The University of the State of New York

The State Education Department
State Review Officer
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No. 13-213

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Suzanne E. Miles, Esq., of counsel

New York Legal Assistance Group, attorneys for respondents, Laura Davis, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to sustain its burden to establish the appropriateness of the particular public school site to which respondent's (the parents') son had been assigned and ordered it to reimburse the parents for the costs of the student's tuition at the Lang School for the 2012-13 school year. The parents cross-appeal from the IHO's decision which found that the district's individualized education program (IEP) offered the student an appropriate educational program and that equitable considerations warranted a reduction in the amount of the tuition reimbursement awarded. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On June 7, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (eighth grade) (Dist. Exs. 8 at pp. 1-9; see Dist. Ex. 7 at p. 1; 10).[1] Finding that the student remained eligible for special education and related services as a

[1] On May 29, 2012, the parents executed an enrollment contract with the Lang School for the student's attendance during the 2012-13 school year (see Parent Ex. F at pp. 1-4). At the time of the June 2012 CSE meeting, the student was attending the Lang School, where he has continuously attended school since sixth grade during the 2010-11 school year (see Parent Ex. B at p. 1; see also Tr. p. 375).

student with other health impairment, the June 2012 CSE recommended that the student recieve integrated co-teaching (ICT) services in a general education classroom for instruction in mathematics, English language arts (ELA), social studies, and science at a community school (Dist. Ex. 8 at pp. 1, 4-5, 7-8).[2] The June 2012 CSE also recommended related services consisting of one 40-minute session per week of individual occupational therapy (OT), one 40-minute session per week of individual counseling, and one 40-minute session per week of counseling in a small group (id. at pp. 5, 7-8). In addition, the June 2012 CSE developed annual goals targeting the student's identified needs in the areas of academics, social/emotional skills, and physical development (id. at pp. 3-4). The June 2012 CSE also recommended strategies to address the student's management needs, as well as testing accommodations and special transportation services (id. at pp. 2, 6-7).

By final notice of recommendation (FNR) dated August 15, 2012, the district summarized the special education and related services recommended in the June 2012 IEP for the 2012-13 school year, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 10).

By letter dated August 29, 2012, the parents informed the district that based upon information provided by a secretary, they could not schedule a visit to the assigned public school at a time when students were in attendance (see Dist. Ex. 11). The parents indicated, therefore, that it would be "very difficult" for them to "make an accurate assessment as to the appropriateness of the recommended program/placement" for the student (id.). Regardless of this "policy," the parents indicated that they would follow up with the parent coordinator to address their concerns and questions (id.). In addition, the parents notified the district of their intentions to unilaterally place the student at the Lang School for the 2012-13 school year and to seek tuition reimbursement from the district (id.).

By letter dated September 4, 2012, the parents informed the district that they had visited the assigned public school site, toured the school, and discussed the student and his IEP with the assistant principal (see Parent Ex. M at p. 1). The parents indicated that the assistant principal told them that the assigned public school site was not appropriate for the student because most of the students receiving ICT services were not native English speakers, and therefore, the students in the classroom worked on language skills (id.). In addition, the parents noted that ICT services would not provide the student, who had sensory issues, with "support" in the "very crowded and noisy" common areas, such as the lunchroom and playground (id.). As a result, the parents informed the district that they intended to continue the student's placement at the Lang School (id.).

A. Due Process Complaint Notice

By due process complaint notice dated April 22, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school years (see Parent Ex. A at pp. 1-6). In particular, the parents asserted that the June 2012 CSE ignored concerns expressed at the meeting, depriving the parents of the opportunity to meaningfully participate (id. at p. 2). The parents further asserted that the June 2012 CSE was not properly

[2] The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

composed because neither the special education teacher nor the district representative met the regulatory criteria, and a regular education teacher did not attend the meeting (id. at p. 3). The parents asserted that the June 2012 CSE failed to conduct a functional behavioral assessment (FBA) and failed to develop a behavioral intervention plan (BIP) (id.). In addition, the parents alleged that the June 2012 CSE failed to: conduct adequate and appropriate evaluations of the student; collect adequate and appropriate information about the student's academic and social/emotional needs in order to recommend an appropriate program; conduct a classroom observation of the student; recommend a program with appropriate supports and services; provide sufficient opportunity for the student to receive 1:1 instruction or attention; and impermissibly engaged in predetermination of the student's program (id. at pp. 3-4). The parents also alleged that the psychological evaluation report relied upon by the June 2012 CSE did not provide sufficient information upon which to make an appropriate recommendation, the June 2012 CSE could not provide the parents with information about the "proposed program," and the recommendations in the June 2012 IEP were contrary to professionals who had direct knowledge of the student (id. at p. 4).

In addition, the parents indicated that the June 2012 CSE did not develop the annual goals at the meeting, which deprived them of the opportunity to meaningfully participate in the development of the annual goals, and relied upon annual goals formulated for implementation at the Lang School (see Parent Ex. A at p. 2). The parents also asserted that the annual goals were not reasonably calculated to enable the student to receive educational benefits (id.). Next, the parents alleged that the June 2012 IEP—including the present levels of academic performance, the annual goals, and the management needs—did not meet all of the student's unique needs (id. at p. 3). In addition, the parents indicated that the June 2012 IEP—including the statement of social/emotional performance, annual goals, behavior, and management needs—did not address all of the student's unique social/emotional and behavioral needs (id.). The parents further indicated that the "class size" and "student to teacher ratio" was too large, and the June 2012 CSE did not follow the "continuum of services" under the IDEA. The parents alleged that the June 2012 CSE failed to recommend special education transportation (id. at p. 3). Additionally, the parents asserted that the June 2012 CSE had no documentation to support the "tremendous reduction in services" from the student's previous IEP; the district failed to provide them with prior written notice; and the district failed to provide them with a proper and timely FNR (id. at p. 4).

