



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-212

### **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 Board of Education of the Chappaqua Central School District**

#### **Appearances:**

Law Office of Peter D. Hoffman, PC, attorneys for petitioners, Catherine Laney, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Michael K. Lambert, 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 parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Eagle Hill School (Eagle Hill) for the 2011-12 and 2012-13 school years and determined that the parents' claims for declaratory relief as to the educational programs the district's CSE had recommended for their son for the 2009-10 and 2010-11 school years were barred by the two-year statute of limitations and also moot. The 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**

Relevant to matters properly raised in this appeal, on April 14, 2011, the CSE<sup>1</sup> convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 15).<sup>2</sup> The CSE reconvened on

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<sup>1</sup> The body that convened was a subcommittee on special education; however, there is no argument that the district was required to convene a full CSE in this instance (see 8 NYCRR 200.3[c]). Accordingly, for purposes of this decision all subcommittees on special education are referred to as CSEs.

<sup>2</sup> The parties' familiarity with the underlying facts, proceedings, and hearing record is presumed and will not be recited here in detail. Those facts necessary to the disposition of the parties' arguments will be set forth as

June 10, 2011 to finish the development of the student's IEP for the 2011-12 school year (Dist. Ex. 16).<sup>3</sup> The June 2011 CSE determined that the student was eligible for special education and related services as a student with autism (*id.* at p. 3).<sup>4</sup> The CSE recommended that the student receive direct consultant teacher services four times in a four-day cycle in science/social studies; two times in a four-day cycle in English/language arts (ELA); two times in a four-day cycle in math; and indirect consultant teacher services once in a four-day cycle (*id.* at p. 12).<sup>5</sup> The CSE also recommended a 12:1 special class (Skills Seminar) four times per four-day cycle (*id.*). The CSE recommended that the student receive the support of a 1:1 teaching assistant in his ELA, math, science, social studies, lunch, technology, and home and careers classes, and receive the support of a 2:1 teaching assistant in his gym, orchestra, and art classes (*id.* at p. 14). With regard to related services, the CSE recommended that the student receive counseling services in a group (5:1) for one 40-minute session bi-weekly; twice weekly 30-minute sessions speech-language therapy in a group (5:1); and parent counseling and training provided twice monthly for one hour in the district school and twice monthly for one hour at home or in the community (*id.* at pp. 12-13). To provide support to school personnel on the student's behalf, the CSE recommended a one-hour counseling consultation per month; two 15-minute speech-language consultation sessions per week; and one 30-minute team meeting per month for the first two months of the school year and one per quarter thereafter (*id.* at p. 15). In addition, the June 2011 CSE determined that the student's behaviors interfered with his learning and indicated that a behavioral intervention plan (BIP), which was updated in April 2011 (April 2011 BIP), was required for the student (*id.* at pp. 3, 7-8). The June 2011 CSE recommended that the student receive services during summer 2011 including direct consultant teacher services three times per week for 45 minutes, with the support of a full-time 2:1 teaching assistant; speech-language therapy for two 30-minute sessions per week in a group (5:1); and three one-hour sessions of individual parent counseling and training (*id.* at pp. 15-16).

By letter to the district dated August 22, 2011, the student's parents indicated that the June 2011 IEP was not appropriate and that the parents had "been forced to place" the student at Eagle Hill, an out-of-state nonpublic school, and "demand[ed]" reimbursement of the student's tuition

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necessary to resolution of the issues presented in this appeal. In addition, because the merits of any of the parents' claims with regard to the IEPs developed for the student for the 2009-10 and 2010-11 school years, as well as the implementation of those IEPs during the 2009-10 and 2010-11 school years, are not reached in this appeal for the reasons stated below, a summary of the factual background and procedural history relevant to those two school years is not necessary here.

<sup>3</sup> The June 10, 2011 IEP is the operative and challenged IEP with respect to the 2011-12 school year in this case.

<sup>4</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher . . . , to a student with a disability to aid such student to benefit from the student's regular education classes," while "[i]ndirect consultant teacher services means consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m][1], [2]).

and that transportation costs be paid at public expense (Parent Ex. D).<sup>6</sup> The student attended Eagle Hill for the 2011-12 school year (Dist. Ex. 47).

On May 22, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist Exs. 17; 18). On July 25, 2012, the parents submitted a due process complaint notice alleging that the district failed to offer the student an appropriate educational program for the 2010-11, 2011-12, and 2012-13 school years (Dist. Ex. 1). On August 17, 2012, the CSE reconvened to respond to concerns raised by the parents in their July 2012 due process complaint notice, to review a June 2012 Eagle Hill progress report that was provided to the CSE by the parents on or about July 2012, and to revise the student's IEP for the 2012-13 school year (Dist. Ex. 19; *see* Dist. Ex. 47; IHO Ex. 8D).<sup>7</sup> The CSE again determined that the student was eligible for special education services as a student with autism (Dist. Ex. 19 at p. 3). The CSE recommended that the student receive direct and indirect consultant teacher services, three times in a six-day cycle for 40-minute periods in science, math, ELA, and social studies, and that the student participate in a 12:1 special class (Skills Seminar) for 55-minutes four times in a six-day cycle beginning in September 2012 (*id.* at p. 19). The CSE also recommended that the student receive full time 1:1 support from a teaching assistant (*id.* at p. 21). With regard to related services, the CSE recommended that the student received one 25-minute individual speech-language therapy session and two 25-minute speech-language therapy sessions in a group (3:1) per six-day cycle; three 25-minute sessions of group (2:1) reading instruction in a six-day cycle; one individual and one group (5:1) 25-minute counseling sessions in a six-day cycle; and two individual one-hour parent counseling and training sessions per month in the home/community and two individual one-hour sessions per month in the school setting (*id.* at p. 19). To provide support to school personnel on the student's behalf, the CSE recommended a one-hour counseling consultation per month; one 25-minute speech-language consultation per six-day cycle; two 30-minute team meetings per month; and one-hour behavioral intervention consultations twice weekly from September through November 2012 and once weekly thereafter (*id.* at pp. 22-23). In addition, the August 2012 CSE determined that the student's behaviors interfered with his learning, indicated that the April 2011 BIP, as modified by the management needs section of the August 2012 IEP, would be implemented and an updated functional behavioral assessment (FBA) would be conducted and the BIP further adjusted as necessary upon the student's return to the public schools (*id.* at pp. 2, 14-15). The August 2012 CSE recommended that the student receive services during summer 2012 including direct consultant teacher services three times per week for 45 minutes, with the support of a full-time 1:1 teaching assistant; speech-language therapy for two 30-minute sessions per week in a group (5:1); and three one-hour sessions of individual parent counseling and training (*id.* at p. 23).

At the end of the August 2012 CSE meeting, counsel for the parents informed the district that the parents were rejecting the August 2012 IEP and stated their intention to seek tuition

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<sup>6</sup> The Commissioner of Education has not approved Eagle Hill as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

<sup>7</sup> The hearing record contains three IEPs that were developed for the 2012-13 school year (Dist. Exs. 17; 18; 19). The August 2012 IEP was the operative IEP for the 2012-13 school year and thus is the IEP challenged by the parents for that year (Dist. Ex. 19). To the extent that the August 2012 IEP was developed after summer 2012 had ended, the special education program and services recommended for summer 2012 are reflected on the August 2012 IEP (*id.* at p. 21).

reimbursement for the student's placement at Eagle Hill (IHO Ex. 8D at pp. 63-64). The student attended Eagle Hill for the 2012-13 school year (Parent Ex. WWW).

### **A. Due Process Complaint Notice**

By amended due process complaint notice dated September 13, 2012, the parents requested an impartial hearing (Dist. Ex. 3 at ¶ 1).<sup>8, 9</sup> In their complaint, the parents enumerated approximately 100 allegations of defects related to the provision of a free appropriate public education (FAPE) to the student during the 2009-10, 2010-11, 2011-12, and 2012-13 school years and with regard to the appropriateness and actual or planned implementation of the May 2009, April 2010, June 2011, and August 2012 IEPs (*id.* at ¶¶ 1-121).<sup>10</sup> The parents also alleged that the student's unilateral placement at Eagle Hill was appropriate to address his special education needs (Dist. Ex. 3 at ¶¶ 7, 106-13). The parents further maintained that no equitable considerations existed that would preclude or diminish an award of relief (*id.* at ¶¶ 8, 114-20).

As noted above, the parents' claims relating to the IEPs developed for the 2009-10 and 2010-11 school years, as well as the implementation of those IEPs, are not addressed in this decision for reasons stated at length below. Briefly, relative to the IEPs developed for the student during the 2009-10 school year and their implementation, the parents alleged that the district failed to adequately address the student's behavioral needs, the student regressed academically and socially as a result of the district's failure to adequately implement his BIPs, and the student failed to make meaningful progress in reading comprehension and writing skills (Dist. Ex. 3 at ¶¶ 15-22, 101). With regard to the student's IEP developed for the 2010-11 school year and its implementation, the parents alleged that the IEP was inadequate because it did not address the student's previous lack of progress and that the district failed to adequately implement the 2010 IEP because, the student was inappropriately provided with a rotating team of teaching assistants instead of the 1:1 assistant he had the previous year, the student was at times without a 1:1 teaching assistant during the school day, and the student's BIP was not implemented appropriately for a majority of the school year (Dist. Ex. 3 at ¶¶ 2, 23, 25-33, 35-36, 38, 69, 74-82, 100-05).

With regard to the June 2011 IEP developed for the 2011-12 school year, the parents alleged that: (1) the goals in the June 10, 2011 IEP were inappropriate because there were no baselines on which to review the goals and the goals were not written in operational terms, making it difficult to assess and document the student's success with the goals; (2) the April 2011 BIP was not appropriate for the 2011-12 school year and was not based on an appropriate FBA; and (3) the

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<sup>8</sup> As noted above, the parents initially filed a due process complaint notice dated July 25, 2012 (Dist. Ex. 1), which was superseded by the amended due process complaint notice dated September 13, 2012 (Dist. Ex. 3).

