2).

Second, a review of the hearing record also reveals that the parent now raises the following issues in the petition—which she did not raise in the due process complaint notice and upon which the IHO did not issue findings—as a basis upon which to now conclude for the first time on appeal that the district failed to offer the student a FAPE for the 2012-13 school year: (1) the May 2012 IEP did not reflect the results of any reevaluation (i.e., "triennial evaluation") of the student, (2) the May 2012 CSE did not notify the parent that additional data (such as a "triennial evaluation") was not needed to develop the student's IEP, (3) the May 2012 CSE failed to advise the parent that it intended to rely upon a 2009 evaluation of the student to develop the IEP, (4) the May 2012 IEP failed to reflect current information about the student's academic functioning or levels, (5) the May 2012 IEP only included two management needs, and (6) the recommended 15:1 special class placement was not appropriate because it did not provide the student with sufficient support and was overly restrictive (compare Pet. ¶¶ 24-28, 32-37, with Parent Ex. M at pp. 1-2).

With respect to the issues raised and decided sua sponte by the IHO in the decision as well as the allegations now raised by the parent in the petition for the first time on appeal, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 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]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and

due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issue raised sua sponte by the IHO regarding the appropriateness of the 15:1 special class placement or the challenges enumerated above and now raised in the parent's petition as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. M at pp. 1-2). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-423 see also Tr. pp. 37-38).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the 15:1 special class placement was appropriate for the student and that particular finding must be annulled. In addition, the allegations as enumerated above and raised now, for the first time, on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Maryland Sept. 29, 2009]).[5]

[5] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9,

### B. CSE Process

#### 1. May 2012 CSE Composition

Turning to the issues now properly before me, the parent contends that the May 2012 CSE was not properly composed due to the absence of a special education teacher. The district argues that because the parent did not assert this contention with this degree of specificity in the due process complaint notice, it is beyond the scope of review and must not be addressed. Upon review of the hearing record, there is no reason to disturb the IHO's finding and the parent's assertion must be dismissed.

At the time of the May 2012 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[6]

A review of the hearing record indicates that the following individuals participated at the May 2012 CSE meeting: a district representative, a district school psychologist, the parent, and the Xaverian school psychologist (via telephone) (compare Dist. Ex. 1 at p. 12, with Tr. pp. 54-55, 112, 115-20). In reaching her finding that the failure to specifically designate an individual on the attendance page identifying who fulfilled the role of special education teacher at the May 2012 CSE meeting did not result in a procedural violation, the IHO relied upon evidence demonstrating that the district representative in attendance was a duly certified special education teacher with 21 years of experience teaching self-contained special classes in a public high school, and furthermore, that the Xaverian school psychologist in attendance testified about his "ongoing communications" with the student's Xaverian teachers, his familiarity with the student's program, as well as the student's "strengths and weaknesses, including those in the academic area," and offered input during the May 2012 CSE meeting (IHO Decision at pp. 8-9). The hearing record also indicates, however, that although the district representative testified that she did not participate

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2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6), the issue raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parent's petition for the first time on appeal were initially raised by counsel for the parent in the opening statement, on cross-examination of a district witness, through testimony of witnesses for the parent, or during counsel for the parent's closing statement (see, e.g., Tr. pp. 29-32, 72-76, 86-90, 92-94, 137-45, 171-72, 192-94, 198-201, 206-08, 234-39). Here, the district did not initially elicit testimony, and therefore, the district did not "open the door" to these issues under the holding of M.H.

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

at the May 2012 CSE in the role of a special education teacher, her participation at the meeting would not have been any different if she had been designated in that role (Tr. pp. 70-71, 101). Moreover, on the attendance page, the handwritten name of the Xaverian school psychologist appears next to the preprinted entry identifying the individual designated in the role of "Related Service Provider/Special Education Teacher" at the May 2012 CSE meeting, along with an additional handwritten notation indicating "Counseling Provider & Legacy Director" (see Dist. Ex. 1 at p. 12). The Xaverian school psychologist testified that while he was not a special education teacher, he "typically" acts as the representative for Xaverian at IEP meetings; an intern under his direct supervision provided the student with counseling services during the 2011-12 school year at Xaverian; and he, himself, provided the student with counseling services during the 2012-13 school year (see Tr. pp. 112, 115-18, 162).[7] Thus, as a related services' provider of the student, the Xaverian school psychologist met the regulatory criteria as an individual who fulfilled the role of special education teacher at the May 2012 CSE meeting.