With respect to the assigned public school site, the parents noted that the parent coordinator characterized the site as a "dumping ground for special education students" and that the site could not provide support to many of the students who had "behavioral needs" (Parent Ex. A at 5). The parents also indicated that the students at the assigned public school site were not "engaged," the percentage ratio of disabled to nondisabled students in the observed classroom was not appropriate, and the student could not manage the school's large cafeteria due to his anxiety (id.). In addition, the parents expressed concerns based upon information learned about the assigned public school site from the district website (id.). Next, upon information and belief, the parents indicated that the assigned public school site could not implement the student's IEP, it could not implement the student's related services, the student would not be appropriately functionally grouped, the assigned public school site could not provide sufficient opportunity for 1:1 instruction or attention, and the teaching methodologies employed were not appropriate (id.).

With respect to the student's unilateral placement, the parents alleged that the Lang School provided the "instruction, supports, methodologies, supervision and services" specifically

designed to meet the student's unique needs, which enabled the student to make progress (Parent Ex. A at p. 6). With regard to equitable considerations, the parents alleged that they cooperated with the CSE and in no way impeded the CSE from offering the student a FAPE (id.). As relief, the parents requested payment of the costs of the student's tuition at the Lang School for the 2012-13 school year, as well as payment or compensatory educational services for the student's related services (id.). In addition, the parents requested reimbursement for the costs of the student's transportation services, evaluations, and costs and fees (id.).

B. Impartial Hearing Officer Decision

On May 22, 2013, the IHO conducted a prehearing conference, and on June 6, 2013, the parties proceeded to an impartial hearing, which concluded on September 13, 2013 after four days of proceedings (see Tr. pp. 1, 3, 6-482). By decision dated October 9, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, and the student's unilateral placement at the Lang School was appropriate; however, the IHO found that equitable considerations warranted a reduction in the amount of the tuition reimbursement awarded to the parents (see IHO Decision at pp. 7-17).[3]

Initially, the IHO found the June 2012 CSE was properly composed, noting that the district special education teacher who attended the meeting was dually certified in both general education and special education (see IHO Decision at p. 9). The IHO also noted that the district special education teacher taught in an "ICT classroom" the previous school year as the regular education teacher (id.). The IHO also found that although the annual goals in the June 2012 IEP were developed after the meeting, the "specific skills and deficits" noted within the annual goals resulted from discussions at the June 2012 CSE meeting (id. at pp. 9-10). The IHO indicated that the June 2012 IEP included annual goals related to counseling, OT, ELA, and mathematics (id. at p. 10). In addition, the IHO concluded that the June 2012 CSE reviewed and discussed "all of the documents including tests and evaluations" available to the CSE, noting in particular the student's most recent psychological evaluation report (id.).

Next, the IHO found that the hearing record did not contain evidence that the student's behavior interfered with his ability to learn, and further, that the hearing record did not contain information about reported behaviors requiring the development of a BIP (see IHO Decision at p. 10). In this instance, the IHO concluded that the failure to conduct an FBA or develop a BIP did not constitute a procedural violation and did not rise to the level of a denial of FAPE (id. at pp. 10-11). The IHO also found that the hearing record contained no evidence that the June 2012 CSE impermissibly engaged in predetermination of the student's program, and similarly, the IHO concluded that the hearing record contained no evidence that the parents were deprived of an opportunity to meaningfully participate in the development of the student's June 2012 IEP (id. at p. 11). Finally, the IHO found that the June 2012 CSE's recommendation of ICT services in a general education classroom was appropriate to meet the student's needs in the least restrictive environment (LRE) (id. at pp. 11-12).

Turning to the assigned public school site, however, the IHO concluded that the district's failure to present evidence to "defend a specific classroom, a specific teacher or functional

[3] At the time of the impartial hearing, the parents no longer sought reimbursement for the costs of transportation services or evaluations (see Tr. pp. 94, 415).

grouping" and to establish that the assigned public school site could implement the student's IEP resulted in a finding that the district failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at pp. 12-14).

With respect to the student's unilateral placement, the IHO found that based upon the evidence in the hearing record the student made progress academically, socially, and in his self-esteem at the Lang School (see IHO Decision at pp. 14-15). The IHO also found that the Lang School provided the student with educational instruction designed to meet his unique needs (id. at p. 15).

With respect to equitable considerations, the IHO found the parents' execution of the enrollment contract with the Lang School prior to the June 2012 CSE meeting implied that they had made up their mind that the student would be attending the Lang School for the 2012-13 school year and would seek tuition reimbursement (see IHO Decision at pp. 15-16). The IHO was not persuaded that the parents went into the June 2012 CSE meeting with an open mind, and therefore, determined that such actions warranted a reduction of approximately 50 percent in the amount of tuition reimbursement awarded to the parents (id. at pp. 16-17).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year. The district contends that challenges related to the assigned public school site and the implementation of the student's June 2012 IEP were speculative as a matter of law, as the student did not attend the assigned public school site. The district also argues to uphold the IHO's findings regarding the appropriateness of the ICT services and the annual goals, the present levels of performance and evaluative information relied upon thereto, the absence of evidence regarding the need for either an FBA or a BIP, and the composition of the June 2012 CSE. The district asserts, however, that the IHO erred in only partially reducing the amount of the tuition reimbursement awarded to the parents, and allege that equitable considerations precluded any award of tuition reimbursement in this case, as the parents failed to comply with the provisions of the notice requirements.[4]

In an answer, the parents respond to the district's allegations and argue to uphold the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year. The parent also argues that they provided the district with sufficient and timely notice of the student's unilateral placement at the Lang School after receiving the FNR. As a cross-appeal, the parents argue that the IHO erred in finding that ICT services were appropriate, contending that the IHO ignored the testimony of those who knew the student, as well as the information provided in a 2011 psychoeducational evaluation report, and instead relied exclusively on evidence provided by district personnel attending the June 2012 CSE meeting who had no direct knowledge of the student. The parents also assert that the IHO erred in finding that the June 2012 CSE was properly composed; the hearing record did not contain sufficient evidence that the student's behaviors impeded his learning and therefore, the failure to conduct an FBA was not a serious procedural violation; and the annual goals were appropriate. Finally, the parents assert that the IHO erred in

[4] The district affirmatively asserts that it does not appeal the IHO's finding that the Lang School was an appropriate unilateral placement for the student for the 2012-13 school year; as such, this determination is final and binding and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

finding that equitable considerations supported a reduction in the amount of tuition reimbursement awarded, arguing that the IHO improperly based this finding on the assumption that the parents never intended to send to the student to a public school.[5]

In an answer to the parents' cross-appeal, the district asserts that the IHO correctly concluded that the June 2012 CSE was properly composed, the recommended ICT services were appropriate, the June 2012 CSE had no reason to conduct an FBA, and the annual goals were appropriate. The district also argues that the IHO erred in finding that equitable considerations supported only a partial reduction of tuition reimbursement awarded to the parents.