<sup>9</sup> Several exhibits contain multiple independently consecutively paginated documents; in this particular case citations to these documents, where possible, are to the numbered paragraphs contained in one document of each exhibit.

<sup>10</sup> In addition to the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint" (*R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 187-88 n.4 [2d Cir. 2012]), in cases involving in excess of 100 itemized allegations, each allegation should include "a description of the nature of the problem . . ., including facts relating to such problem" (8 NYCRR 200.5[i][1][iv]).

district failed to inform the parents of the student's teaching assistant or special education coordinator for that year in a timely fashion (Dist. Ex. 3 at ¶¶ 3, 34, 37, 39, 69, 83-86).<sup>11</sup>

As to the August 2012 IEP developed for the 2012-13 school year, the parents alleged that: (1) the goals in the August IEP were inappropriate for the student because they provided strategies rather than true goals, were often not written in operational terms, and failed to provide a baseline from which to document expected improvement; (2) the April 2011 BIP was not based on an appropriate FBA and was not appropriate for use during the 2012-13 school year because it was outdated; and (3) the CSE failed to review behavioral data at the May 2012 CSE meeting (Dist. Ex. 3 at ¶¶ 4, 69, 71-73, 87-95).<sup>12</sup>

With respect to the parents' unilateral placement of the student at Eagle Hill for the 2011-12 and 2012-13 school years, the parents alleged that (1) Eagle Hill was and continues to be an appropriate placement for, and meets the needs of, the student; (2) Eagle Hill offers individualized programming and a small class size; and (3) the student made progress in both academic and social skills (Dist. Ex. 3 at ¶¶ 6-7, 43-47, 49-50, 53-56, 106-13). The parents also alleged that equitable considerations would not bar an award of tuition reimbursement because they had always cooperated with the district, attended every CSE meeting, provided the district with releases and consent, and provided all educational reports to the district (Dist. Ex. 3 at ¶¶ 8, 114-20).

As to relief, the parents requested a declaratory order finding that (1) the April 2010 IEP was not appropriate and not properly implemented; (2) the June 2011 IEP was not appropriate; (3) the August 2012 IEP was not appropriate; and (4) the district failed to conduct appropriate FBAs and implement appropriate BIPs for the 2010-11, 2011-12, and 2012-13 school years (Dist. Ex. 3 at ¶¶ B-C). The parents also sought tuition reimbursement for the costs of the student's enrollment at Eagle Hill for the 2011-12 school year (id. at ¶ D). The parents next requested that the district be required to develop an appropriate IEP, FBA, and BIP for the student for the 2012-13 school year or, in the alternative, fund the student's placement at Eagle Hill for the 2012-13 school year (id. at ¶ E). Finally, the parents sought an order granting the parents prevailing party status and attorney's fees and costs (id. at ¶¶ A, F).

## **B. Prehearing Conference and Motion to Dismiss**

On October 5, 2012, the IHO conducted a prehearing conference to address certain preliminary matters (Tr. pp. 1-66). At the prehearing conference, the district informed the parents and the IHO on the record that it would be making an application to dismiss certain claims raised

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<sup>11</sup> The parents' allegation that the district failed to timely inform the parents of the student's teaching assistant or special education coordinator for the 2011-12 school year was neither addressed by the IHO nor advanced on appeal by the parent. Under the circumstances of this appeal, the parents have effectively abandoned this claim by failing to identify it in any fashion or make any legal or factual argument as to how it would rise to the level of a denial of a FAPE. Therefore, this claim will not be further considered (34 CFR 300.514[d]; 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]).

<sup>12</sup> The parents' allegation that the CSE failed to review behavioral data at the May 22, 2012 CSE meeting was also neither addressed by the IHO nor advanced on appeal by the parent. Therefore, the parents have also effectively abandoned this claim and it will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at \*6-\*7, \*10).

by the parents (Tr. pp. 17-18). By motion dated October 16, 2012, the district moved to dismiss and/or limit the parents' due process complaint (IHO Ex. 1). Specifically, the district alleged that the parents' claims with regard to the 2009-10 and 2010-11 school years were brought after the two-year limitations period had run for those claims (id. at pp. 1, 5-7). The district also argued that the parents' claims for the 2009-10 and 2010-11 school years were moot because the parents sought only declaratory relief for those two school years (id. at pp. 1, 7-10). Finally, the district argued that the impartial hearing should be limited to the issues specifically pleaded in the parents' amended due process complaint notice—namely, the parents' challenges to the goals in the June 2011 and August 2012 IEPs, and the April 2011 BIP and underlying FBA recommended for the student for the 2011-12 and 2012-13 school years (id. at pp. 10-11).

In the parents' opposition to the district's motion to dismiss and to limit issues at hearing, the parents expressly stated that they had "not made any claims, nor do they seek relief, for the 2009-10 school year" (IHO Ex. 2 at p. 8). The parents also "withdr[e]w their request for declaratory relief for the 2010-11 school year" (id. at p. 9). As to the 2011-12 and 2012-13 school years, the parents continued to maintain their challenges to the IEPs and the April 2011 BIP recommended by the CSE for those two school years (id. at pp. 9-10).

In an interim decision dated November 3, 2012, as clarified by e-mail dated November 24, 2012, the IHO found that (1) any claims brought by the parents for the 2009-10 and 2010-11 school years were barred by the two-year statute of limitations; (2) the parents' claims for the 2009-10 and 2010-11 school years were moot because the parents sought only declaratory relief for those school years; (3) the district conceded that the parents properly raised a challenge to the April 2011 BIP and the underlying FBA recommended by the CSE for the 2011-12 and 2012-13 school years; (4) the district conceded that the parents properly raised challenges to the goals set forth in the June 2011 and August 2012 IEPs; and (5) the parents could introduce and present evidence of facts prior to the 2011-12 school year but that any discussion of such evidence "must be directly related" to a claim they were making for the 2011-12 and 2012-13 school years (IHO Exs. 5 [emphasis in original]; 7).

### **C. Impartial Hearing Officer Decision**

A prehearing conference was conducted by the IHO on October 5, 2012 and the impartial hearing was continued on October 16 and October 23, 2012; November 16, 2012; December 3, 14, and 19, 2012; January 3, 2013; February 4, 14, and 22, 2013; April 5, 22, 26, 29, and 30, 2013; June 10, 12, 17, and 21, 2013; and July 18, 2013 (Tr. pp. 74-4422). Following the conclusion of the 21-day impartial hearing, the IHO, finding that the evidence and testimony in favor of the district was overwhelming, found in a well-reasoned and thorough decision that (1) the June 2011 and August 2012 IEPs and the goals contained in each of those IEPs were appropriate for the student; and (2) the April 2011 BIP and underlying FBA recommended by the CSE for the 2011-12 and 2012-13 school years were appropriate for the student (IHO Decision). Before turning to his analysis of the 2011-12 and 2012-13 school years, the IHO found that the evidence in the hearing record established that throughout the student's years in the district public schools—from kindergarten through sixth grade—the district "provided the student with a quality educational program that was calculated to lead to meaningful educational gains" (id. at p. 19). Moreover, the IHO noted the academic and social progress that the student had made in the district's educational program from 2004 to 2010 and the parents' admission that the IEPs and goals throughout those years were "okay" (id. at pp. 19-21). As to the 2010-11 school year, the IHO found that the June

2011 IEP indicated that the student had made progress during the 2010-11 school year and noted that the student passed all of his courses (id. at p. 21).

With regard to the April 2011 BIP recommended by the CSE for both the 2011-12 and 2012-13 school years, the IHO found that the parents' challenge to the April 2011 BIP was without merit because the BIP and underlying FBA "demonstrate[d] a deep understanding of the student, the challenges faced by the student's service providers[,] and practical methods of dealing with his behaviors" (IHO Decision at p. 23). The IHO further found that none of the testimony at the impartial hearing cast serious doubt on the appropriateness of the BIP, noting that professionals who evaluated the student privately acknowledged that the BIP contained appropriate strategies for addressing the student's interfering behaviors (id. at pp. 18-19, 23).

As to the appropriateness of the June 2011 and August 2012 IEPs, the IHO found that the IEPs in question were appropriate for the student and that the goals in each of the IEPs were "custom-designed" for the student and his needs as to both the 2011-12 and the 2012-13 school years (IHO Decision at pp. 17, 26). The IHO found that there was "no credible evidence" to undermine the appropriateness of the goals, the adequacy of the evaluations on which the goals were based, or the accuracy of the student's present levels of functional performance described in the IEPs (id. at p. 21). Further, the IHO noted that the parents' "primary objection" to the annual goals was the manner in which they would be implemented (id.). The IHO also found that the June 2011 IEP indicated that the parents did not object to the goals as written, that the parents acknowledged that goals were individually discussed by the CSE with the participation of staff from Eagle Hill, and that the CSE incorporated the recommendations of Eagle Hill staff to the extent possible (id.).

Finally, the IHO found that the parents' claims that the district would not have appropriately implemented the behavioral strategies put in place for the 2011-12 and 2012-13 school years were meritless as a matter of law because the parents had removed the student from the public school, making any claim about what might have happened had the school district been required to implement the IEPs speculative (IHO Decision at pp. 23-24).