Notwithstanding this determination, however, even if the absence of a special education teacher constituted a procedural violation, the hearing record does not provide any basis under these circumstances upon which to conclude that such procedural inadequacy 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, or caused a deprivation of educational benefits to how or why this procedural violation rose to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011]).

**2. Evaluative Information**

Turning next to the dispute regarding whether the May 2012 CSE possessed and considered adequate evaluation information in order to develop the student's May 2012 IEP and to recommend a 15:1 special class placement, a review of the hearing record does not support the parent's assertions.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information

[7] See A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; see also A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *7 [S.D.N.Y. Aug. 9, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student]'s educational and therapeutic needs"]; Application of a Student with a Disability, Appeal No. 12-071; Application of the Dep't of Educ., Appeal No. 12-010; Application of the Dep't of Educ., Appeal No. 08-105).

provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The CSE must also consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]; accord Application of a Student with a Disability, Appeal No. 12-108). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that the recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; see T.G., 2013 WL 5178300, at *18).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]).

Based upon the hearing record, the May 2012 CSE considered and relied upon the following to develop the student's May 2012 IEP: a February 2012 counseling update, a March 2012 teacher report checklist, an April 2012 related service progress report (speech-language therapy), the student's 2011-12 report card from Xaverian, and information provided by the parent and the Xaverian school psychologist during the May 2012 CSE meeting (see Tr. pp. 57-58, 60-

62, 72-75, 101-03, 121-23; Dist. Exs. 2-3).[8] In addition, the district representative testified that the May 2012 CSE had the student's "folder" available at the meeting for reference (Tr. pp. 72-75).

The February 2012 counseling update described the student as a "well-mannered and sensitive young man" with many positive relationships among staff and students (Dist. Ex. 2 at p. 3). However, with the demands of school and athletics, the student became overwhelmed at times, and would perseverate on unfinished homework, upcoming tests, and athletic demands (id.). The update also indicated that the student "made strides" in understanding when he was becoming overwhelmed, and used techniques to help "de-escalate his stress levels" (id.). Furthermore, the student had improved his social relationships "dramatically," and he "better underst[ood] that humor and joking" could be used in "camaraderie and not in a negative sense" (id.). The February 2012 counseling update also noted that the student had difficulty breaking up task demands into manageable portions, and he would perseverate on the "demands of an entire month at one time" (id.).

The May 2012 CSE summarized the March 2012 teacher report checklist within the present levels of performance and individual needs section of the IEP, which reflected that the student performed "well" in word attack skills, math calculation, and problem solving, but performed "good to poor" in reading comprehension, reading speed, writing content, and grammar (Dist. Ex. 1 at p. 1). The May 2012 IEP also reported the student's then-current academic functional levels for reading (eighth grade) and mathematics (tenth grade), as indicated on the "teacher report" (see Tr. p. 199; Dist. Ex. 1 at p. 10).

According to the April 2012 related services progress report, the student exhibited difficulty with receptive and expressive language (Dist. Ex. 2 at p. 1). The report specifically indicated that the student struggled with reading and listening comprehension, including difficulty "interpreting and synthesizing" information from a reading or listening passage (id.). The report further indicated that to improve the student's comprehension of material, he required frequent cueing to return to written information in order to re-read or to identify unfamiliar vocabulary using context cues (id.). At that time, the student achieved greater than 80 percent accuracy when using a strategy of defining unfamiliar words based on context cues in isolated activities (id. at p. 2). The student also benefited from having information and directions presented in chunks to aid in processing (id. at. p. 1). Expressively, the student required support to generate ideas and to convey his thoughts clearly for both writing and speaking, and he benefitted from the use of graphic organizers to "generate, expand, and organize his thoughts on a topic prior to expressive language tasks" (id.). The April 2012 related services progress report indicated that the student made progress toward his annual goals (id. at p. 2). In addition, the student could identify main ideas and supporting details in isolated paragraphs; however, he needed cues to use this strategy with longer, more complex work from textbooks or other curriculum based reading (id.). Additionally, the student could follow multiple step directions with minimal repetition or cues, and he could summarize information; however, the student required cues and support to sequence and organize thoughts and ideas (id.). Finally, the student could complete a three paragraph to five

[8] Although neither party submitted the March 2012 teacher report checklist into evidence at the impartial hearing, there is no dispute that it was available to the May 2012 CSE or that the May 2012 CSE relied upon it, in part, to develop the student's May 2012 IEP (see Tr. pp. 101-03, 122-23, 199; see Dist. Ex. 1 at p. 1).

paragraph essay, but he needed to work on expanding his ideas and organizing his thoughts into a cohesive piece (id.).