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.

[5] To the extent that the parents do not cross-appeal or assert additional arguments in the answer related to issues included in the due process complaint notice but that the IHO did not address as additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year, these issues have been deemed abandoned and will not be considered in this decision

Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. CSE Process

1. June 2012 CSE Composition

In the cross-appeal, the parents argue that the IHO erred in concluding that the absence of a regular education teacher at the June 2012 CSE meeting did not constitute a violation that rendered the development of the June 2012 IEP procedurally deficient. The district contends that the IHO correctly found the June 2012 CSE was properly composed, and alternatively, that the absence of a regular education teacher—even if it was a procedural violation—did not result in a failure to offer the student a FAPE. In this instance, a review of the evidence in the hearing record supports the parents' assertion that the absence of a regular education teacher at the June 2012 CSE meeting constituted a procedural violation; however, the weight of the evidence does not support a finding that such procedural inadequacy resulted in a failure to offer the student a FAPE for the 2012-13 school year.

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). However, as indicated above, 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]).

In this case, the hearing record indicates that the following individuals attended the June 2012 CSE meeting: a district social worker (who also served as the district representative), a district school psychologist, a district special education teacher, an additional parent member, the parent, the parents' advocate, and the student's then-current teacher from the Lang School (Lang School teacher) (via telephone) (Dist. Exs. 7 at p. 1; 8 at p. 9; see Tr. pp. 13-16, 280-82, 351-53). The hearing record further reflects that the attendance page included with the June 2012 IEP did not reflect any CSE member's signature in the space provided to document the attendance of a regular education teacher (see Dist. Ex. 8 at p. 9).

At the impartial hearing, the district school psychologist who attended the June 2012 CSE meeting testified that no one specifically functioned in the role of regular education teacher at the meeting, and he was "not aware that anyone specifically identified themselves as a [regular] education teacher" or that the attendance of a regular education teacher was required at the meeting (Tr. pp. 12-13, 15, 87-90). However, he also testified that the district special education teacher at the June 2012 CSE meeting had experience teaching both special education classes and regular education classes, and believed she was licensed in both special education and general education

(see Tr. pp. 88-89). The district special education teacher who attended the June 2012 CSE testified that she was licensed in both special education and general education; however, she only functioned only in the role of special education teacher at the June 2012 CSE (see Tr. pp. 104-07). The district special education teacher also testified that during the previous school year, she taught as a regular education teacher in an "ICT classroom" and as a special education teacher in a 12:1+1 special class (see Tr. pp. 118-20).

Based upon the district special education teacher's dual certification in both general education and special education—and her testimony regarding her experience as a regular education teacher in an "ICT classroom" during the previous school year—the IHO concluded that the June 2012 CSE was properly composed (see IHO Decision at p. 9). However, regardless of the district special education teacher's dual licensure, the hearing record unequivocally indicates that the district special education teacher was not attempting to serve in the role of the regular education teacher at the June 2012 CSE meeting and moreover, that no other member of the June 2012 CSE functioned in the role of regular education teacher (see Tr. pp. 87-90, 105-07, 118-21).[6] Therefore, the hearing record does not support the IHO's conclusion that the attendance of the special education teacher, who by virtue of holding a dual certification as a regular education teacher, in this circumstance, comported with the procedural requirements of federal and State regulations as to the attendance of a regular education teacher at the June 2012 CSE meeting (see Application of the Dep't of Educ., Appeal No. 13-165; Application of the Dep't of Educ., Appeal No. 12-058; Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). Accordingly, given that the June 2012 IEP recommended that the student receive ICT services within a general education classroom, the June 2012 CSE should have included the participation of a regular education teacher and the absence of such, in this instance, constituted a procedural violation.

However, this technical error on the part of the IHO is of little consequence because the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Rather, the evidence demonstrates the parents' familiarity with the CSE and IEP processes, as the parent testified that she participated in several meetings for this student since he attended preschool (see Tr. pp. 379-80; see also Tr. p. 365).[7] Additionally, the evidence demonstrates that the parent participated in the development of the

[6] A further review of the evidence in the hearing record reveals that the Lang School teacher who attended the June 2012 CSE meeting testified that she was licensed in general education (see Tr. pp. 287-88). However, the hearing record does not conclusively indicate whether the Lang School teacher was a licensed regular education teacher in New York or in another state, or that she served as the regular education teacher at the June 2012 CSE meeting (see Tr. pp. 279-81, 287). In addition, neither party asserts that the Lang School teacher functioned in the role of a regular education teacher at the June 2012 CSE meeting.

[7] Familiarity with the process is a relevant consideration (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *7 [E.D.N.Y. Aug. 19, 2013]; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at * 7 [S.D.N.Y. Mar. 30, 2011]).

student's IEP at the June 2012 CSE meeting, and that the parent and the Lang School teacher were afforded the opportunity to participate in the review process and express their opinions as to the appropriateness of the recommended program for the student (see Tr. pp. 29-30, 54, 71, 80, 142-43, 148, 353-56, 364-65, 375-78, 381-82; Dist. Exs. 7 at pp. 2-4; 8 at pp. 1-2). Finally, as discussed more fully below, the recommended placement was appropriate and the June 2012 IEP provided the student with appropriate supports in the recommended setting.

Accordingly, the hearing record does not provide a basis upon which to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Davis, 431 Fed. App'x 12, 15, 2011 WL 2164009; Dirocco v. Bd. of Educ., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012] [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

2. Evaluative Information

In this instance, although the sufficiency of the evaluative information available to the June 2012 CSE is no longer in dispute, a discussion thereof provides context for the discussion of the remaining disputed issues to be resolved—namely, the appropriateness of the annual goals, whether the June 2012 CSE was required to conduct an FBA, and whether the June 2012 CSE appropriately recommended ICT services in a general education classroom for the student.