Having found that the district offered the student a FAPE for the 2011-12 and 2012-13 school years, the IHO nevertheless went on to find that Eagle Hill was not an appropriate placement for the student for the 2011-12 and 2012-13 school years (IHO Decision at pp. 24-26). Specifically, the IHO found that Eagle Hill was inappropriate because: (1) it did not provide an educational program specifically designed to meet the student's unique educational needs; (2) it was not the student's least restrictive environment; (3) it did not provide the student with an opportunity to interact with non-disabled peers; (4) the student was required to commute for nearly three hours per day, which was inappropriate for the student; (5) the student was not grouped in classes based upon similarity of needs; (6) the hearing record contained insufficient information with respect to the student's progress and performance at Eagle Hill; and (7) the student was required to change buildings during the course of the day, providing unnecessary challenges to the student who could become overwhelmed by rapid change (id.). Lastly, the IHO also found that equitable considerations did not favor the parents' request for tuition reimbursement (id. at p. 26). Specifically, the IHO found that the hearing record indicated that the parents did not attend the June 2011 or August 2012 CSE meetings with the intent of cooperating in the development of appropriate IEPs for the student (id.). The IHO also noted that at the May and August 2012 CSE meetings, the parents' "attorney did much of the talking" (id.).

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

The parents appeal and argue that the IHO erred in finding that the district offered the student a FAPE for the 2011-12, and 2012-13 school years, erred in determining that Eagle Hill was not an appropriate placement for the student for the 2011-12 and 2012-13 school years, and erred in determining that equitable considerations did not favor their request for tuition reimbursement for the 2011-12 and 2012-13 school years.<sup>13</sup>

Initially, the parents allege that the IHO was biased and incompetent to serve as hearing officer because he fell asleep during the impartial hearing, he was of an "advanced age" at the time of the hearing, and he lacked legal knowledge. The parents also allege that a district special education teacher who testified at the impartial hearing violated the sequestration rule by discussing the impartial hearing with the assistant director of special education (assistant director), also a witness, during the hearing and that the IHO erred by not applying a negative inference to the testimony of both the special education teacher and the assistant director.

As to the 2009-10 and 2010-11 school years, the parents allege that the IHO erred in determining that the parents' claims for the 2009-10 and 2010-11 school years were barred by the statute of limitations and that their claims for those two years were also moot. The parents also argue that even if their 2009-10 and 2010-11 claims were barred by the statute of limitations or moot, their claims for those two school years—and the evidence in the hearing record supporting those claims—are still relevant to establishing their claims for the 2011-12 and 2012-13 school years. The parents also argue that their claims for the 2010-11 school year are not moot because the declaratory relief that they sought for the 2010-11 school year "was the impetus" for the student's unilateral placement for the 2011-12 school year.

As to the parents' arguments concerning both the 2011-2012 and 2012-13 school years, the parents argue that the IHO erred in finding that (1) the district witnesses were credible insofar as they testified that the parents did not raise objections at the April and June 2011 CSE meetings and at the May and August 2012 CSE meetings; (2) the annual goals contained in the June 2011 IEP and August 2012 IEP were appropriate for the student for the 2011-12 and 2012-13 school years; (3) the April 2011 BIP—including the underlying functional behavioral assessment (FBA) developed for the April 2011 BIP—was appropriate for the student for the 2011-12 and 2012-13 school years; (4) claims regarding the implementation of the April 2011 BIP and the June 2011 and August 2012 IEPs were speculative as a matter of law because it was foreseeable that the district continue not to implement appropriately the BIP and IEPs given the district's failure to implement the student's previous BIPs while the student was enrolled in the district; (5) the parents'

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<sup>13</sup> In addition to running afoul of the form requirements applicable to pleadings submitted to the Office of State Review, as discussed below, the parents' petition for review is "replete with acronyms" not used within standard legal practice, this jurisdiction, or in IDEA cases (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 223 n.1 [2d Cir. 2012]). Parties are encouraged to limit extensive use of atypical acronyms (see id.; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 672 n.1 [S.D.N.Y. 2012]). Although not expressly violative of State regulations, the parents' use of acronyms rendered their submissions almost unintelligible, and based on the particular selections made, it appears as though this may have been the desired effect. At the risk of rejection of pleadings, counsel for the parents is directed to refrain from this practice in future filings with this office, and after identifying a term should rely on simple, shortened references such as "district" for the school district or board of education; the parents as the "parents"; and the child at issue to be referred to as the "student" or "child."

claims concerning the June 2011 and August 2012 IEPs were limited to the adequacy of the annual goals in those IEPs.<sup>14</sup>

Relative to the IHO's finding that Eagle Hill was not an appropriate placement for the student, the parents argue that the IHO erred and that Eagle Hill was appropriate for the student for both the 2011-12 and 2012-13 school years because: (1) Eagle Hill was uniquely tailored to meet student's needs and in particular in the areas of speech and language; (2) the student improved his language and social skills at Eagle Hills; (3) Eagle Hill was not overly restrictive; (4) the student did not require exposure to regular education students; (5) the daily bus trip to Eagle Hill was not overly long for the student; (6) the student was grouped with students of similar cognitive strengths, weaknesses, and social needs; (7) the lack of an IEP at Eagle Hill did not mean that the student was without an individualized program; (8) the Eagle Hill progress reports provided an update as to the student's performance and indicated progress; and (9) the parents produced a witness from Eagle Hill who was familiar with the student and the educational program offered to the student.

With regard to equitable considerations, the parents argue that the IHO erred in finding that equitable considerations did not weigh in their favor. Specifically, the parents argue that (1) over the years, the parents were cooperative with the district; (2) they attended each CSE meeting during the years in question; (3) they fully considered the programs offered by the district; (4) the parents did not predetermine to send student to Eagle Hill; and (5) the parents' attorney spoke on their behalf just as the district's attorney spoke for the district at certain CSE meetings.

The parents further argue that the IHO erred in declining to award them tuition reimbursement for the 2011-12 and 2012-13 school years and that they should be awarded full tuition reimbursement for both school years. The parents also contend that they are entitled to prevailing party status with leave to apply for an award of attorney's fees and costs. Finally, the parents attach three supplemental exhibits not received into evidence at the impartial hearing to their petition for review and request that these documents be considered by the SRO in support of their appeal.

The district submitted an answer, admitting and denying the allegations raised in the petition and arguing that the IHO's decision should be affirmed in all respects. In pertinent part, the district maintains that the IHO did not fall asleep during the proceedings and that there was no evidence of bias in favor of the district at the impartial hearing, as the IHO provided the parents with a 21-day hearing to develop the record and cross-examine the district's witnesses. The district

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<sup>14</sup> As to any other of the parents' other purported challenges to the June 2011 and August 2012 IEPs that the parents claim that the IHO erred in failing to address, the parents argue that their amended due process complaint notice included challenges to the district's six-day cycle and mainstream placement of the student (Pet. ¶ 10). Here, the parents' amended due process complaint notice, and in particular paragraphs 93 and 94—cited to as support for the proposition that additional claims were raised within the due process complaint notice—failed to raise any claims beyond those addressed by the IHO. Indeed, paragraphs 93 and 94 fail to raise clearly any claim for the 2011-12 or 2012-13 school years, much less an argument regarding the student's classroom placement or any other aspect of the program recommended by the district. Accordingly, the IHO did not err in limiting the parents' challenge to the June 2011 and August 2012 IEPs to the goals as written in those IEPs. Moreover, in addition to its motion to dismiss submitted prior to the impartial hearing, during the impartial hearing the district vigorously opposed any expansion of the issues to be litigated at the impartial hearing (see, e.g., Tr. pp. 94-98, 127-29, 387-89, 434-37, 585-86, 588-92, 1019-21, 1539-46; IHO Ex. 1).

further contends that the special education teacher's violation of the sequestration rule should not result in an adverse credibility determination applied to her testimony because she was forthcoming about her conduct during her testimony. As to the 2009-10 and 2010-11 school years, the district argues that the IHO correctly applied the statute of limitations to bar claims relating to each of those school years. The district further argues that the parents' claims for declaratory relief for the 2009-10 and 2010-11 school years are moot. The district further contends that the parents withdrew their claims relating to the 2009-10 and 2010-11 school years in their response to the district's prehearing motion to dismiss.

As to the 2011-12 and 2012-13 school years, the district argues that the goals in the June 2011 and August 2012 IEPs were appropriate and that there were no specific challenges raised by the parents to the goals as written and that the only real objection was whether the goals could be implemented within the educational program recommended by the CSE for each year. The district also argues that the IHO correctly determined that the April 2011 BIP was appropriate for the student for both the 2011-12 and 2012-13 school years. Moreover, the district argues that to the extent the parents argue that the June 2011 IEP, August 2012 IEP, or April 2011 BIP could not have been implemented by the district during the 2011-12 and 2012-13 school years, the IHO correctly found that such claims were speculative as a matter of law because the parents unilaterally placed the student at Eagle Hill and the student never attended the district for the 2011-12 and 2012-13 school years.

The district also argues that Eagle Hill was not an appropriate placement to address the student's educational needs for the reasons stated by the IHO and that equitable considerations do not support the parents' request for relief also for the reasons stated by the IHO. As a remedy, the district requests dismissal of the parents' appeal and affirmance of the IHO's decision in all respects.

The district also argues that the parents' petition for review and memorandum of law both exceed the page-limitation requirement and should therefore be rejected by the SRO. The district also contends that the parents impermissibly incorporated by reference the procedural history and facts described in their post-impartial-hearing brief to circumvent page-limitation requirements. Next, the district argues that the parents impermissibly attached three exhibits submitted with the petition for review and that these supplemental exhibits should not be considered by the SRO because those exhibits were not part of the hearing record and because they are not necessary to resolution of this appeal.

In response to the defenses raised by the district, the parents argue that to the extent their petition or memorandum of law violate the form requirements applicable to pleadings, such violations do not prejudice the district. The parents also argue that they have not circumvented the page limits through incorporation by reference, that they are not required to repeat the full procedural history of the case in every pleading, and that they have used citations and footnotes as the State regulations intended. The parents further argue that the IHO improperly excluded the three supplemental exhibits attached to the petition and that the exhibits should be considered by the SRO because they are necessary to render a decision in this case.