In addition to the information contained within the abovementioned reports, the May 2012 IEP also reflected information within the present levels of performance and individual needs based upon a 2009 privately obtained evaluation of the student (see Dist. Ex 1 at p. 1).[9] According to the May 2012 IEP, an administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) revealed that the student's full scale score placed him within the "high end" of the low average range (id.). The May 2012 IEP also reported that the student's perceptual reasoning index was significantly stronger than his verbal comprehension index, and further noted the evaluator's opinion that the student's full scale score "underestimated" the his intellectual potential (id.). In addition, the May 2012 IEP reported that according to the 2009 evaluation, the student's sight word recognition, written language skills, math computation and mathematical concepts skills all fell within the average range; his phonetic word attack skills fell within the high average range; and his recall of basic math facts fell within the low end of the average range (id.). The May 2012 IEP further reflected that the student exhibited weaknesses in his expressive language syntax, his ability to express himself in complex sentences, and his ability to write topic sentences and sentences appropriate to the body of a paragraph (id.).

Therefore, in this case and as described above, the hearing record demonstrates that the May 2012 CSE adequately considered and reviewed a variety of sources to ascertain information about the student's academic, speech-language, and social/emotional skills and developed the student's May 2012 IEP based on this information (Tr. pp. 56-62; Dist. Exs. 3; 4; 5; 7). Based upon the evidence, the parent's assertions regarding the sufficiency of the evaluative data and its consideration by the May 2012 CSE are not supported by the hearing record and must be dismissed (see J.C.S., 2013 WL 3975942, at *10; [D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041).

**3. Annual Goals**

The parent argues that the May 2012 CSE's failure to rely upon and consider adequate evaluative information in the development of the May 2012 IEP resulted in the development of annual goals that were not appropriate to meet the student's needs. However, a review of the hearing record reveals that the May 2012 CSE developed the annual goals based upon the student's identified needs and areas of deficits—which the May 2012 CSE accurately and adequately set forth in the present levels of performance and individual needs section of the May 2012 IEP—such that the parent's assertions must be dismissed.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to

[9] The district representative testified that she could not recall if the May 2012 CSE discussed the 2009 evaluation report in particular, but that the report would have been part of the student's "folder" available to the May 2012 CSE (see Tr. p. 73).

measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).[10]

In this case, the May 2012 CSE described the student as a "hard worker" with an academic average of 88.6 within the present levels of performance and individual needs section of the May 2012 IEP, and indicated that he was "working his way" to a Regents diploma (Dist. Ex. 1 at p. 1). The May 2012 IEP further indicated that the student exhibited delays in his receptive and expressive language skills, and he became overwhelmed with increased school work (id. at p. 2). As reported by his teachers, it was "helpful" to the student if teachers prepared him by "using prompts or cues in order to help him answer questions correctly" (id.). The May 2012 CSE noted in the IEP that the student would raise his hand to ask questions, but he tended to forget information and required prompts and cues to stay on task (id.). According to the May 2012 IEP, the parent reported that the student was seeing a tutor for "SAT Prep" once per week, that he needed support for homework requiring "a lot of reading," as well as support and direction to refer back to information read (id.). The parent also reported that, at times, she repeated information to the student "several times" in order for him to understand it (id.).

With regard to the student's speech-language skills, the May 2012 CSE summarized the April 2012 related services progress report in the IEP, which indicated that the student had difficulty in both receptive and expressive language (see Dist. Ex. 1 at p. 2). The May 2012 IEP also reflected the student's difficulties with reading and listening comprehension tasks, especially as the grade level and complexity increased; his difficulty "interpreting and synthesizing information" from a reading or listening passage; and that he required frequent cues to return to the written information (id.). Moreover, the May 2012 IEP indicated that the student benefitted from having information and directions presented in chunks to aid in processing; the student needed support to "generate ideas and convey his thoughts clearly on a topic when writing or speaking;" and that the student benefited from using graphic organizers to generate, expand, and organize his thoughts on a topic prior to expressive language tasks (id.).

With regard to social skills, the May 2012 CSE described the student in the IEP as "kind and sensitive," noting that he "genuinely care[d] about the well-being of his friends and family;" and he was polite and respectful to staff and students (Dist. Ex. 1 at p. 2). Furthermore, the student was described as very hard working and that he "excel[led] in academics and athletics" (id.).