The hearing record demonstrates that the June 2012 CSE reviewed and considered several sources of evaluative information in the development of the student's June 2012 IEP, including a February 2012 psychoeducational evaluation report, a March 2012 classroom observation report, and the student's "Fall 2011-Winter 2012" Lang School progress report (2011-12 Lang School progress report), as well as input from the parent and the Lang School teacher at the meeting (see Tr. pp. 16-19, 27-29, 42-44, 55-56, 108-09,123-24, 370-71, 376; Dist. Exs. 3-4, 6; 7 at pp. 2-3; 8 at p. 2).[8] At the time of the June 2012 CSE meeting, the February 2012 psychoeducational

[8] The hearing record shows that the parent provided the June 2012 CSE a copy of the 2011 private psychoeducational evaluation and opined that it provided a more detailed description of the student's needs than the February 2012 psychoeducational evaluation conducted by the district (Tr. p. 378). According to the parent, the CSE declined to discuss the private evaluation and suggested that the district's evaluation was more current (Tr. pp. 377-78, 408).

evaluation report (February 2012 evaluation) represented the most recent evaluation of the student available to the June 2012 CSE (compare Dist. Ex. 3 at p. 1, with Parent Ex. B at p. 1).[9]

In February 2012, the district administered formal and informal assessments to evaluate the student, including the following: the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV); the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II); the Woodcock-Johnson III Tests of Achievement (WJ-III ACH); the House-Tree-Person Test; a student interview; and a consultation with the student's teacher (see Dist. Ex. 3 at p. 1). During the February 2012 evaluation, the evaluating psychologist described the student as "somewhat guarded" but able to maintain appropriate eye contact (id. at p. 1). Although the student responded to all inquiries, he did not engage in conversation, and became easily overwhelmed—especially when he perceived a task as too challenging—and he "gave up quickly" (id.). In addition, the evaluator noted that the student tended to respond "impulsively" and "overlooked important details" (id. at pp. 1-2). The student exhibited physical restlessness, but if encouraged to take a break, he preferred to complete the task (id. at p. 2).

An administration of the WISC-IV yielded a full scale IQ of 108, which fell within the average range of intellectual functioning (see Dist. Ex. 3 at p. 2). The evaluator reported that the student's performance on the perceptual reasoning, working memory, and processing speed indices fell within the average range, while his performance on the verbal comprehension index fell within the high average range (id. at pp. 2, 5). With respect to the student's academic functioning and as measured by the W-JIII ACH, the student's skills ranged from the low average range in the area of mathematical calculations to the superior range in word attack and letter-word identification (id. at pp. 3, 5-6). Overall, the evaluator concluded that the student's intellectual functioning fell within average range; he exhibited strengths in word recognition and decoding, but exhibited relative weaknesses in mathematics and written expression; and the student struggled to cope with academic and social demands (id. at pp. 3-4).

According to the student's 2011-12 Lang School progress report, in "English & Language Arts" the student worked on developing "healthy reading habits" such as selecting a book at his reading level, creating and following a reading plan, and performing "self 'check-ins'" for comprehension (Dist. Ex. 6 at pp. 1-2). The 2011-12 Lang School progress report also noted that the student's potential in writing far exceeded his progress, and he did not apply his knowledge of capitalization, punctuation, and paragraphing in everyday writing tasks (id. at p. 2). In addition, the student often rushed to begin writing tasks, and as a result, did not complete "all parts of the task" (id.). In science, the student actively participated in class discussions, but could be "silly when completing his work," which deterred him from "completing projects at the high standards" of which he was capable (id. at p. 3). In social studies, the student was developing a "clear sense of ethics," and the ability to "support an idea" with various examples from multiple sources (id. at p. 4). In addition, the student continued to work on "evaluating multiple points of view" prior to forming an opinion on a topic (id.).

According to the 2011-12 Lang School progress report in mathematics, the student's differentiated goals included dividing and multiplying fractions; finding common factors and

[9] The parents testified that the student's file included a copy of a 2011 psychoeducational evaluation report privately obtained by the parents, but it was not reviewed at the June 2012 CSE meeting (see Tr. pp. 377-79; Parent Ex. B at pp. 1-16).

multiples; computing with multi-digit numbers; working with rational numbers and algebraic expressions; solving one-variable equations and inequalities; working with area, surface area, and volume; and working with "dot plots, histograms and box plots" (id. at p. 5). In his one-to-one tutorial, the student reviewed basic geometry concepts, such as perimeter and area, and worked with the coordinate system (id.).

During OT at the Lang School, the student received the support of his occupational therapist during gym, handwriting activities, and ELA, as well as during OT sessions (see Dist. Ex. 6 at p. 10). The 2011-12 Lang School progress report indicated that although the student never pushed himself to go beyond what was expected of him, he could complete his work with "minimal verbal cues" (id.). With respect to sensory regulation and self-regulation, the student demonstrated "good self-regulation (calmness)," but his attention to task varied, and he needed teacher support to follow multi-step directions, as well as "multiple reminders to stay focused or to push himself through an assignment" (id. at p. 11). However, in gym the student increased his level of participation, and improved his motor skills, balance, bilateral skills and motor planning, strength, and overall endurance and fitness level (id. at p. 10). In counseling, the 2011-12 Lang School progress report described the student as socially motivated to make connections with his peers, using humor as a means to make connections; however, he benefitted from teacher prompts to remind him of the appropriateness and timing of using humor "unrelated to a lesson" (id. at p. 13). The student's counseling goals included expressing his feelings when overwhelmed and increasing positive social interactions with peers (id. at pp. 13-14).

Next, the March 2012 classroom observation conducted by a district social worker indicated that the student sat quietly in his seat writing, and did not volunteer answers to the teacher's questions; however, when called upon he provided answers to questions (see Dist. Ex. 4 at p. 1). While the class watched a video, the student used "theraputty" and "wrote as he watched" the video (id.). Overall, the district social worker noted that the student was attentive, easily transitioned from activity to activity, and worked independently, but he required sensory input during the read aloud (id. at p. 2). According to the student's classroom teacher, "this was a typical day" for the student (id.).