## 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, 161, 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, 22, 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, 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).

## **VI. Discussion**

### **A. Form Requirements for Pleadings**

In its answer, the district challenges the parents' petition as noncompliant with the form requirements set forth in the practice regulations applicable to proceedings before the Office of State Review. The district alleges that the parents' petition and memorandum of law both exceed the 20-page limitation set for each and impermissibly incorporate by reference the procedural and factual history of this case (see 8 NYCRR 279.8[a][5] [providing that "the petition, answer, or memorandum of law shall not exceed 20 pages in length" and that "[a] party shall not circumvent page limitations through incorporation by reference"]). Here, the district is correct and the parents' 21-page petition for review and 21-page memorandum of law fail on their face to comply with the 20 pages, albeit a slight noncompliance were that the only issue with their form.

In addition, the parents' petition for review and memoranda of law do not comport with the format requirements prescribed by State regulations. Specifically, State regulations require that "[a]ll pleadings and memoranda of law shall be in . . . 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font). Compacted or

other compressed printing features are prohibited" (8 NYCRR 279.8[a][2] [emphasis added]). Here, instead of using the required standard Times New Roman font, the parents' pleadings used an obviously compacted or compressed font that is blurry, difficult to read, and appears to serve the purpose of attempting to circumvent the 20-page requirement of 8 NYCRR 279.8(a)(5). Moreover, this technique for text compression is used for only those portions of the parents' submissions that are subject to page limitation requirements by regulation. For example, counsel for the parents correctly used the required font and did not compress the text for those portions of the parents' submissions that do not have page limitations specified by regulation, which in this case include the parents': (1) notice of intention to seek review; (2) affidavit of service of notice of intention to seek review; (3) notice with petition; (4) affidavit of verification; (5) affidavit of service of the notice with petition, verified petition with exhibits, and memorandum of law; and (6) title page, table of contents, and table of authorities of the parents' memorandum of law's, all of which are plainly legible (see Pet.; Parent Mem. of Law).

State regulations provide that documents that do not comply with the pleading requirements "may be rejected in the sole discretion of the State Review Officer" (8 NYCRR 279.8[a]). Due to the foregoing violations of State regulations applicable to the form requirements for pleadings submitted to the Office of State Review, I exercise my discretion to reject the parents' pleadings in this case and dismiss the parents' appeal. Nevertheless, in this instance I address, in the alternative, the merits of the parents' submissions below. I remind parents' counsel of the pleading requirements expressly prescribed by State regulations and of the potential consequences in future appeals for failing to comply with the form requirements set forth in State regulations.

The district also argues that the parents impermissibly attached additional evidence in the form of three supplemental exhibits to their petition for review and that the supplemental exhibits should be rejected. The three proffered exhibits submitted by the parents were not received into evidence at the impartial hearing (Tr. pp. 3532, 3633, 3839). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[a]; see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

In this case, in addition to a May 23, 2013 observation report by an educational consultant, the parents' supplemental exhibits include affidavits of the parents summarizing the transcript of audio recordings of the May and August 2012 CSE meetings (Pet. Exs. 1; 2; 3; see also IHO Exs. 8E; 8F). Arguing that the IHO improperly excluded the exhibits from evidence, the parents seek to introduce their affidavits on appeal for the purpose of rebutting testimony presented at the impartial hearing that the parents did not raise objections at the May and August 2012 CSE meetings.<sup>15</sup> However, over the course of 21 hearing dates, the parents had ample opportunity in this case to present testimony relative to the issue of whether they raised objections at the CSE meetings and to rebut any testimony at the impartial hearing that they failed to do so. Moreover,

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<sup>15</sup> For the reasons set forth below, the appropriateness of the unilateral placement of the student at Eagle Hill is not reached in this appeal, and therefore there is no need to reach the parents' argument that the IHO "wrongly excluded" the report of the May 2013 observation of the student at Eagle Hill (Pet. ¶ 49).

there is no evidence in the hearing record suggesting that the parents were deprived of any opportunity to cross-examine district witnesses on any matter generally, or any matter related to the CSE meetings in particular. Finally, to allow the parents to introduce what would in essence be additional testimony on appeal without affording the district an opportunity to cross-examine or respond to that testimony would be unfair and prejudicial to the district and it is largely cumulative of the evidence already presented in this case. Accordingly, the three supplemental exhibits attached to the parents' petition for review will not be considered because the parents have not provided an adequate basis for why these exhibits are necessary for rendering a decision in this matter.

## **B. Scope of Review**

On appeal, the parents raise certain arguments relative to the 2009-10 and 2010-11 school years, which the IHO found barred by the statute of limitations. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).<sup>16</sup>

In this case, the parents filed their original due process complaint notice on July 25, 2012 (Dist Ex. 1). Thus, any of the parents' claims that accrued after July 25, 2010 that formed the basis for their due process complaint would have been timely raised. Accordingly, the IHO correctly found that any allegations raised by the parents as to the April 2010 IEP as written were barred by the statute of limitations (IHO Decision at p. 14; IHO Ex. 5 at p. 2). However, to the extent that the IHO found that the parents' claims relating to the implementation of the April 2010 IEP during the 2010-11 school year were barred by the statute of limitations (id.), the IHO erred because those claims accrued every time the district failed to implement the April 2010 IEP. Thus, claims relating to the implementation of that April 2010 IEP during the 2010-11 school year subsequent to July 25, 2010 were not barred by the statute of limitations and therefore were timely raised.

Nevertheless, the parents' claims challenging any aspect of the implementation of the April 2010 IEP during the 2010-11 school year were neither raised properly before the IHO nor are raised properly on appeal because those claims are moot and also were withdrawn by the parents prior to the conclusion of the impartial hearing. First, the impartial hearing officer correctly acknowledged in his decision that the parents in this case sought a declaratory judgment as to the appropriateness of the student's 2009-10 and 2010-11 IEPs and requested, as relief, an order finding the student's IEPs inappropriate for those years, which, by virtue of the expiration of the respective school years, renders the parent's claims moot because no meaningful relief can be given (see IHO Decision at p. 14; Dist. Ex. 3 at pp. 24-25). Moreover, while it is generally accepted that a request for compensatory educational services as relief can survive a mootness challenge, the parents have not requested compensatory educational services in this case (see Lillbask v. State of

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<sup>16</sup> New York State has not explicitly established a different limitations period since Congress adopted the two-year limitations period.

Conn. Dep't of Educ., 397 F.3d 77, 89-90 [2d Cir. 2005]; ). Here, the parent did not raise the issue of compensatory services as either an allegation or as a basis for relief in her due process complaint notice or amended due process complaint notice, the parent did not request to amend her due process complaint notice at any time prior to or during the lengthy impartial hearing to include such a claim for relief. Furthermore, the parents do not request in their voluminous pleadings that an SRO grant compensatory additional services as relief for the district's alleged failure to offer the student a FAPE for the 2009-10 and 2010-11 school years. In any event, counsel for the district raised numerous objections to attempts to introduce either testimonial or documentary evidence related to issues not raised in the due process complaint notice, and notably, the hearing record does not reflect that a deprivation of educational services occurred during the 2009-10 and 2010-11 school years that caused harm to the student that could be rectified by an award of compensatory additional services. Moreover, the parents have failed to cite or point to any authority indicating that an IHO or SRO should proceed with resolution of a claim where the sole remedy sought is declaratory relief.

Second, resolution of any of the parents' claims as to the 2009-10 or 2010-11 school year by either the IHO or SRO would be entirely inappropriate because resolution of the parents' claims as to either school year would deny the district due process of law and create an unfair advantage for the parents, as the parents expressly withdrew all of their claims as to the 2009-10 and 2010-11 school years at the beginning of the impartial hearing (see IHO Ex. 2 at pp. 8-10). In the parents' memorandum of law in opposition to the district's motion to dismiss, the parents expressly stated that they "have not made any claims, nor do they seek any relief, for the 2009-10 school year. . . . [The parents] merely seek to admit historical evidence, from the 2009-10 school year, if not earlier, necessary to build a foundation for their true claims " (*id.* at p. 8). As to the 2010-11 school year, the parents also expressly stated in their memorandum that they "withdraw their request for declaratory relief for the 2010-11 school year" (*id.* at p. 9). Accordingly, given the parents' express representations made before the IHO, it would be inappropriate and unfair to allow the parents to now pursue a claim on appeal relating to either the 2009-10 or 2010-11 school years.<sup>17</sup>

### **C. IHO Bias/Conduct of the Impartial Hearing**

Turning next to the parent's assertions regarding the IHO's conduct during the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability; Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealing with litigants and others with whom the IHO interacts in an official capacity,

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<sup>17</sup> Moreover, a review and plain reading of the parents' original and amended due process complaint notices demonstrates that the IHO also did not err in limiting the parents' claims at the impartial hearing to the parents' challenges to the June 2011 and August 2012 IEPs and implementation of those IEPs during the 2011-12 and 2012-13 school years, because no other justiciable claims were raised as to the 2011-12 or 2012-13 school years, as stated above (see IHO Exs. 5; 7; see also Dist. Exs. 1; 3).

and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Child with a Disability, Appeal No. 07-090; Application of a Child with a Disability, Appeal No. 07-075; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child Suspected of Having a Disability, Appeal No. 01-021).

An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Here, the parents argue that the IHO erred in denying their application for the IHO to recuse himself (Tr. pp. 1353-62, 59-65, 1637-47). Specifically, the parents raise several arguments in support of their claim that the IHO was biased in favor of the district and exhibited inappropriate conduct at the impartial hearing.