To address these identified needs, the May 2012 CSE included six annual goals targeting the student's deficits in reading comprehension, math problem solving, auditory processing, expressive language, and social/emotional skills (see Dist. Ex. 1 at pp. 4-5). The district representative testified that the May 2012 CSE developed the annual goals based upon information from the February 2012 counseling update and the April 2012 related services progress report, as

[10] To the extent that the IHO found that the annual goals were procedurally defective, in part, because they lacked "baselines" to measure progress, the applicable State regulations cited within do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). The annual goals must meet a simpler criteria—which is the annual goal must be "measurable."

well as information provided by the parent, Xaverian reports, and the Xaverian school psychologist (see Tr. pp. 58-67, 82-83). She further testified that the May 2012 CSE derived the annual goals related to counseling directly from the Xaverian school psychologist, and similarly, the annual goals related to speech-language skills were based on the April 2012 related services progress report (id.). The Xaverian school psychologist testified that the May 2012 CSE discussed the student's then-current speech-language annual goals, including the "new goals" suggested in the April 2012 related services progress report, and the annual goals for counseling—and the only annual goal not discussed at the May 2012 CSE meeting that appeared in the IEP was the annual goal related to mathematics (Tr. pp. 172-78; see Dist. Exs. 1 at pp. 4-5; 2 at pp. 1-3).

More specifically, to address the student's reading comprehension skills, the May 2012 IEP included an annual goal designed to improve his ability to answer a variety of literal, inferential, or critical thinking questions based on material read (see Dist. Ex. 1 at p. 4). The May 2012 IEP included an annual goal to improve the student's auditory processing skills by targeting his ability to follow directions of increasing length and complexity and by defining unfamiliar words using context clues during a reading activity (id.). With regard to student's expressive language skills, the May 2012 IEP included an annual goal to improve his ability to verbally summarize information, including the main idea and four to six supporting details based on material read (id. at pp. 4-5). The student's social emotional skills were addressed by two annual goals to improve his ability to use stress reducing techniques during stressful or anxiety provoking situations, and to improve his self-esteem by learning to verbalize his feelings related to social and academic competence (id. at p. 5).

To address the student's mathematics skills, the May 2012 IEP included an annual goal designed to improve his problems solving skills by using two of the four operations correctly in order to solve "multistep" word problems (Dist. Ex. 1 at p. 4). To the extent that the Xaverian school psychologist testified that the annual goal addressing math was not appropriate because it only targeted the student's ability to perform operations (addition, subtraction, multiplication, and division) in math problems and it would have been too easy for the student in light of mathematics courses he had already taken (algebra, geometry), the annual goal targeted the ability to perform operations within multiple step word problems (see Tr. pp. 179-80; Dist. Ex. 1 at p. 4). Furthermore, the hearing record indicated that this annual goal was consistent with the student's needs related to reading comprehension, his tendency to forget information, his difficulty synthesizing information related to reading, his difficulty breaking up task demands into manageable portions, and his difficulty sequencing and organizing his thoughts and ideas (Dist. Exs. 1 at p. 2; 2 at p. 2).

Finally, to address the student's management needs, the May 2012 IEP included recommendations to present information and directions in chunks to aid in processing and for tasks be broken down in order to increase understanding and mastery (Dist. Ex. 1 at p. 2). Additionally, the May 2012 IEP included the following testing accommodations: extended time, separate location or room, use of calculator, revised test directions, questions read aloud, and answers recorded in any manner (id. at p. 7).

Thus, overall, the annual goals contained in the student's May 2012 IEP, when read together, targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring her progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of

Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

**C. Challenges to the Assigned Public School Site**

Finally, the parent argues that the IHO erred in finding that the assigned public school site could appropriately implement the student's May 2012 IEP. The district asserts that, while speculative, the IHO's finding was proper.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes, 2012 WL 6136493, at *7; 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 D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 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, 677-78 [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 now find it necessary to depart from those cases. Since 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., (Region 4), 2013 WL 2158587, at *4 [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., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, 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., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 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 Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Dep't 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 is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 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'"]).

In view of the forgoing, the parent cannot prevail on claims that the district would have failed to implement the May 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the May 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. D-E; I-L). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington School 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]). However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parent to challenge the IEP services through information she acquired after the fact. Therefore, the district

was not required to demonstrate the proper implementation of services in conformity with the student's May 2012 IEP at the assigned public school site when the parent rejected it and unilaterally placed the student.

## VII. Conclusion

Thus, having determined that the IHO properly concluded 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 2012-13 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 Xaverian was an appropriate placement (Burlington, 471 U.S. at 370). By the same token it is not necessary to reach the parties' contentions regarding the burden of proof as to equitable considerations.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**January 8, 2014**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**