At the June 2012 CSE meeting, the Lang School teacher provided updated information about the student's functioning (see Tr. pp. 279, 283-85; see also Tr. pp. 353-54). For example, the Lang School teacher reported that the student had "always been extremely anxious," and described him as having a "withdrawn nature" (Tr. p. 283). The Lang School teacher also testified that the student was "quite depressed," which caused frustration and emotional dysregulation when presented with academic or social challenges (id.). She also reported that the student exhibited low energy, and needed one-on-one attention from adults to provide directions, explicit positive reinforcement, and motivation (see id.).

The district school psychologist and the district special education teacher testified that June 2012 CSE developed the academic achievement, functional performance and learning characteristics portion of the student's June 2012 IEP based upon the information provided and discussed at the meeting, as well as upon the information conveyed through the abovementioned documentation (see Tr. pp. 16-30, 107-12; Dist. Exs. 3 at pp. 1-6; 4 at pp. 1-2; 6 at pp. 1-14; 7 at pp. 1-4; 8 at pp. 1-2). In addition, the district school psychologist testified that the Lang School teacher provided information about how the student was currently functioning in ELA, mathematics, and writing (see Tr. pp. 108-09; see also Tr. pp. 353-54). In reading, the student

functioned on grade level, and did not exhibit specific deficits other than that he struggled with fluency, and his overall engagement and motivation was low (see Tr. p. 108). According to the district special education teacher, the Lang School teacher reported that the student's mathematics skills were at a sixth grade level, and he struggled and needed prompting to follow the steps of math problems (see Tr. p. 108-11). The district special education teacher also testified that in writing, the student struggled with grammar, using correct punctuation, and providing supporting details in his writing (see Tr. pp. 109, 134).[10]

3. Annual Goals

Turning to the dispute regarding the annual goals in the June 2012 IEP, the parents assert that the evidence in the hearing record does not support the IHO's conclusion that although not written at the June 2012 CSE meeting, the annual goals were appropriate and based upon information discussed at the June 2012 CSE meeting. The district rejects the parents' contentions and argues to uphold the IHO's determination. A review of the hearing record does not support the parents' contentions.

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, it is undisputed that the annual goals ultimately included in the June 2012 IEP were not written during the June 2012 CSE meeting (see Tr. pp. 35, 58-61, 125-26, 280-82, 288-91, 354). However, the weight of the evidence in the hearing record indicates that the parent attended the June 2012 CSE meeting with an advocate, she listened to the discussions regarding the student's progress and substantive discussions regarding the annual goals, and had the opportunity to participate in these discussions; therefore, any failure to discuss the particular wording of the annual goals or the specific annual goals included in the June 2012 IEP or any failure to draft the annual goals at the June 2012 CSE meeting did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see Tr. pp. 35-37, 58-73, 125-34, 280-82, 353-54, 361-62, 365; see also E.A.M., 2012 WL 4571794, at * 8 [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

In this instance, both the district school psychologist and the district special education teacher who attended the June 2012 CSE meeting testified that the June 2012 CSE discussed the substance of the annual goals at the meeting—namely, the specific areas to address, as well as the

[10] The parents also testified that the Lang School teacher provided the June 2012 CSE with information regarding "how he participated, the progress he had made, the difficulties he presented with during a normal school day, and how they were addressing those difficulties" and that she was "very thorough" (Tr. pp. 375-76).

particular skills or activities that should be included in the annual goals that the student would focus upon in order to address his needs, in the areas of social/emotional functioning (i.e., peer interactions), physical development, mathematics, and reading fluency—as opposed to the "exact wording" of the annual goals (see Tr. pp. 35-37, 58-73, 91-92, 125-34; see also Tr. pp. 108-12, 134-40; Dist. Ex. 8 at pp. 3-4). The district school psychologist specifically testified that the process to develop the annual goals began with a discussion at the June 2012 CSE meeting regarding "what goal and areas—what specific skills should be worked on" (Tr. pp. 61-62).

With respect to the annual goals, the parents testified that the annual goals were not written or developed or reviewed at the June 2012 CSE meeting (see Tr. p. 379). The parents further testified that throughout their experiences attending CSE meetings, no two CSEs did the "same things," for example: at some CSE meetings, annuals goals were written, and at other CSE meetings, the annual goals were not written (Tr. pp. 379-80).[11] The parents' advocate who attended the June 2012 CSE meeting testified that the CSE did not discuss the annual goals, but the Lang School teacher spoke about the student's progress (see Tr. pp. 360-61). The parents' advocate further testified that although she believed the June 2012 CSE should have discussed the annual goals, she also believed it was "not [her] place to tell them what to do" and her responsibility was to support the parent at the meeting (Tr. pp. 361-62). However, the parents' advocate testified that she did not tell the parent at the meeting that the June 2012 CSE should have discussed the annual goals because she believed the parent "knew that on her own" (id.). The parents' advocate could not recall whether the parent asked the June 2012 CSE to discuss the annual goals (see Tr. p. 362). During the June 2012 CSE meeting, the parents' advocate did not "alert" the parents that annual goals should be discussed; after the June 2012 CSE meeting, the parents did not express any concerns to her about the annual goals (see Tr. pp. 369-70).