First, the parents argue that the IHO should have recused himself as the IHO in this case because the IHO had served for twenty years as a superintendent of schools. The parents claim that they were not aware of the IHO's prior service as a superintendent for 21 years until after the start of the impartial hearing, that the IHO should have revealed his prior service at the start of the impartial hearing, and that the IHO's prior service conflicted with the IHO's objectivity and impartiality at the impartial hearing (see Tr. p. 1353-55, 1638; see also Tr. pp. 1637-47; see generally Parent Ex. LL at pp. 1-3). The parents further claim that the IHO was biased in favor of the district because of the IHO's past affiliation as a superintendent of schools. Under the circumstances presented in the hearing record, I find that the parents' claim is entirely without merit (see D.R. v. Dep't of Educ., 827 F. Supp. 2d 1161, 1166 [D. Haw. 2011] [noting that the "IDEA expressly bars current employees of educational agencies from serving as hearing officers, but says nothing about former employees of those agencies"] [emphasis in original]). The hearing record demonstrates that the IHO has been conducting impartial hearings since 1985 and the IHO's prior service as a superintendent of schools does not by itself call into question his ability to render a fair and impartial hearing on the facts presented at the impartial hearing, and the parents failed to demonstrate how the IHO's prior service affected his impartiality in this case and failed to point to instances in the record where his impartiality could reasonably be questioned. Moreover, the IHO explained to the parties in this case that as former superintendent of schools, he gained experience working with student with special needs, an understanding of "the needs of students with disabilities," each of which, according to the IHO, made him "uniquely qualified" and sensitive to the claims raised by the parents in this case (Tr. p. 1360). Indeed, the parents have failed to explain how the IHO's prior service as a superintendent of schools is any way a "negative" affiliation or how that prior service would negatively impact the special needs of the student or the claims raised by the parents on behalf of the student in this case (Tr. pp. 1360-61). Further, the IHO stated on the record that throughout his career, including his 21 years as a superintendent of schools, he had "made a commitment to the welfare of all children and especially those with disabilities" and had "tried to do all that [he] could to ensure that children with disabilities were never treated like second[-]class citizens and that they received all the services and programs that

are appropriate" (Tr. pp. 1638-43).<sup>18</sup> In view of the foregoing, the IHO did not abuse his discretion in declining to recuse himself, and the parents' allegations of bias are without merit. There is no evidence in the hearing record to call into question the statements made by the IHO in support of the denial of the parents' recusal application and made to rebut the parents' allegations of bias, which find absolutely no support in the hearing record.

Second, the parents claim that the IHO was incompetent to serve as the IHO in this case due to his lack of legal knowledge and his advanced age, which was purportedly "well beyond the age of 70" (Pet. ¶ 3 n.2).<sup>19</sup> Even assuming the parents' characterization of the IHO's age is true, their claims are without merit. The plain language of the age-limitation statute to which the parents cite makes it patently clear that the statute is not applicable to administrative due process hearings. In any event, judges over the age of 70, including retired judges and justices, routinely issue well-written, thorough decisions in important cases (see, e.g., Lund v. City of Fall River, 714 F.3d 65, 67 [1st Cir. 2013] [Souter, J. (Ret.)]; Osterweil v. Bartlett, 706 F.3d 139, 140 [2d Cir. 2013] [O'Connor, J. (Ret.)]). Moreover, the parents have failed to cite to anything specific in the hearing record to suggest that the IHO was incompetent in this case. To the contrary, the IHO's management of and competence demonstrated during this case was outstanding, thorough, organized, and patient. For example, the IHO conducted a prehearing conference on October 5, 2012, to deal with preliminary matters raised by the parties and narrow and clarify the issues properly raised at the impartial hearing; issued an interim decision ruling on the district's motion to dismiss in which the IHO limited the issues for the impartial hearing and cited to applicable legal authority on complicated questions pertaining to the applicability of the statute of limitations and whether the parents' claims for 2009-10 and 2010-11 school years were moot; managed effectively a contentious 21-day impartial hearing despite hundreds of objections made by the parties consistently throughout the impartial hearing; responded patiently and courteously to counsel for the parent's accusations of bias and incompetence; and issued a thorough, 27-page single-spaced decision adjudicating the parents' claims that were properly before him and rendering additional findings as to the appropriateness of the student's unilateral placement at Eagle Hill for the 2011-12 and 2012-13 school years and whether equitable considerations would have barred tuition reimbursement had that unilateral placement been appropriate (see IHO Decision at pp. 1-27; Tr. pp. 1357-61, 1637-46; IHO Exs. 5 at pp. 1-4; 7; see generally Tr. pp. 1-4421; Parent Ex. LL).<sup>20</sup>

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<sup>18</sup> The hearing record indicates that the IHO was superintendent in several districts, none of which was the district whose actions are being challenged in this case (Tr. pp. 1639, 1642).

<sup>19</sup> The parents have not cited to any authority in the hearing record indicating the actual age of the IHO in this case.

<sup>20</sup> The same cannot be said in this case of the conduct of the attorney who represented the parents at the impartial hearing. The hearing record is replete with instances of counsel for the parents—especially during the district's case-in-chief—ignoring objections; failing to comply with the IHO's reasonable directives; interrupting and attempting to speak over the IHO; "snorting" and making indiscernible remarks towards the IHO following unfavorable rulings; general rudeness; and sarcasm (e.g., Tr. pp. 22-23, 1261-76, 1286, 1358-59, 1418-19, 1423, 1440, 1518-19, 1529-31, 1538, 1568). The IHO would have been well within his discretion to caution or rely on his inherent authority as an IHO to impose remedial sanction upon counsel for the parent regarding the failure to follow his reasonable directives (for the purpose of maintaining control of the proceeding), and SROs have previously upheld IHO dismissals of due process complaints for the failure to do so (Application of a Student with a Disability, Appeal No. 09-073 [finding that "[a]s a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the impartial hearing officer regarding the conduct of the

Third, the parents claim that the IHO demonstrated incompetence in during the impartial hearing by allegedly "nodding off" or "sleeping" during certain points of the impartial hearing. This claim is also without merit. In this case, the IHO was uniquely attentive during the impartial hearing because the hearing record establishes that the IHO promptly responded to the hundreds of objections consistently made by the parties' attorneys throughout the entire impartial hearing. Moreover, the parents have failed to cite to any portion in the hearing record suggesting that the IHO was not closely following the impartial hearing or that he failed to issue a ruling when a ruling was required. Further, the IHO explained to the parties that he had surgery on both eyes, that he had cataracts removed from both eyes, that he used eye drops to relieve the irritation, and that if he was seen "rubbing" his eyes, blinking, or squinting that he was "not sleeping or nodding off" but attempting to "relieve the irritation" (Tr. pp. 1637-38). The one instance in the hearing record during which the parents contemporaneously argued that the IHO fell asleep, the IHO immediately responded to and denied the accusation on the record (Tr. pp. 1482-86). Moreover, even assuming that the IHO did momentarily fall asleep in this instance, it does not afford a basis for finding that the IHO was incompetent in this case because the IHO still had, for the purpose of issuing a written decision in this case, the benefit of a fully developed record consisting of over 4,400 pages of written transcript and over 125 exhibits on which to base his findings and issue a written decision (see Tr. pp. 1-4421; Parent Exs. A-YYY; Dist. Exs. 1-56).

Finally, the parents argue that the IHO exhibited bias in favor of the district and erred in failing to strike and to apply a negative inference to the testimony of the district's special education teacher, whose testimony revealed that she discussed with several of her colleagues and the assistant director her general experience of testifying on direct examination at the impartial hearing (Tr. pp. 301-32). Over the objection of the parents at the impartial hearing during their cross-examination of the district's special education teacher, the IHO allowed the special education teacher to continue to testify. However, the IHO also reminded the witness that she should not discuss her testimony with anyone to any extent at all and, in response to the witness's inquiry, that she also should not discuss her testimony with family members (Tr. pp. 331-32).

The IHO's ruling and instruction provided to the witness in this instance was a reasonable exercise of the IHO's discretion, and a review of the hearing record reflects that the IHO's ruling does not constitute reversible error. As the IHO found, the special education teacher's brief discussion with a few of her colleagues about the experience and stress of being a witness at an impartial hearing did not have any identifiable adverse impact on her testimony later provided at the hearing or on any other testimony of other witnesses provided at the impartial hearing in this case (Tr. pp. 327-28) (cf. Application of a Child with a Disability, Appeal No. 99-048). There is nothing in the hearing record to indicate that the IHO's ruling to allow the witness to continue to testify on cross-examination constituted incompetence, misconduct, or bias in favor of the district. Moreover, the special education teacher had already provided her testimony on direct examination on a previous impartial hearing date prior to the alleged sequestration violation (Tr. pp. 155-262). Thus, even if the IHO should have stricken or applied a negative inference to portions of the witness's testimony, the only portions to which such a sanction would appropriately have been applied would have been the witness's testimony provided after the alleged sequestration

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impartial hearing"]; Application of a Child with a Disability, Appeal No. 05-026; see also Application of the Dep't of Educ., Appeal No. 08-052; Application of a Child with a Disability, Appeal No. 04-010). I note that the attorney who represented the parents at the impartial hearing is not the same attorney who appeared and submitted the parents' petition for review and memorandum of law in this appeal.

violation—here, the testimony provided on cross-examination, re-direct examination, and re-cross-examination, all of which occurred on later impartial hearing dates (Tr. pp. 298-527, 611-714, 744-63, 766-68, 764-65). In any event, although the parents assert the possibility of fabrication or collusion, they point to no testimony by the witness that they argue was the result of such fabrication or collusion.

In this case, based on my independent review, and contrary to the contentions of the parents, I find that the hearing record does not support a reversal of the IHO's decision on the basis that he acted with bias, demonstrated incompetence, or abused his discretion in the conduct of the hearing. An independent review of the hearing record demonstrates that the parent was provided an exemplary opportunity to be heard at the impartial hearing, which I also find was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). Indeed, in this case the hearing record establishes that the parents were afforded more than the requisite process due.