However, a review of the hearing record indicates that the June 2012 IEP included annual goals targeting the student's identified needs—and as reflected in the present levels of performance and individual needs—in the areas of academics, social/emotional skills, and physical development (see Dist. Ex. 8 at pp. 1-4). To address the student's social/emotional functioning, the June 2012 CSE recommended annual goals designed to improve the student's social interactions with peers and to express his feelings instead of withdrawing (compare Dist. Ex. 6 at pp. 13-14, with Dist. Ex. 8 at p. 3; see Tr. pp. 139-40). With respect to the student's physical development, and as reflected in the 2011-12 Lang School progress report, the June 2012 IEP included annual goals targeting the student's physical fitness and fine motor skills, legibility, and verbal self-control (compare Dist. Ex. 6 at p. 12, with Dist. Ex. 8 at pp. 3-4; see Tr. pp. 109, 134). In mathematics, the June 2012 IEP included an annual goal related to applying algorithms to solve mathematics problems (Dist. Ex. 8 at p. 4; see Tr. pp. 108-11). Finally, the June 2012 IEP included

[11] The parents' advocate testified that as a parent representative, her duties included supporting the parents and answering any questions "before, during, and after a meeting" (Tr. pp. 351-52). She also testified that the June 2012 did not write the annual goals at the meeting and that she did not speak at all during the June 2012 CSE meeting (see Tr. pp. 354, 358-59). The parents' advocate also testified that the parent who attended the June 2012 CSE meeting did not ask her any questions during the meeting, but after the meeting, the parent expressed her unhappiness with "what [the June 2012 CSE] recommended" (Tr. pp. 359-60). Based upon her recollection, the parents did not have any questions for the parent advocate before the June 2012 CSE meeting (see Tr. p. 365). In addition, the parents' advocate testified that she would not advise a parent during a CSE meeting if "something has gone wrong at the meeting" (Tr. pp. 367-68).

an annual goal targeting the student's reading fluency by encouraging him to read with appropriate affect and expression (Dist. Ex. 8 at p. 4; see Tr. pp. 108-10).

Based upon the evidence in the hearing record and under the circumstances of this case, the development of the annual goals after the June 2012 CSE meeting did not constitute a procedural violation that led to a loss of educational opportunity to the student or seriously infringed on the parent's opportunity to participate in the CSE meeting (see E.A.M., 2012 WL 4571794, at * 8 [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F., 2011 WL 5419847, at *10-*11; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010] [explaining that parental presence is not required during actual goal drafting]; E.G., 606 F. Supp. 2d at 388-89; see also Mahoney v. Carlsbad Unified Sch. Dist., 430 Fed. App'x 562, 565-66, 2011 WL 1594547 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]). In addition, the hearing record supports a finding that the annual goals in the June 2012 IEP targeted the student's identified areas of need and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress several times over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

4. Consideration of Special Factors—Interfering Behaviors

The parents assert that the IHO erred in finding that the hearing record did not contain sufficient evidence that the student's behaviors impeded his learning and as a result, the IHO erred in finding that the June 2012 CSE's failure to conduct an FBA was not a serious procedural violation. The district asserts that the IHO's findings should not be disturbed, as the June 2012 CSE had no reason to conduct an FBA. As set forth in greater detail below, a review of the evidence in the hearing record indicates that the student's behaviors did not seriously interfere with instruction, and the June 2012 CSE was, therefore, not required to conduct an FBA of the student.

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., 2009 WL 3326627, at *3 [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., 454 F. Supp. 2d at 149-50). 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]; Gavrity 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., 569 F. Supp. 2d at 380).

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]).[12] State regulation defines an FBA 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]).

In this case, the parties do not dispute that the district did not conduct an FBA of the student. In particular, the district's school psychologist testified that the June 2012 CSE did not conduct an FBA of the student (see Tr. p. 30). He further testified that the June 2012 CSE also did not develop a BIP for the student because there were no behaviors reported requiring a BIP, such as "verbal or physical aggression, very significant disruptive behaviors that a student might be engaging in, behaviors that might be considered self-dangerous or dangerous to others," or "extreme behaviors that would be beyond what might be otherwise considered" age appropriate (Tr. pp. 30-31, 52-53). The district school psychologist also did not recall any June 2012 CSE member "stating any specific behavioral difficulties" the student exhibited throughout the day (Tr. p. 53). The district school psychologist was aware, however, that the student suffered from anxiety and that the Lang School teacher "mentioned that anxiety affect[ed] his performance" (Tr. pp. 53-54).

With respect to the student's identified deficit areas, the district special education teacher testified that the student's "overall engagement and motivation" were "low" (Tr. pp. 107-08). The district special education teacher also testified that at the June 2012 CSE meeting the parents indicated that the student struggled with anxiety, lack of motivation and engagement within the context of discussions regarding the recommendation for ICT services in a "classroom of 25 students" (see Tr. pp. 142-43, 148). In addition, the district special education teacher testified that the discussion regarding the ICT services would have addressed the parents' concerns about the student's anxiety, and furthermore, many of the parents' concerns could be "specifically addressed

[12] 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," at p. 22, Office of Special Educ. [Dec. 2010], 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.).

with in the classroom by teachers" as guided by the present levels of performance, management needs, and supports in the June 2012 IEP (Tr. pp. 143-44).

At the June 2012 CSE meeting, the Lang School teacher testified that she described the student as "extremely anxious," and noted his "withdrawn nature" and his depression, which "caused [the student] to become frustrated" when faced with a "challenge" relating to academics or to his peer group (Tr. pp. 282-84). The Lang School teacher also testified that these types of challenges could result in "emotional dysregulation" (Tr. p. 283). The Lang School teacher further testified about the student's "extremely low energy"—resulting in "frequent naps" or withdrawing from the classroom—and that the student required a "lot of one-on-one" from her or another adult, as well as "explicit directions and explicit positive reinforcement to really motivate him to initiate tasks," which she reported to the June 2012 CSE (id.). According to the June 2012 CSE meeting minutes, the Lang School teacher reported that the student did not "perform well due to anxiety [and] lack of motivation" (Dist. Ex 7 at p. 2).

The parents' testified that at the June 2012 CSE meeting, both they and the Lang teacher adamantly expressed disagreement with the recommendation for ICT services in a general education setting due to the student's "anxiety" (Tr. pp. 380-81). Similarly, the parents' advocate testified that the Lang School teacher described the student's "anxiety" and "how much that affect[ed] his work," and that the parents "repeatedly talked about his anxiety" in response to the recommendation for ICT services (Tr. pp. 353, 355-56).

However, notwithstanding the information presented to the June 2012 CSE regarding the student's anxiety, low motivation and engagement, and frustration when facing challenging situations, neither the March 2012 classroom observation report nor the 2011-12 Lang School progress report indicate that the student exhibited related behavioral manifestations that either impeded his learning, or that of others (see Dist. Exs. 4 at pp. 1-2; 6 at pp. 1-14). Therefore, based on the above, while it appears that the June 2012 CSE knew that the student suffered from anxiety, low energy, low motivation and engagement, and frustration, the IHO correctly concluded that the hearing record does not contain sufficient evidence with regard to how the student's difficulties in these areas resulted in the student engaging in behaviors that either impeded his learning, or that of others, to the extent that the district was required to conduct an FBA.

Moreover, even if the June 2012 CSE should have conducted an FBA, under the circumstances of this case, the absence of an appropriate FBA (or BIP) might not result in a denial of FAPE if the CSE addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and classroom observation conducted by the district (see R.E., 694 F.3d at 190-91; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *5, *8 [S.D.N.Y. Mar. 21, 2013] [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]). In this case, the recommended strategies to address the student's management needs, as well as additional teacher supports, ICT services, and the annual goals in the June 2012 IEP rescued any inadequacy by failing to conduct an FBA, and any deficiency therein would not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year (see A.C., 553 F.3d at 172-73 [concluding that the failure to conduct a FBA did not make the IEP legally inadequate because the IEP noted (1) the student's attention problems, (2) the student's need

for a personal aid to help the student focus during class, and (3) the student's need for psychiatric and psychological services]; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).[13]

The district special education teacher testified that although the student did not have "specific deficits" with respect to ELA—other than struggling with fluency—the student's "overall engagement and motivation" were "low" (Tr. pp. 107-08). To address the student's fluency needs, the district special education teacher testified that the June 2012 CSE developed an annual goal targeting fluency, and recommended management needs to provide "opportunities for support in his reading" (Tr. pp. 109-10; Dist. Ex. 8 at p. 4). In addition, the June 2012 IEP addressed the student's difficulties related to "engagement and motivation" by specifically noting that the student's engagement was low, that he "needed support with choosing a book appropriately during . . . independent reading time," and by indicating that the student required "coaxing" and to "receive pep talks" (Tr. pp. 110-11; see Dist. Ex. 8 at pp. 1-2; see also Dist. Ex. 7 at pp. 2-3). The June 2012 IEP also included annual goals to improve the student's positive social interactions with peers, increase his empathy by understanding the perspective of others, and identifying and expressing his feelings (see Dist. Ex. 8 at p. 3). The June 2012 IEP also indicated that the student would be provided a notepad to write down his feelings when he was unwilling to talk about them and that he would receive counseling (id. at pp. 3, 5).

With respect to management needs in the June 2012 IEP, the district special education teacher testified that "scaffolded instruction" allowed for "opportunities for the teacher to provide [the student] with modifications to the assignments to try to promote his engagement" (Tr. p. 111; see Dist. Ex. 8 at p. 2). According to the district special education teacher, the June 2012 CSE developed the management needs in the June 2012 IEP as a result of the discussion with the student's Lang School teacher as to the "specific techniques" she used in the classroom, as well as from "suggestions that were listed" in the Lang School reports (Tr. pp. 112, 124; compare Dist. Ex. 8 at p. 2, with Dist. Ex. 6 at pp. 2-3, 5-6, 11, 13). The district special education teacher further testified that the student benefited from prompts, reminders, repetition, and modified homework or individualized homework assignments (see Tr. p. 112). Ultimately, the June 2012 CSE recommended the following strategies as management needs for the student: verbal and visual cues

[13] Notably, 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. 25 [emphasis in original]), 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., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). This is especially true under the circumstances of this case where the hearing record indicates that at the time of the June 2012 CSE meeting, the student was attending the Lang School, and thus conducting an FBA to determine how the student's behavior related to the student's school environment at the Lang School would have at the very least diminished, or nearly inconsequential, value where, as here, the June 2012 CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli, 2006 WL 3102463, at *3; J.C.S., 2013 WL 3975942, at *13).

and prompts; repetition, practice and review; scaffolded instruction; teacher modeling of mathematics problems; and access to sensory tools and strategies (see Dist. Ex. 8 at p. 2).[14]

In summary, review of the hearing record reflects that, notwithstanding the absence of an FBA, the June 2012 IEP included sufficient information regarding the student's behavioral and management needs.[15]

5. ICT Services

The parents argue that the IHO erred in finding that ICT services were appropriate, contending that the IHO ignored the testimony of those who knew the student, as well as the information provided in a 2011 psychoeducational evaluation report, and instead relied exclusively on evidence provided by district personnel attending the June 2012 CSE meeting who had no direct knowledge of the student. The district asserts that the IHO relied upon appropriate evidence to support the conclusion that the recommended ICT services were appropriate to meet the student's needs in the LRE. Upon review of the hearing record, and contrary to the parents' allegations, the June 2012 CSE's recommendation for ICT services in a general education setting, together with the related services, was reasonably calculated to enable the student to receive meaningful educational benefits.

According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In addition, State regulation requires that personnel assigned to each class "shall minimally include a special education teacher and a general education teacher," and each class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).[16]

In reaching the decision to recommend ICT services for the student, the district school psychologist testified that the student required "more support than would just be provided in a typical general [education] classroom environment" (Tr. pp. 38-39). Given the student's skills and abilities, the district school psychologist further testified that the student should attend an "academically focused setting that would appropriately challenge him and give him opportunities for working on the appropriate curriculum," and that would be "supportive" and help the student make "academic progress" (id.). He also testified that the June 2012 CSE relied, "in large part," upon the district special education teacher's experience in making the "final conclusion as to the

[14] In addition, many of the testing accommodations recommended in the June 2012 IEP were consistent with recommendations in the parents' privately obtained 2011 psychoeducational evaluation of the student (compare Dist. Ex. 8 at p. 6, with Parent Ex. B at pp. 10-11).

[15] I have also considered the Second Circuit's most recent opinion in the area of addressing student behavioral concerns, which was issued yesterday, and find it does not dictate a contrary conclusion in the circumstances of this case (see C.F. v. New York City Dep't. of Educ., 2014 WL 814884, at *9 [2d. Cir Mar. 4, 2014]).