Having determined these initial procedural matters and determined the scope of matters properly raised on appeal for review, I now turn to the substantive claims concerning the IEPs developed for the 2011-12 and 2012-13 school years.

#### **D. June 2011 IEP**

Contrary to the parents' contention that the IEP for the 2011-12 school year was not appropriate, a review of the June 10, 2011 IEP reveals that, as described in detail below, the CSE recommended a program for the 2011-12 school year that was reasonably calculated to provide the student with educational benefits.

The hearing record reflects that the CSE relied on current evaluative data to determine the student's needs for the development of the June 2011 IEP, including information reported by the student's regular and special education teachers and his speech-language pathologist; an April 14, 2011 classroom observation of the student; a March 10, 2011 educational evaluation; a February 18, 2011 speech-language evaluation; an April 2011 BIP; April 20, 2011 behavioral and social-emotional testing (BASC-TRS(C), BRIEF); and April 4, 2011 intelligence testing (WISC-IV) (Dist. Exs. 16 at pp. 2-5; see Dist. Exs. 38; 39).<sup>21</sup>

Consistent with these reports, the June 2011 IEP reflected that the student's cognitive profile was within the average range of functioning (Full Scale IQ 92) and, with regard to academic achievement, that the student exhibited deficits in reading, writing, and mathematics (Dist. Ex. 16 at pp. 4-5). Although the student demonstrated ability to read on grade level, he was reported to read very slowly, his comprehension was affected by his attentional variability, and he required support to make inferences (id. at p. 6). In writing skills, the student demonstrated growing knowledge of writing mechanics, voice, and plot, however, his lack of flexibility affected his ability to demonstrate his writing skills within the confines of assignments, he required breaking down of assignments, structured expectations, and 1:1 support in order to be as productive as possible (id.). The June 2011 IEP reflected the student's greatest area of need was in mathematics where he required a modified curriculum and the assistance of a teaching assistant, as well as

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<sup>21</sup> The April 2011 classroom observation of the student; the April 2011 behavioral and social-emotional testing (BASC-TRS(C), BRIEF); and the April 2011 intelligence testing (WISC-IV) are not in the hearing record.

scaffolding, repetition, and a reduction in the volume of work given, as he was resistant to math instruction and perceived new math concepts as difficult (*id.* at p. 5). The IEP further reflected that the student exhibited avoidant behaviors, a low frustration level, that he was easily overwhelmed by too much visual or auditory stimuli, and that he demonstrated poor mental stamina, a rigid approach to learning, and weaknesses in processing speed, integrating multiple ideas, and variable attention (*id.* at p. 6). With regard to speech-language skills the IEP reflected that the student's receptive, expressive and pragmatic language abilities were in the below to well below average range on standardized tests, that his literal/rigid understanding of word meanings interfered with his understanding of figurative expressions, and that he had difficulty participating in verbal interactions when topics were imposed by others (*id.* at pp. 4-6). With regard to social/emotional development, the IEP reflected, among other things, that the student required further social skill development, could be harsh in his interactions (especially when he felt threatened or made fun of), was prone to name calling, required wait time to prepare for school and readjust when feeling stressed, and had difficulty engaging in classroom activities and remaining on task (*id.* at p. 7). Although the student's present levels of performance are not challenged on appeal, there is no evidence in any event that the June 2011 IEP failed to adequately and appropriately identify the student's needs.

In addition to the program and services specified above with regard to the June 2011 IEP, the IEP also reflected extensive modifications, supports, and accommodations to address the student's needs (Dist. Ex. 16 at pp. 8, 13-14, 16). The June 2011 IEP also contained annual goals in the areas of need identified in the present levels of performance (*id.* at pp. 9-12).

### **1. Annual Goals**

On appeal, the parents argue that the IHO erred in finding the annual goals in the June 2011 IEP appropriate. In particular, the parents contend that the annual goals identified strategies and not true goals; contained no baselines on which to review goals; contained goals not written in operational terms; and lacked a sufficient method to measure progress. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this case, the June 2011 IEP contained 36 annual goals to address the student's identified needs in the areas of study skills (attending to tasks), reading comprehension, writing, mathematics, speech-language skills (receptive, expressive, and pragmatic language), and social-emotional/behavioral skills (Dist. Ex. 16 at pp. 9-12). A review of the goals reveals that they comported with State regulations, were sufficiently linked to the student's needs, and contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision (*id.*).

With regard to the parents' contention that the goals merely identified strategies and were not true goals, their argument is without merit. As opposed to merely identifying strategies, several of the goals appropriately reflected that the student would use a specific strategy in order to assist him in completing a particular task or skill (Dist. Ex. 16 at pp. 9-12). For example, one of the student's reading goals required the student to use a comprehension strategy such as picture or context cues to answer inferential questions; one of the math goals required the student to use a strategy such as highlighting key information in order to solve word problems; and one of the writing goals required the student to use a pre-writing tool such as a graphic organizer prior to beginning a writing assignment (*id.* at pp. 9-10). While testimony by the parents' educational consultant indicated that these goals focused on strategies and that there was nothing to measure, these goals actually targeted the student's ability to use a specific strategy in order to complete a specific task and indicated that his progress would be measured by noting the number of times that he demonstrated use of these strategies in his daily work samples (i.e., in 75 percent of his writing assignments, over 10 weeks) (*id.* at p. 9; *see* Tr. pp. 1587-88; *see also* Parent Ex. G at p. 11). With regard to testimony by the parents' educational consultant that the goals contained no baselines or operational terms which made it more difficult to assess progress, I note that State regulations do not require "baseline" functioning levels to be included in IEP goals (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [explaining 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"]; Application of a Student with a Disability, Appeal No. 12-119). I also note that the absence of baseline functioning would have no effect on the ability to measure the student's progress toward meeting these goals, as the criteria for mastery for these goals was not dependent on the student's baseline functioning but rather how often the student was able to perform the task using the specified strategy (i.e., in 75 percent of his writing samples or in 80 percent of the word problems he completed) (Dist. Ex. 16 at pp. 9-10).

## **2. Special Factors—Interfering Behaviors**

With regard to the parents' challenge to the appropriateness of the April 2011 BIP, I find that the hearing record reflects that the April 2011 BIP was initially written and implemented during the last few months of the 2010-11 school year and that it continued to be appropriate to meet the student's behavioral needs during the 2011-12 school year (Tr. pp. 206-08, 619). Although the district did not complete a separate functional behavioral assessment (FBA) of the student, a review of the April 2011 BIP reveals that, as described in detail below, and in accordance with State regulations, it included information that would typically be found in an FBA.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* E.H. v. Bd. of Educ., 361 Fed. App'x 156, 161, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4];

8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 22, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although state regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

I note initially that testimony by the district consultant who wrote the student's April 2011 BIP indicated that an FBA is a process which entails gathering information in order to understand what the functions are behind an individual's behavior (Tr. pp. 1172). Her testimony also indicated that she did not prepare a separate FBA document because the information that was a part of the FBA process is reflected within the BIP (Tr. p. 1184). In accordance with State regulations, the district consultant indicated that she worked with district staff members including the student's special education teacher, his teaching assistant, the student's psychologist, various leave

replacements, as well as the student's mother, to compile information related to the student's behaviors from multiple sources, for the FBA (Tr. pp. 1173-74, 1182-83, 1185).<sup>22</sup>

Consistent with State regulations, based on the information gathered through talking to staff as well as through her own observations of the student, the district consultant psychologist identified the student's target behaviors in the "Target Behaviors" section of the BIP as (1) refusing to complete classroom work and (2) refusing to follow requests made by school staff (Tr. pp. 1183, 1186-87). Her testimony indicated that the purpose of the "Occurrence of Behavior" section of the BIP was to provide information regarding when, where, and with what frequency the behaviors occurred and that the information considered in this section came from conversations with staff—including the student's special education teachers and his teaching assistant—and from observations of the student, in addition to the two forms that were completed at her request; an incentive chart developed by the student's teacher assistant; and a scatter plot form that she created for staff to use to gather baseline information regarding the frequency of the student's refusals (Tr. pp. 1176-78, 1188; Dist. Ex. 40 at pp. 1-2). The district consultant psychologist also indicated that the student's teacher developed an "A-B-C type form" that was used to provide more specific information regarding antecedents or triggers, to provide effective or ineffective responses to the student's behavior, and to provide more detailed information regarding the length of time of which his refusal behavior lasted (Tr. pp. 1179-80; Parent Ex. CC at pp. 1-8). The student's teaching assistant also provided the district consultant psychologist with forms that reflected the strategies and tools that were used with the student in the past that were highly effective, which the consultant utilized to guide the development of the student's BIP (Tr. pp. 1181-82; Dist. Ex. 37; Parent Ex. CC). Consistent with testimony by the district consultant psychologist, the April 2011 BIP reflected that the student's refusals occurred throughout the school day and across subject areas, that assignments involving written expression and group and/or partner work were the most challenging, and that the student's refusals presented in a variety of forms including verbal refusal, ignoring by not responding to the teacher or teaching assistant, placing his head on the desk, turning his body away from the teacher, silliness, off-topic comments, walking away, and/or inappropriate statements (name calling) (Dist. Ex. 40 at p. 1). The BIP further reflected that the frequency data was collected over a three week period during February and March 2011 and that it revealed at least four to five episodes of the target behavior each week, typically one incident per day (id.; see Parent Ex. Q). Notably, the BIP reflected that all of the student's incidents occurred following a transition from one teaching assistant to another, as the student interacted with at least three different teaching assistants across each day (Dist. Ex. 40 at p. 2).

The district consultant psychologist testified that the April 2011 BIP also reflected information regarding the triggers that precipitated the student's refusal behavior in the "Antecedents of Target Behaviors" section of the BIP (Tr. p. 1189). Consistent with this information, the BIP reflected that the student's refusals were triggered when he perceived his assignments and/or tasks were too long or too hard; when he make mistakes or did not feel successful in the completion of classroom tasks or assignments; when he misunderstood or misinterpreted teacher directions and/or expectations; and when there was an interruption of highly preferred activities (Dist. Ex. 40 at p. 2). Her testimony also indicated that the purpose of a BIP is

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<sup>22</sup> Testimony by the district consultant indicated that she omitted the student's parents and the student's teaching assistant in the list of participants in the BIP by error (Tr. p. 1185).

to manipulate these antecedent conditions such that they occur less often and result in a reduced frequency of the target behavior (Tr. p. 1189).

With regard to the "Formulation" section of the April 2011 BIP, the district consultant psychologist testified that its purpose was to generate an understanding or hypothesis of why the behaviors were occurring, what function they served and to identify some of the underlying cognitive or affective factors that contributed to the behaviors (Tr. p. 1191). Consistent with her testimony, the BIP reflected that the student's behavior patterns indicated an avoidance of undesirable or challenging tasks (i.e., escape) (compare Tr. p. 1192, with Dist. Ex. 40 at p. 2). The BIP further reflected that although the student wanted to experience success with daily tasks, his endurance and academic stamina was limited; that he had difficulty using language to regulate his interactions with others; and that his motivation for tasks that were not of high interest to him was quite low (Dist. Ex. 40 at p. 2). The effect of these factors combined was to lower the student's threshold for task completion and to raise his propensity for becoming overwhelmed and agitated by daily classroom demands (id.).

The BIP indicated that the overarching goal of the plan was to reduce the frequency of the student's refusals to complete work and to shorten the duration of his "meltdowns" (Dist. Ex. 40 at p. 2). In accordance with State regulation, the BIP included strategies aimed at: preventing the target behaviors, developing responses to the student's target behavior (what to do when he refuses to complete a task/assignment or becomes agitated and upset), and teaching the student new skills to replace the target behavior (id. at pp. 2-3).

With regard to the prevention of target behaviors, the BIP outlined six strategies with a detailed explanation of how to implement each strategy including the provision of a written schedule; minimization of non-essential teacher requests; differentiation or modification of academic tasks; provision of high frequency reinforcement for positive behavior; and provision of general positive feedback (Dist. Ex. 40 at pp. 3-5). I note that the BIP also specifically addressed minimizing the number of transitions between teaching assistants across each day since, as noted above, each of the student's documented incidents occurred after transitioning from one teaching assistant to another (id. at pp. 2, 5).

As to developing responses to the student's target behaviors, the April 2011 BIP included a six-step sequence of responses describing in detail the action to be taken by staff when the student initially exhibited refusal behavior and/or became agitated and upset and when the student continued his refusal behavior (Dist. Ex. 40 at pp. 5-6). Each step provided a different type and level of support that was intended to engage the student to complete the task at hand or ultimately provide a new task, at which the student can succeed (id.).

The April 2011 BIP reflected that the interventions discussed above to re-engage the student in task completion were in fact strategies to teach the student replacement behaviors and were directed at fostering greater academic endurance by presenting tasks in a more user-friendly format while accompanied by moderate to high levels of positive feedback (Dist. Ex. 40 at p. 6). The BIP further reflected that the purpose of this was to help the student feel good about completing school work and to provide the student with structured opportunities to convey his feelings about the work presented to him (id.). For example, a handout created by the student's private clinical psychologist was utilized to assist the student in advocating for himself and

conveying his feelings (*id.* at pp. 6-7).<sup>23</sup> Three handouts were attached to the BIP that were to be used to assist the student in successful class participation and task completion (*see* Tr. pp. 203-06; Dist. Ex. 40 at pp. 8-10). These attached handouts guided the staff in how to implement appropriately the BIP and also provided the student with clear expectations for a specific class in written form (Dist. Ex. 40 at pp. 8-10). For example, one handout entitled "Behavior Intervention Plan Overview" summarized what the staff should provide the student with in the classroom including a review of expectations with the student when he entered the room, giving no more than three-to-four expectations regarding academic tasks, providing time frames for each task (such as five minutes), gathering all necessary materials for the student instead of asking him to retrieve them (pencils, text books), and providing breaks involving movement (such as a walk or an errand), after all expectations are met (*id.* at p. 8). Expectations for the student's participation in a class were also enumerated. For example, in science class the student would fill out the lab sheet, watch a brain-pop video, answer five questions, listen to the teacher's lesson for 10 minutes, and take a break (*id.*). Another handout assisted staff by providing reminders of how to offer praise, how to make connections with the student, how to interact with the student using direct statements instead of questions, how to acknowledge and accept the student's attempts to use language appropriately, and how to provide the student with structured choices related to task completion, timing of breaks, and duration of tasks (*id.* at p. 9).

In accordance with State regulations, the BIP also included a schedule to measure the effectiveness of the interventions (Dist. Ex. 40 at p. 7). Further, in order to assess the impact of the interventions, the BIP indicated that data should be collected in two phases: the first phase centering on the implementation of the behavior intervention plan itself (i.e., consistency of implementation) and the second phase focusing on an assessment of the number of refusals and length of time that the student was "upset" each day over a two-week period (*id.*). Additionally, the BIP indicated that the student's use of the skills being taught should also be evaluated (*id.*).

In view of the foregoing and an independent review of the hearing record, I agree with the IHO's finding that the April 2011 BIP demonstrated a clear understanding of the student and the challenges faced by the student's providers and also included practical methods to address the student's behaviors. Accordingly, the April 2011 BIP adequately and appropriately addressed the student's behavioral needs in accordance with State regulations for the 2011-12 school year.

#### **E. August 2012 IEP**

The parents also argue on appeal that the IHO erred in finding that the goals set forth in the August 17, 2012 IEP were appropriate as written. Specifically, the parents argue that the goals were not uniquely tailored for the student to allow the student to make progress and that many of the goals remained the same from the June 2011 IEP. An independent review of the hearing record and the August 17, 2012 IEP reveals for the reasons set forth below that the CSE recommended a program for the student for the 2012-13 school year that was reasonably calculated to provide the student with educational benefits.

The hearing record reflects that the CSE relied on current evaluative data to determine the student's needs at the time of the May 22, 2012 CSE meeting including, among other things, (1) information reported orally by the parent, Eagle Hill staff, and the student's speech-language

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<sup>23</sup> This handout was not attached to the BIP.

pathologist at the May 22, 2012 CSE meeting; (2) a May 18, 2012 neuropsychological assessment report; (3) an April 5, 2012 classroom observation by the student's private educational consultant; (4) a January 26, 2012 teacher report; (5) a January 26, 2012 speech-language progress summary; (6) a January 20, 2012 parent letter; (7) a December 1, 2011 classroom observation of the student by the district; (8) the student's June 2011 IEP; and (9) the student's April 2011 BIP (Dist. Exs. 16; 19; 40; 43; 44; 45; 46).<sup>24</sup> In addition to the foregoing evaluative information, when the CSE reconvened on August 17, 2012 it also considered information reported orally by the parent at the August 2012 CSE meeting and a July 2, 2012 private school report which included a June 2012 pragmatic language report by the student's speech pathologist (Dist. Exs. 19 at p. 3; 47; see generally IHO Ex. 8D).<sup>25</sup> Consistent with the evaluative information before the CSE, the student's August 2012 IEP reflected that the student continued to have deficits in reading comprehension, writing skills (contextual conventions), mathematics (applied problems and fluency), study skills, expressive, receptive and pragmatic language skills, behavior, and social interaction skills (Dist. Ex. 19 at pp. 2, 4-8).<sup>26</sup>

In addition to the program and services specified above with regard to the August 2012 IEP, the IEP reflected the student's management needs, specified strategies to employ to address the student's behaviors while an FBA was being conducted after the student's return to the district, and extensive program modifications and accommodations (Dist. Ex. 19 at pp. 14-15, 19-22). The August 2012 IEP also contained annual goals in the areas of need identified in the present levels of performance sections (id. at pp. 15-18).

### **1. Annual Goals**

On appeal, the parents contend that the IHO erred in finding that the goals in the August 2012 IEP were appropriate and uniquely tailored for the student. However, the hearing record establishes that the CSE appropriately identified the student's needs in the present levels of performance sections of the August 2012 IEP, based on sufficient and current evaluative information, including from those who knew the student best, and developed annual goals that were linked to the student's needs. In addition, the hearing record reflects that the programs and services recommended in the August 2012 IEP were reasonably calculated to provide the student with educational benefits.

Applying the State regulations set forth above applicable to annual goals, the CSE recommended 37 annual goals in the August 2012 IEP designed to address the student's needs in the areas of study skills, reading comprehension, writing, mathematics, speech-language skills (receptive, expressive, and pragmatic language), and social-emotional/behavioral skills (Dist. Ex. 19 at pp. 15-18). A review of the goals reveals that they comported with State regulations, were directly linked to the student's needs, and contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation

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<sup>24</sup> The hearing record does not include the parent's letter dated January 20, 2012.

<sup>25</sup> I note that several of the exhibits listed on the August 17, 2012 IEP reflect a date other than the date that appears on the actual exhibit (see Dist. Exs. 44 at p. 1; 45 at p. 1; 47 at p. 1). It appears that the August 17, 2012 IEP reflects the date that the CSE received district exhibits 44 and 47 and not the date that the reports were completed (see Dist. Exs. 44 at p. 1; 47 at p. 1).

<sup>26</sup> I note that the student's present levels of performance are not at issue in this appeal.

or revision (id.). For example, testimony by the parent indicated that at the May 2012 CSE meeting, the district consulted with staff at Eagle Hill via telephone to construct the student's goals (Tr. pp. 2588, 2591; see IHO Ex. 8C at pp. 2-3, 64-72, 74-86). Transcripts of the August 2012 CSE meeting and testimony by the district representative also reflect that when the CSE reconvened, a detailed review of the goals that were established at the May 2012 CSE meeting took place in order to make adjustments based on the June 2012 progress reports received from Eagle Hill (Tr. pp. 820-23; IHO Ex. 8D at pp. 6-44).

To the extent that the parents argue that the goals on the August 17, 2012 IEP were not appropriate because many remained the same as the goals in the June 2011 IEP, I note that the CSE considered the input of the Eagle Hill staff during the development of the student's goals for the 2012-13 school year and that the goals carried over from the previous year's IEP remained appropriate.<sup>27</sup> The transcripts of the CSE meeting reveal that the district's assistant director indicated that some of the goals from Eagle Hill had not been mastered and that the student had a continued need in an area (IHO Ex. 8C at pp. 75-76). Eagle Hill staff participants similarly indicated that the goals developed at the May 2012 CSE meeting encompassed the student's needs (IHO Ex. 8C at pp. 76, 85). Additionally, testimony by the district representative indicated that the parents declined the opportunity to participate in or comment on the goals developed for the August 17, 2012 IEP on the advice of their attorney and there is nothing in the hearing record to suggest that the goals carried over from the student's June 2011 IEP did not continue to be appropriate for the student (Tr. pp. 807-08).

As was the case with respect to the June 2011 IEP goals, the parents' contention that the goals failed to provide a baseline from which to document expected improvement and often were not written in operational terms has no merit. As discussed above, State regulations do not require "baseline" functioning levels to be included in IEP goals (R.B., 2013 WL 5438605, at \*13; Application of a Student with a Disability, Appeal No. 12-119). Furthermore, each goal in the August 2012 IEP clearly identified the specific skill the student was to achieve, the criteria by which the student's success toward achieving the skill was to be measured (i.e., in four out of five trials over two weeks; with 75 percent success over 3 weeks), the procedures that would be utilized to evaluate the student's success, and how frequently the student's progress toward meeting each goal would be measured (Dist. Ex. 19 at pp. 15-18).<sup>28</sup>

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<sup>27</sup> A comparison of the June 2011 and the August 2012 IEPs reveals that of the 37 annual goals in the student's August 2012 IEP, only two of the eight math goals were similar to those on the June 2011 IEP; only three of the eight speech-language goals were carried over from the June 2011 IEP; and only two of the seven social/emotional/behavioral goals were carried over from the June 2011 IEP (compare Dist. Ex. 16 at pp. 10-11, with Dist. Ex. 19 at pp. 17-18).

<sup>28</sup> With respect to both the 2011-12 and 2012-13 school years, the hearing record supports the IHO's observation that the parents' primary objection to the annual goals in the June 2011 and August 2012 IEPs appears to be the manner in which they would be implemented during the 2011-12 and 2012-13 school years, respectively (IHO Decision. at p. 21; Tr. pp. 2536-39; 2585-87, 2590). The parents' testimony revealed that they were concerned as to whether the student would be given the supports necessary to achieve his goals and whether the goals would actually be "executed" such that the teachers would teach the student the skills he needed in order to reach his goals before moving on to more advanced goals (Tr. pp. 2536-40). However, the parents' concern does not inform the appropriateness of either the June 2011 or August 2012 IEPs. To the extent that the parents are implying that the district staff is incompetent or unable to implement the student's goals, the entire hearing record belies such an argument. In addition, for the

## 2. Special Factors—Interfering Behaviors

With regard to the parents' contention that the district had not developed a BIP since the April 2011 BIP and that the April 2011 BIP was inappropriate for the 2012-13 school year, an independent review of the student's present levels of social development in the August 2012 IEP reflects that the student continued to exhibit deficits in social-emotional skills including, among other things, the resistant/refusal behaviors identified in the BIP related to working on and completing non-preferred or challenging tasks (Dist. Ex. 19 at pp. 12-13). The IEP noted that the student continued at times to become overwhelmed by the size of a task, and that he required wait time to process and adjust to task demands, as well as breaks to deescalate and manage frustration, frequent reinforcement to stay engaged in tasks, and discreet units for work completion (*id.* at p. 13). Testimony by the district consultant psychologist indicated that the BIP that was recommended by the CSE for the 2012-13 school year was the same BIP that she had authored for the previous school year and that she believed that it continued to be appropriate for the student to begin the 2012-13 school year if he were to return to the district (Tr. pp. 1229, 1231-32; *see* Dist. Ex. 40). The district consultant psychologist further testified that when the student returned to the district, data should be collected in order to assess the implementation of the April 2011 BIP including the integrity and consistency of the implementation as well as the effectiveness of the BIP so that adjustments could be made if needed (Tr. p. 1232).<sup>29</sup> The district consultant psychologist also testified that the district increased the behavioral consult services on the student's IEP specifically for the purpose of evaluating the effectiveness of the BIP (Tr. pp. 1232-33). She indicated that this service referred to "meeting with the team, observing the implementation and utilization of the plan, observation of the student's response to the utilization and implementation of the strategies, and then guiding adjustments as needed" (Tr. p. 1233).

Consistent with the foregoing, testimony by the district representative explained that the BIP would have been implemented upon the student's arrival at the district and that when the student returned to the district, an updated FBA would be conducted and the BIP adjusted if necessary (Tr. pp. 830-31; IHO Ex. 8D at pp. 58-59; *see* Dist. Ex. 19 at pp. 14-15).<sup>30</sup> I note that consistent with the district consultant psychologist's testimony, the IEP reflects that in addition to the one-hour per month counseling consultation service previously recommended, behavioral intervention consultation services were added, including two one-hour consults per week from

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reasons set forth below, such concerns are entirely speculative in nature. And although not at issue in this appeal, the hearing record also indicates that the student made meaningful progress during the 2010-11 school year (Dist. Ex. 57).

<sup>29</sup> Testimony by the district consultant psychologist indicated that it was more appropriate to conduct an FBA and BIP in the environment that the student would be interacting (Tr. pp. 1228-29).

<sup>30</sup> While the student's need for a BIP must be documented in the IEP and, prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (*see Cabouli v. Chappaqua Cent. Sch. Dist.*, 202 Fed. App'x 519, 522, 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

September 5, 2012 through November 30, 2012, and one one-hour consult per week beginning December 1, 2012 (Dist. Exs. 16 at p. 15; 19 at p. 22).<sup>31, 32</sup>

## **F. Implementation of the June 2011 and August 2012 IEPs**

To the extent that the parents argue on appeal that the district would not have been able to implement appropriately either the June 2011 IEP or August 2012 IEP at the public school during the 2011-12 and 2012-13 school years, respectively, the IHO correctly found that such challenges are speculative as a matter of law, and the IHO's determination must not be disturbed for the reasons that follow. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6).<sup>33</sup> The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 130 S. Ct. 3277 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 887-89 [D. Ariz. Mar. 21, 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]).

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 a parent's "[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, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see

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<sup>31</sup> The counseling consultation services were described in the August 2012 IEP whereby the counselor consults with the teachers regarding the student's social-emotional needs, progress, and ongoing development of the BIP (Dist. Ex. 19 at pp. 22-23). The additional behavioral intervention consultation services were described as the provision of training and support to the teacher regarding the development and implementation of the BIP (id. at p. 22).

<sup>32</sup> I note that this case demonstrates how a CSE conducts the review and maintains general oversight of a student's BIP under State regulations and how, at the same time, personnel working with a student retain flexibility to permissibly modify a BIP to address the subtle permutations of a student's behavior without the need to reconvene the CSE every time modifications to a BIP may be appropriate to better serve the student.

<sup>33</sup> In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; 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 in which a student would be placed 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 adequacy of the student's services where the parent removed the 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, 676-79 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), 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., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]), and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>34</sup>

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<sup>34</sup> 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 T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

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 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 foregoing and under the circumstances of this case, I find that the parents cannot prevail on the claims that the district would have failed to implement the student's 2011-12 and 2012-13 IEPs, or the April 2011 BIP, at the public school site because a retrospective analysis of how the district would have executed the student's 2011-12 and 2012-13 IEPs or April 2011 BIP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186 [2d Cir. 2012]; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.C., 906 F. Supp. 2d at 273). Indeed, in this case, the district timely developed the student's 2011-12 and 2012-13 IEPs and offered them to the student each year. It is undisputed that the parent enrolled the student at Eagle Hill prior to the time that the district became obligated to implement the June 2011 IEP and August 2012 IEP (Parent Exs. D; MMM at pp. 1-3; NNN at pp. 1-3; IHO Ex. VIII at p. 63). As the time for implementation of the student's IEP at the assigned public school site had not yet occurred when the parent rejected the district's offer for both the 2011-12 and 2012-13 school years, the parent's various challenges relating to the assigned school were speculative claims. These were claims regarding the execution of the student's program and the district was not obligated to present retrospective evidence of the IEP's implementation to refute them (R.E., 694 F.3d at 186; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.C., 906 F. Supp. 2d at 273). Accordingly, there is no reason under these factual circumstances to disturb the IHO's rejection of the claims related to the assigned public school site.

## **VII. Conclusion**

Having determined, as did the IHO, that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 and 2012-13 school years, the necessary inquiry is at an end, and there is no need to reach whether the student's unilateral placement at Eagle Hill was an appropriate placement or whether equitable considerations would have supported an award of tuition reimbursement (Burlington, 471 U.S. at 370; see Voluntown, 226 F.3d at 66).<sup>35</sup> In light of these determinations, I need not address the parties' remaining contentions.

### **THE APPEAL IS DISMISSED.**

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

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>35</sup> Nonetheless, on consideration and review of the entire hearing record, the weight of the evidence provides no reason to depart from the IHO's determinations on these issues.