[16] In describing how LRE related to the continuum of service options, State guidance in 2008 indicated that ICT services were "directly designed to support the student in his/her general education class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3-4, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) [Apr. 2008], available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

appropriateness of a specific program" recommendation (Tr. pp. 83-84). In addition, the district school psychologist testified that the discussion regarding the appropriateness of the ICT services at the June 2012 CSE meeting focused on the "combination" of the student's "very good academic strengths, as well as, having weaknesses at the same time in the academic areas," and noting that the student would "benefit from having the support of a special educator in addition to a general educator, in academic instruction" in order for the student to make progress (id.; see Tr. pp. 91-93).

Next, the district special education teacher who attended the June 2012 CSE meeting testified that she agreed with the recommendation for ICT services for the student based upon the information presented about the student and in conjunction with her personal experience (see Tr. pp. 115-16).[17] The district special education teacher testified that within an "ICT classroom," the students' classifications varied, but did not display "any severe behavior issues;" additionally, she indicated that students in an ICT class primarily needed "more support opportunities for small group or individualized instruction" and the regular education students tended to be "higher functioning" (Tr. pp. 113-14; see Tr. pp. 141-42). Based upon her personal experience, the district special education teacher also testified that an ICT setting allowed for a "lot of peer group work," "a lot of opportunities for a direct instruction lesson," and smaller group work (id.). She explained that this student "presented" as a "very typical candidate for an ICT class setting," and specifically noted that, in her experience, students in her ICT classes "tended to need a lot of the similar strategies" that also benefitted this student—including "repetition, prompting, encouragement, [and] review of specific steps and procedures" (id.). The district special education teacher further testified that the aforementioned strategies were "very much the typical day within an ICT class whether . . . as a whole group, a small group or 1:1 work" (Tr. p. 116). She also indicated that the student's areas of difficulty could be met by "a teacher or two teachers within an ICT setting," and the student's grade-level functioning in ELA (seventh grade level) and mathematics (sixth grade level) were also "typical" of students who attended ICT classes (id.; see Tr. pp. 107-08; Dist. Ex. 8 at p. 7). Finally, the district special education teacher agreed that the parent expressed concerns about the ICT services due to the student's anxiety and the size of the class; however, in her experience, the teachers in an ICT setting would do what was necessary to meet the student's needs in this regard (see Tr. pp. 142-44; see also Tr. pp. 153-54).[18]

According to the hearing record, the parents and the Lang School teacher disagreed with the recommendation of ICT services, and specifically requesting the June 2012 CSE to consider a nonpublic school placement or a 12:1+1 or a 12:1 special class placement (see Tr. pp. 381). The

[17] The district special education teacher testified that within an ICT class, the students' classifications varied, but the students did not tend to display "any severe behavior issues;" additionally, she indicated that students in an ICT class "warrant the need for primarily more support opportunities for small group or individualized instruction" and the regular education students tended to be "higher functioning."

[18] In reviewing the program offered to the student, the focus of the inquiry is on the information that was available to the June 2012 CSE at the time the June 2012 IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE]; D.A.B., 2013 WL 5178267, at *12 [same]). Although the parents and the parent advocate testified that the student's Lang school teacher gave her opinion to the June 2012 CSE on whether ICT was appropriate, the student's Lang school teacher testified that the CSE did not ask her if she agreed with the ICT recommendation and she did not offer the CSE an opinion about whether an ICT was appropriate (Tr. pp. 285, 291-92, 355, 364-65, 380-81).

parents' testified that the June 2012 CSE did not discuss other placement options, but reiterated that ICT services were appropriate for the student (see Tr. p. 381). However, the June 2012 IEP reflects that the CSE considered and rejected a 12:1 special class placement and a 12:1+1 special class placement in a community school as too restrictive for the student (see Dist. Ex. 8 at p. 8). Moreover, the district special education teacher testified that based upon her experience teaching a 12:1+1 special class placement, she agreed that this placement option was not appropriate for the student because students in a 12:1+1 special class would be cognitively lower functioning, have severe behavioral issues, and require a much slower pace and more support than the student in the instant case, thereby limiting his academic progress (see Tr. p. 117). In addition, the hearing record indicates that the student participated actively in class discussions, greatly contributed to most activities, worked well collaboratively, and developed strong relationships with his classmates (see Dist. Exs. 6 at p. 3; 8 at pp. 1-2).

In light of the above, the hearing record supports the IHO finding that the ICT services recommended in the June 2012 IEP were appropriate to meet the student's needs and were reasonably calculated to enable the student to receive educational benefits.

B. Challenges to the Assigned Public School Site

For the reasons described below, the district correctly asserts that the IHO erred as a matter of law in finding that the district's failure to present evidence regarding the assigned public school site resulted in a failure to offer the student a FAPE for the 2012-13 school year.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669, at *6 [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 a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ.,

2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M., 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. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587, at*4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x 81, 87, 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Dep't of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the June 2012 IEP at the assigned public school site because a retrospective

analysis of how the district would have executed the student's June 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the June 2012 IEP containing the recommendations of the June 2012 CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Dist. Ex. 11; Parent Ex. F at pp. 1-5). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parents to challenge the June 2012 IEP through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's May 2013 IEP at the assigned public school site when the parents rejected it and unilaterally placed the student.[19]

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 9, 2013, is modified by reversing that portion which determined that the district failed to offer the student a FAPE for the 2012-13 school year; and

[19] At the impartial hearing, the parents could not recollect with specificity when the assistant principal of the assigned public school site allegedly told them that the site was a "dumping ground" for special education students and advised them to "run the other way" (see Tr. pp. 384-390, 399-402, 404-07). However, at the impartial hearing the assistant principal categorically denied making these statements to the parents (see Tr. pp. 423, 425-26, 434). Additionally, in their due process complaint notice, the parents claimed that the parent coordinator told them that "this is a dumping ground for special education students" (see Parent Ex. A at p. 5).

IT IS FURTHER ORDERED that the IHO's decision, dated October 9, 2013, is modified by reversing that portion which ordered the district to reimburse the parents for the costs of the student's tuition at the Lang School for the 2012-13 school year.

Dated: **Albany, New York**
March 5, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER