The University of the State of New York

The State Education Department
State Review Officer
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No. 13-218

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 respondent, Ilana A. Eck, Esq., of counsel

Susan Luger Associates, Inc., attorneys for petitioners, Lawrence D. Weinberg, 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 a decision rendered by an impartial hearing officer (IHO) which found that it did not offer a free appropriate public education (FAPE) to respondents' (the parents') child (the student) for the 2011-12 school year, and which ordered it to fund the costs of the student's tuition at the Rebecca School for the 2011-12 school year and the costs of educational and paraprofessional services for summer 2011 at Camp Mishkon Sternberg (Camp Mishkon). The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

This appeal is related to Application of a Student with a Disability, Appeal No. 12-152, in which the parents appealed an IHO's decision that dismissed their claims on the basis that they lacked standing to seek tuition reimbursement for the student. The parents' appeal in that case was sustained, and this matter was remanded to a new IHO for a determination on the merits of the parents' claims. A new IHO was subsequently appointed, and a decision was rendered in the parents' favor. It is from that decision that this appeal arises.

Much of the factual information is both known to the parties in this matter, and is described in Application of a Student with a Disability, Appeal No. 12-152. However, for purposes of context and background, I note that the student was five years old at the time that the IEP at issue in this matter was developed (Parents Ex. B at p. 1). While the student has not recieved a diagnosis of autism (Tr. p. 39), she is described in the hearing record as having a "global developmental delay" (Tr. p. 282). In this regard, the record reflects that the student experienced difficulties across all areas of development including neurodevelopmental delays in relating and communicating, gross and fine motor delays (deficits in motor planning secondary to ataxic movement patterns in her extremities), learning difficulties, and sensory processing difficulties (Tr. pp. 38, 234; Parent Ex. B at p. 5). In addition, the hearing record reflects that the student is highly distractible in environments with moderate to high levels of visual input (Parent Ex. B at p. 5), and that she exhibits deficits in activities of daily living (ADL) skills (feeding and toileting skills) (id.). The student has also been prescribed glasses for distance, and has tubes in her ears to facilitate drainage (Parent Ex. B at p. 5).[1]

Since September 2010, the student has attended the Rebecca School (Tr. p. 484).[2] On February 2, 2011, the CSE convened for an annual review of the student and to develop her IEP for the 2011-12 school year (Parent Ex. B). The resultant IEP (February 2011 IEP), among other things, reflected that the student was classified as a student with multiple disabilities,[3] contained 12 annual goals and 37 short-term objectives, and recommended that the student be placed in a 6:1+1 special class in a specialized school with related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT), and receive the assistance of a 1:1 health paraprofessional, with all services to be provided on a 12-month basis (id. at pp. 1, 13, 15). The hearing record reflects that a copy of this IEP was sent to the parents on February 4, 2011 (id. at p. 2).

The hearing record reflects that in May 2011, the student was accepted to attend Camp Mishkon for summer 2011 (Parent Ex. L). Also in May 2011, the parents signed a contract with the Rebecca School for the 2011-12 school year (Tr. p 499; Parent Ex. C at p. 4), and a $5,000.00 deposit was paid to the Rebecca School on the student's behalf (Tr. pp. 502-04; Parent Ex. K).[4]

By a Final Notice of Recommendation (FNR) dated June 9, 2011 (June 9 FNR), the district advised the parents that, among other things, the student was assigned to a specific public school site (school 1) (Tr. p. 485; Parents Ex. AA). Thereafter, the parents received another FNR, dated

[1] The student also has a history of oropharyngeal dysphasia, which necessitates thickening the liquids that she consumes in order to prevent aspiration, and at the time of the CSE meeting relevant to this matter was receiving one feeding per day via a G-Tube by the school nurse (Parent Ex. B at p. 5). It appears, however, that this G-tube was later removed (Tr. pp. 252-253, 274, 281).

[2] The Rebecca School has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8 [c][7]; 8 NYCRR 200.1 [zz][8]).

[4] The payment was made by the student's grandfather (see Tr. pp. 502-504; Parent Ex. K)

June 15, 2011 (June 15 FNR),[5] which advised that the student had been assigned to a different public school site (school 2) (Tr. pp. 485, 488). The student's mother arranged to visit school 1 and was directed to an "alternate" site because school 1 would not have a 6:1+1 program until fall 2011 (Parent Ex. D at p. 3). Accordingly, the student's mother visited the alternate site on June 16, 2011, and by letter dated June 20, 2011, rejected the school for a number of reasons (id.). However, she was subsequently informed that she could visit school 1 at the site listed on the June 9 FNR, and did so on June 28, 2011 (id. at pp. 1-2). However, by letter dated June 29, 2011, she again rejected school 1 because the "program" was new to that building, and there were "still some issues that [needed] to be straightened out" (id. at p. 1). Accordingly, the student's mother advised the district that, among other things, she would be unilaterally placing the student at Camp Mishkon for summer 2011, and that she would be seeking reimbursement for this placement (id.). The record reflects that the student attended Camp Mishkon in summer 2011 (Tr. p. 200; Parent Ex. O).

A. Due Process Complaint Notice

By due process complaint notice dated July 7, 2011 (notice), the parents requested an impartial hearing (Parent Ex. A). In this notice, the parents alleged that the district denied the student a FAPE in the 2011-12 school year for a number of reasons, including that that the student's annual review was held too early (Parent Ex. A at p. 2), that the CSE "predetermined the program recommendation" (id. at p. 3),[6] that the CSE team was not "duly constituted" (id.), and that they were "deprived of the opportunity to meaningfully participate" in the development of both the student's February 2011 IEP and the "selection of the student's placement" (id. at p. 5). In addition, and with respect to the February 2011 IEP itself, the parents alleged that the goals and objectives in the IEP did not reflect all of the student's needs (id. at p. 2), that the goals in the IEP "did not contain [any] evaluative criteria, procedures, or schedules to measure progress" (id. at p. 3), and that the CSE failed to recommend an appropriate program for a number of reasons, including that the student–to-teacher ratio was inappropriate and that the student needed a "more therapeutic" program (id.). The parents also took issue with the school site identified in the June 9 FNR, and alleged, among other things, that the size of school 1 was inappropriate, that the size of the proposed classroom was inappropriate, that students in the class did not have "needs" that were similar to the student, and that the teaching methodology in the proposed program "does not comport with recommended and successful methodologies that are used with [the student]" (id.).[7] The parents also indicated in their notice that they had received an FNR recommending placement

[5] The hearing record contains two FNRs dated June 15, 2011, both of which assign the student to school 2 (see Dist. Ex. 3; Parent Ex. R). The parents contend that they never received the FNR submitted by the district (Dist. Ex. 3), but they admit to receiving a copy of the other June 15 FNR (Tr. pp. 485-486; Parent Ex. R).

[6] The reasons given in support of this allegation included (1) that the CSE never discussed or considered other more or less restrictive settings, and that (2) "[i]n not considering a more restrictive program, the CSE did not place the [student] in the Least Restrictive Environment (LRE) based on her special education needs" (Parent Ex. A at p. 3). In their answer, however, the parents contend that LRE "was not an issue in this case" (Answer ¶ XIII).

[7] The parents made other allegations pertaining to school 1, as well. However, many of these allegations overlap with their claims regarding the sufficiency of the IEP offered to the student. In addition, the parents acknowledge that school 1 was not the final placement that was offered by the district in this matter (see Answer at p. 13). Accordingly, other claims raised in the due process complaint notice regarding school 1 are irrelevant for purposes of this matter.

at school 2, that this FNR had no address on it, and that while they made "numerous calls" and left "numerous messages" to find out where school 2 was located, no one from the district ever returned their calls (id. at 4). Among other things, the parents requested direct payment for the costs of the student's tuition at Camp Mishkon for summer 2011 and for the Rebecca School for the 2011-12 school year (id. at pp. 5-6).

B. Events Post-Dating the Due Process Complaint

In September 2011, the student returned to the Rebecca School for the 2011-12 school year (Tr. pp. 231, 485; see Parent Ex. C). In addition, on September 26, 2011 the student's mother again visited school 1, and by letter dated September 27, 2011 she again rejected it (Parent Ex. S at p. 1). Accordingly, the student's mother advised the district that she was "unable to accept this program/placement for [her] child," and that she had "no alternative but to keep [the student] unilaterally placed at the Rebecca School for the 2011-12 school year (id.). The student's mother also advised the district that she intended to "seek reimbursement for this placement at the DOE's expense" (id.).

C. Impartial Hearing Officer Decisions

An impartial hearing convened on October 6, 2011 and concluded on February 3, 2012, after four non-consecutive days of proceedings (see Tr. pp. 1-515). A description of those proceedings is contained in Application of a Student with a Disability, Appeal No. 12-152 and need not be repeated in detail here. However, on the first day of hearing, counsel for the district notified the IHO that it was the district's position that the June 9 FNR had been superseded, and that school 2 was the public school site that the district would be "defending" (Tr. pp. 18-19). In response, the parents did not object to this, but rather suggested that they provide a letter setting forth the parents' objections to school 2, and that the parties "deal with the objections in that letter rather than . . . moving to amend the complaint" (Tr. pp. 20-21). Accordingly, a letter dated October 17, 2011 was eventually entered into the record which indicated that on October 11, 2011, the student's mother and an advocate visited school 2, and that this school was rejected because, according to the student's mother, it was not "appropriate" (Parent Ex. S at p. 2). Specifically, the student's mother contended in this letter that the teacher at school 2 was "unfamiliar with working with students with [her child's] disability," that the "program" at the school was "not therapeutic enough" for the student, that other students in the class "do not have similar needs to [the student]," that "all of the students in the program are classified with Autism" while the student was classified with "Multiple Disabilities," that the "environment" at the school was "too overwhelming and distracting" for the student, and that the "academic program" was not "appropriate" (id.). In addition, the parent informed the district that the student would remain "unilaterally enrolled at the Rebecca School for the 2011-12 school year," and that she intended to "seek reimbursement" for this placement (id.).

In a decision dated June 27, 2012, the IHO denied the parents' request for relief (IHO Ex. I at p. 17). As noted above, however, that decision—which denied the parents' claims for lack of standing—was appealed by the parents and, by decision dated July 5, 2013, was reversed and remanded to a new IHO for a decision on the merits of the parents' claims (see Application of a Student with a Disability, Appeal No. 12-152).

The hearing record reflects that on July 23, 2013, a new IHO was appointed to this matter (IHO Decision at p. 2), and on September 11, 2013, one additional day of hearing was held (Tr. pp. 516-562). Thereafter, by decision dated October 23, 2013, the IHO found that the district did not offer the student a FAPE for the 2011-12 school year, and ordered the district to "fund the student's 2011-12 ten-month school year enrollment" at the Rebecca School, and to reimburse the parents for certain of the costs associated with Camp Mishkon for summer 2011 (IHO Decision at pp. 9-10, 22). The IHO rejected the parents' contentions that the CSE met too early, that it predetermined the program recommendations, and that the goals in the February 2011 IEP were not sufficiently comprehensive (id. at pp. 5-6). However, after reviewing the three FNRs in the hearing record (see Dist. Ex. 3; Parent Exs. R; AA), the IHO determined that the June 15 FNR submitted by the parents (Parent Ex. R) was the relevant FNR for the purpose of "determining whether the CSE offered the student an appropriate placement," and with respect to that FNR found that it was "defective" because it did not set forth school 2's address (IHO Decision at pp. 6-7).

In addition, the IHO found that school 2 was not "appropriate" for the student (IHO Decision at p. 8). Specifically, the IHO noted that while the student has "global developmental delays" and is described as having some "autistic tendencies," the student had not received a diagnosis of autism but would have been placed in a class with students who were all diagnosed as having autism (id. at pp. 8-9). Accordingly, relying on testimony regarding the student's social ability, the IHO found that the student "would not have been suitably grouped for instructional purposes" at school 2 (id. at p. 9). In addition, the IHO found that applied behavior analysis (ABA), which all of the then-current students in the class were receiving, was not an appropriate instructional methodology for use with the student, and that the student "should not be in a classroom in which the students are communicating using a [Picture Exchange Communication System (PECS)] book and augmentative communication devices" (id. at p. 9). Rather, the IHO found that the student "needs to be with peers with whom she can initiate social interactions verbally, and who will initiate interactions with her" (id.).

After finding that the district had denied the student a FAPE for the 2011-12 school year, the IHO addressed the appropriateness of the unilateral placement at Camp Mishkon and the Rebecca School. With respect to Camp Mishkon, the IHO found that the camp's program was based on the student's IEP, was individually tailored to meet her unique needs, was designed to enable the student to make progress, and that the student, in fact, made progress (IHO Decision at p. 11). Accordingly, the IHO found that Camp Mishkon was an appropriate placement for the student in summer 2011 (id.). Further, and with respect to the Rebecca School, the IHO found that "the parents produced substantial credible and convincing evidence in support of the contention that the [school] met the [s]tudent's special education needs and provided her with instruction that was specially designed to meet her unique needs" (id. at 13). Accordingly, the IHO found that the Rebecca School was an appropriate placement for the student for the 2011-12 school year (id. at 14).

Finally, the IHO held that there was no evidence in the hearing record that would preclude or limit reimbursement to the parents on equitable grounds (IHO Decision at pp. 14-16). However, the IHO determined that while the parents established an entitlement to the direct payment of tuition from the district to the Rebecca School for the 2011-12 school year, they did not establish such an entitlement with respect to Camp Mishkon because "the record does not support a finding that the [p]arents were financially responsible for paying for the cost of Camp Mishkon (id. at pp.

16-22). Accordingly, the IHO ordered the district to "fund" the student's ten-month school year at the Rebecca School for the 2011-12 school year, and to "reimburse" the parents for certain expenses associated with Camp Mishkon (id. at p. 22).

IV. Appeal for State-Level Review

The district appeals the IHO's decision and contends that it offered the student a FAPE for the 2011-12 school year. In this regard, the district contends that the IHO correctly found that the timing of the "IEP meeting" did not deprive the student of a FAPE, that the "IEP team" did not impermissibly predetermine the program recommendation for the student, and that the goals in the February 2011 IEP were "sufficiently comprehensive." However, the district maintains that the IHO's finding with respect to the June 15 FNR "allegedly received by the [p]arents" was erroneous and should be annulled. In addition, the district argues that the IHO's findings regarding the "alleged implementation claims" were improper. Specifically, and regarding this latter assertion, the district contends that there can be no denial of a FAPE due to the "alleged failure to implement the IEP," that the student would have been appropriately grouped at school 2, and that the parents' rejection of the "offered placement" based on the methodology used "is both speculative and meritless." The district also argues that the Rebecca School and Camp Mishkon were inappropriate for the student, that equitable considerations disfavor the parent in this matter, and that the parents are not entitled to "direct funding" because "the record does not prove the full range of [their] financial resources."

In their answer, the parents "neither admit nor deny" many of the district's allegations. Instead, the parents set forth 27 "affirmative defenses" which, for the most part, present legal arguments and address the issues that the IHO decided in their favor. Regarding the IHO's findings concerning the FNR, the parents assert that they "do not contend that [school 1] was the placement or that the [district] cannot submit a second timely [FNR] to the parents." Rather, the parents argue that the June 15 FNR that was sent to them (Parent Ex. R) was "defective" because it lacked an address. In addition, the parents assert that the student (who has not received a diagnosis of autism) is not functionally similar to the students at school 2 (all of whom had received diagnoses of autism), and they maintain that the use of ABA or PECS is not "appropriate" for the student. In addition, the parents set forth numerous contentions regarding Camp Mishkon and the Rebecca School, essentially arguing that each was appropriate for the student, as well as assertions regarding the equitable considerations in this matter, which the parents suggest do not favor the district. Moreover, the parents make some general contentions including that they "did not waive any issues at hearing and do not waive any issues on appeal," and that the district "failed to ensure that federal and state mandated procedural requirements guaranteeing parental participation and due process were used or provided." The parents also request that an SRO consider additional documentary evidence.

In a reply dated December 16, 2013, the district objects to the parents' request to submit additional documentary evidence for consideration by an SRO.

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, 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

As noted above, the parents request that an SRO consider additional documentary evidence annexed to their answer. Specifically, they request that consideration of (1) an IHO Decision dated August 5, 2013 (August 5 Decision) which relates to the 2012-13 school year; (2) handwritten notes; (3) a "partial transcript" of testimony given by the student's father in the impartial hearing relating to the 2012-13 school year; and (4) two letters, dated November 14 and November 25, 2013) from the New York State Education Department's Office of Special Education (NYSED letters) relating to the "disposition" of complaints that were filed by counsel for the parents against two IHOs involved in this matter (Answer Exs. A-E). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

As an initial matter, consideration of the August 5 decision, the handwritten notes, and the "partial transcript" is not warranted. While these documents were not available to the parents at the time of the original hearings before the first IHO in this matter, it appears that they were available prior to the September 11, 2013 hearing date. In any event, the record reflects that only one of these documents (the August 5 decision) was offered into evidence by the parents, and the IHO determined that this document was irrelevant and declined to admit it into the record (Tr. pp. 524-527). Further, and with respect to this decision by the IHO, the parents affirmatively assert in their answer that they are not cross-appealing it (Answer at p. 4). These factors alone, therefore, make consideration of these documents improper at this juncture.

Further, all three of these documents relate to the IEP developed for the student for the 2012-13 school year and, thus, have no probative value regarding the February 2011 IEP which is currently before me. In this regard, while I recognize that the parents wish to use these documents to show that the student would not have been appropriately grouped in the public school during the 2011-12 school year,[8] the appropriateness of a particular grouping (as explained below) requires an assessment, not of students' disability classifications or diagnoses, but of their functional levels. To that extent, these documents indicate that the student was assigned to a different public school site for the 2012-13 school year than the one to which she was assigned for the 2011-12 school year. Further, and more importantly, the documents do not contain any

[8] The parents argue that the district should be "estopped" from arguing that school 2 was appropriate because in the 2012-13 school year, the district place the student at "another school with a classroom with all autistic children" and "that school refused to seat [the student] because she was not autistic" (Answer ¶ XXVII).

information regarding the functional levels of the students who would have been in the student's 2012-13 class, and thus do not allow for a comparison of these two different schools. Accordingly, even if the student's 2012-13 public school site assignment was inappropriate, this would have no relevance to the question of whether school 2 (and the class that the student would have attended there) was appropriate for the student in the 2011-12 school year. Consideration of these documents, therefore, is not necessary to render a decision in this matter.

Likewise, I decline to accept the NYSED letters as additional evidence. Again, this matter pertains to the 2011-12 school year, and the issues that are currently before me relate to whether the student was offered a FAPE in that school year. The NYSED letters—which do not involve the IHO whose decision is under review here—have no bearing on any of these issues. Accordingly, consideration of these letters is, likewise, not necessary to render a decision in this matter.

2. Scope of Review

Initially, the IHO made a number of findings that were adverse to the parents. Specifically, the IHO (1) rejected the parents' contention that the 2011-12 "proposed program and placement" was inappropriate because the CSE met in February 2011, (2) found that the February 2011 IEP was not "impermissibly predetermined" by the CSE, and (3) that the goals in the February 2011 IEP were "sufficiently comprehensive." The parents do not cross-appeal from these findings or otherwise address any of these issues in their answer. Therefore, these issues are not properly before me, and the IHO's determination on these issues is final and binding on the parties (34 CFR 300.514 [d]; 8 NYCRR 200.5 [j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Furthermore, a review of the IHO's decision also reveals that the IHO did not address a number of allegations raised by the parents in their due process complaint notice, including claims that the CSE was not properly composed, that the goals in the February 2011 IEP were not measurable, allegations with respect to the program offered in the February 2011 IEP (including the claim that the student-to-teacher ratio offered was "inappropriate" for the student), a claim that the student was not placed in the "least restrictive environment," and additional claims regarding the sufficiency of school 2.[9] However, other than an indefinite assertion in their answer that they "did not waive any issues at hearing and do not waive any issues on appeal," the parents do not identify or address any of these issues in their answer, nor do they make any legal or factual assertions as to how these issues would rise to the level of a denial of a FAPE. Further, the record is replete with examples that undermine the parent's assertion including statements made at the impartial hearing by counsel for the parents that the parents had "no objection in terms of [the] general education teacher" member of the CSE (Tr. pp. 17-18) and that "the ratio of 6-1-1 with a para wasn't the problem with this child" (Tr. p. 555), and another assertion that "[LRE] was not an issue in this case" (Answer ¶ XIII). As such, the parents' assertion that they did not and do not waive any issues, standing alone, is insufficient to resurrect any issues not addressed by the IHO

[9] The parents' due process complaint notice also raises a number issues relating to school #1. However, these issues are irrelevant since this was not the school "defended" by the district, and the parties appear to have agreed to address the objections to school 2 listed in the parents' October 17, 2011 letter (Parent Ex. S at p. 2; see Tr. pp. 18-21).

for a determination in this appeal. Under these circumstances, it is not this SRO's role to research and construct the parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752-53, 2009 WL 3634098 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). This is especially true where, as here, the parents twice chose not to mention these issues in summaries (both oral and written) to two separate IHOs (see Tr. pp. 554-556; IHO Ex. III at p. 7).[10] Accordingly, the only issues properly addressed on appeal are those that were considered by the IHO, found to have resulted in a denial of a FAPE, and were appealed by the district.

B. Notice of Assigned School (FNR)

As noted above, the IHO found that the student was denied a FAPE for the 2011-12 school year, in part, because the "relevant" FNR in this matter was "defective" because it did not set forth an address for the public school site to which the student was assigned (IHO Decision at pp. 6-7). In this regard, the IHO made a number of findings, including that (1) the operative assignment in this matter was school 2, that (2) the "relevant" FNR in this matter was the June 15 FNR submitted by the parents as Exhibit R (id. at p. 7), and that (3) the district was required to identify the proposed placement, and that by not including an address in the FNR, the district "did not timely notify the parent of the CSE's proposed placement" (id. at 8).

As an initial matter, the hearing record supports the IHO's determination that school 2 is the operative school assignment in this matter. The record contains three FNRs which,

[10] I note that the parents state that the district "failed to ensure that federal and state mandated procedural requirements guaranteeing parental participation and due process were used or provided," and that this denied the student a FAPE (Answer ¶ II). However, it is not clear from this statement how the parents' are claiming that their right of "parental participation" was denied. To the extent that this assertion can be read as a response to the IHO's finding that the February 2011 IEP was not predetermined, I find that the IHO's determination on this issue is well supported by the record. Specifically, the hearing record indicates that the student's mother, a representative from the Rebecca School, and an advocate for the student all attended and participated at the February 2011 CSE meeting (see, e.g., Tr. pp. 27-28, 34-37; Dist. Ex. 2; Parent Ex. B at p. 2). In addition, the IEP reflects that the CSE discussed that the student's specific constellation of needs continued to require 12-month educational services and as such rejected any programs that did not provide for an extended school year (see Dist. Ex. 2; Parent Ex. B at p. 14). The IEP also reflects that 12-month 12:1+1 and 8:1+1 special classes were considered but rejected because the student-to-teacher ratios would not meet the student's needs (Parent Ex. B at p. 14). In addition, the record further reflects that the CSE initially suggested a 12:1+4 special class, but that a small class size was requested by the parent, and that a 6:1+1 class was ultimately agreed to as a result of this request (Tr. pp. 35-37; see Dist. Ex. 2; Parent Ex. B at p. 14). The hearing record also reflects that the CSE discussed but rejected a 6:1+1 program without a 1:1 health paraprofessional and determined that the student's needs warranted individual support throughout the school day in order to ensure her safety to address her significant health concerns, including feeding, ambulation, and toileting (Tr. pp. 46-48; 75-76; 79-80; Dist. Ex. 2; Parent Ex. B at pp. 5, 14). The hearing record reflects that there were no objections to the 1:1 paraprofessional recommendation (Tr. p. 80).

collectively, make two different school assignments for the student (Parent Ex. R; Parent Ex. AA; Dist. Ex. 3). As between these assignments, the IHO found that the operative assignment was school 2 because (1) that was the "placement" that the district defended, and (2) the June 9 FNR (Parent Ex. AA) predated the offers for school 2 and "should be viewed as having been superseded" (IHO Decision at pp. 6-7). Such findings are supported by the record inasmuch as the district clearly indicated (without objection from the parents) its position that the June 9 FNR was superseded by a subsequent FNR, and that school 2 was the operative recommendation (Tr. pp. 18-19). In addition, the parents assert that, among other things, they "do not contend that [school 1] was the placement or that the [district] cannot submit a second timely notice to the parent" (Answer ¶ XII). Accordingly, there appears to be no dispute that school 2 is the operative school assignment, and there is no reason to disturb the IHO's finding on this issue.

The hearing record also supports the IHO's determination that the FNR submitted by the parents in this matter (Parent Ex. R) was the correct FNR to review. The hearing record contains two FNRs that assign the student to school 2, including one that included an address for the relevant school assignment (Dist. Ex. 3) and one that did not (Parent Ex. R). As between these two FNRs, the IHO found that the FNR submitted by the parents was the "relevant" FNR and rejected the district's contentions otherwise (IHO Decision at p. 7). In reaching this conclusion, the IHO found credible the testimony of the student's mother that she received the FNR that she submitted into the record and did not receive the FNR submitted by the district (id.). In addition, the IHO found that the student's mother's testimony was uncontroverted, and that the district did not offer any testimony to show that its FNR was ever mailed (id.). The district does not appeal any of these findings. Accordingly, the IHO's decision on this issue is supported by the record and there is no reason to disturb it (see, e.g., Tr. pp. 485-486).

However, while it is uncontroverted that the FNR submitted by the parents in this matter (Parent Ex. R) did not contain a school address, the IHO erred in finding that this alone amounted to—or resulted in—a denial of a FAPE. To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement … for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). There is no requirement in the IDEA

that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92 [district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

Here, the hearing record reflects that the district developed an IEP for the student for the 2011-12 school year, that the parents received a copy of this IEP, and that an FNR offering a public school placement at school 2 was sent to the parents prior to the beginning of the 2011-12 school year (Parent Exs. B; R; see Tr. p. 495). Thus, while the FNR received by the parent did not provide an address for the school to which the student was assigned, this evidence alone does not amount to a substantive denial of a FAPE. This is especially true since there is nothing in the IDEA, State law, or the regulations implementing these statutes that requires a district to formally provide parents with a notice with the school address in a specified format in order to either offer the student a FAPE or to implement a student's IEP. Moreover, I note that unlike an IEP which is an entitlement created by the IDEA, an FNR is simply one mechanism by which the this district notifies parents of the school to which their child has been assigned and at which his or her IEP will be implemented.[11]

Further, and assuming that the failure of the district to provide a school address in an FNR could be considered a violation under IDEA, I would be unable to find that such violation, in this case, would justify an award of tuition reimbursement. While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d at 419-20). Accordingly, any failure on the part of the district to include an address in its FNR could not have significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the student (see T.Y., 584 F.3d at 419-20; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11-*12 [S.D.N.Y. Nov. 9, 2011] [finding that even if the FNR was untimely, it did not interfere with the provision of a FAPE to the student because the district was not obligated to afford the parents an opportunity to visit the assigned school]; A.S. v. New York City Dep't of Educ., No. 10–cv–00009, slip op. at 18–19 [E.D.N.Y. May 25, 2011] [holding that "the parents' right to participate in the development of their child's IEP does not extend to the [district]'s decision regarding the particular school site that their child would attend"]; see also Luo, 2013 WL 1182232, at *5 [noting that a parent "does not have

[11]I note that in their answer, and in support of their claim the district was required to put an address in its FNR, the parents cite to D.C. v. New York City Dep't of Educ., 2013 WL 1234864 (S.D.N.Y. March 26, 2013), which held that "a parent must have sufficient information about [a] proposed placement school's ability to implement [an] IEP to make an informed decision as to the school's adequacy" (id. at *13). However, and while as noted below this holding has been called into question by the Section Circuit (see P.K. v New York City Dep't of Educ., 526 Fed. App'x 135, 140-41, 2013 WL 2158587 [2d Cir. May 21, 2013]; K.L., 530 Fed. App'x 81, 87), D.C. did not hold that an FNR is itself a requirement under the IDEA, or that the failure of a district to provide a parent with an address of a proposed school assignment, without more, amounts to a substantive denial of a FAPE (see D.C., 2013 WL 1234864 at *13).

a procedural right in the specific locational placement of his child, as opposed to the educational placement"]; J.L., 2013 WL 625064, at *10 [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement'," not to selection of a particular school building]; K.L.., 2012 WL 4017822 at *16; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at *5 [S.D.N.Y. Feb. 15, 2011]).

Further, the hearing record does not support the conclusion that the district's failure to include an address in the FNR had any bearing on the parent's decision to reject the February 2011 IEP and/or to unilaterally place the student at the Rebecca School for the 2011-12 school year. Rather, the record reflects that the parents, who claim to have initially believed that the FNR was an error, eventually visited school 2 and rejected it due to concerns with the site itself (Parent Ex. S at p. 2). Accordingly, even if the FNR at issue had contained an address, there would be no basis to conclude that the parents' actions or decision regarding the student's unilateral placement would have been any different. As such, the district's failure to provide an address for the assigned school in the FNR did not, by itself, prejudice the parents or cause a deprivation of educational benefit to the student.

Finally, to the extent that IHO found that school district was required to provide prior written notice as a result of the change it made to the student's assigned school, she was incorrect. Prior written notice is required any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503; 8 NYCRR 200.5[a]). In this regard, the Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; A.L., 812 F. Supp. 2d at 504; K.L.A., 2010 WL 1193082, at *2; Concerned Parents, 629 F.2d at 756). Thus, a change from one school building to another, without more, is not a "change in educational placement" that triggers the district's obligation to provide the parents with prior written notice (see Concerned Parents, 629 F.2d at 753-54; see also Veazey, 121 Fed. App'x at 553; Weil v. Bd. of Elementary and Secondary Educ., 931 F.2d 1069 [5th Cir. 1991]).

C. Assigned School

In addition to finding that the FNR sent to the parents was defective and constituted a denial of a FAPE, the IHO also found that school 2 was inappropriate to meet the student's needs and "constituted a substantive deprivation of FAPE" (IHO Decision at p. 8). Specifically, the IHO found that (1) the class described at the impartial hearing would not have provided the student with an appropriate peer group; and that (2) ABA was not an appropriate instructional methodology to use with the student and that the student's social/emotional needs precluded her placement in a classroom in which the students used PECS and other augmentative communication devices (id. at p. 9).

As an initial matter, 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., 2012 WL 4891748, at *14-*16; 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 [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., 2013 WL 1234864, at *11-*16 [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., 910 F.Supp.2d at 677-78 [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dep't of Educ., 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 at 87, quoting R.E., 694 F.3d at 187 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [holding that "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"]). 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. August 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Dep't of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [rejecting challenges to placement in a specific classroom]).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the February 2011 IEP at school 2 because a retrospective analysis of how the district would have executed the student's February 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 186; C.L.K., 2013 WL 6818376, at *13; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the February 2011 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, as such, there is no basis for concluding that it failed to do so. Accordingly, the IHO's findings relating to the appropriateness of the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

In addition, even if a retrospective assessment of how the district would have implemented the student's February 2011 IEP were proper, for the reasons discussed below the IHO's findings with respect to the student's assigned school placement were incorrect and must be reversed.

1. Functional Grouping

The parents argue (and the IHO agreed) that the class in school 2 identified at the impartial hearing by the district as the one in which the February 2012 IEP would have been implemented had the student attended the assigned public school site (the proposed class) was not appropriate for their daughter essentially because all of the students in the proposed class had received diagnoses of autism and their daughter had not (Tr. pp. 99, 142). In particular, the parents contend that the student's ability to initiate social interaction set her apart from students who are on the autism spectrum. However, the issue is not whether the student would have been grouped with students with a similar classification. Rather, state regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1 [ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of

physical development; and the management needs of the students in the classroom (8 NYCRR 200.6 [h][2]; see 8 NYCRR 200.1 [ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6 [a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]).

Here, the hearing record reflects that the student presents with needs across the developmental spectrum. However, the hearing record shows that despite not having received a diagnosis of autism, within this constellation of needs, the student shared similar needs to those typical of students with autism. Testimony by the director of the Rebecca School indicated that, similar to students with autism, the student presented with neurodevelopmental delays in relating and communicating, in addition to other complications in her development including gross and fine motor delays, learning difficulties, and sensory processing difficulties (Tr. pp. 234, 251; see Tr. pp. 38-39, 42-43, 46-47; Parent Exs. B at pp. 3-5; E at pp. 1-9). Her testimony also indicated that, like the student in the instant case, students with autism sometimes exhibit delays in sensory processing, academics, socialization, and attention and in regulation (Tr. p. 252). While the director testified that the student was "very social," she further testified that "the way that [the student] interacts or her ability to interact comprehensively is impaired, which could be similar to a child on the autis[m] spectrum" (Tr. p. 235). While the director testified that the student's ability to initiate social interactions was not typical of a student with autism, she acknowledged that "there is a range in a spectrum, so there are children who do have some social skills" (id.).

In addition, testimony by the director of Camp Mishkon also indicated that the student exhibited tendencies typical of students with autism, including deficits in focusing, attending to tasks, and awareness of her surroundings (Tr. p. 209). Consistent with this, testimony by the student's summer camp teacher indicated that much of the student's autistic tendencies were related to "social aspects" of her development, including that she was "very much in her own world" and needed constant redirection and refocusing to class activities (Tr. p. 403). Additionally, testimony by the district representative indicated that, although at the time of the February 2011 CSE meeting the student had not been formally diagnosed as a student with autism, she functioned in a similar manner with regard to communication and social abilities (Tr. p. 39). She stated that at the time of the CSE meeting, the student tended not to initiate with peers or interact much with peers but preferred adults (Tr. p. 39; see Parent Exs. B at p. 4; E at p. 2). Accordingly, the hearing record does not support a conclusion that the student's ability with regard to social interaction excluded her from being appropriately grouped with students with autism.

In addition, it is important to note that not all individuals who are diagnosed and/or classified with autism are the same. As noted by witnesses for both the parents and the district, individuals with autism fall on a "spectrum" and their disabilities present in differing manners (Tr. pp. 144; 235). To that extent, I note that testimony by the teacher of the proposed class indicated that she would pair together students for classroom activities as well as play time based on the degree to which the students related, in order to enhance their skills and so that they would be able to work in harmony with a person to whom they were close (Tr. p. 106). I also note that the teacher of this class testified that her class contained both verbal and nonverbal students, and the record demonstrates that two of the five students in the class at the time of the hearing in this matter were

verbal, while the student in the instant case fell in between, demonstrating "emerging verbal" skills (Tr. p. 103; Parent Ex. B at p. 3). In this regard, testimony by the student's speech-language pathologist reflected that in September 2011 the student was using mainly one to two-word utterances as well as nonverbal communications such as gestures and nodding to communicate her intent (Tr. pp. 371-73, 378). Thus, to say that the student would not have been grouped with children of similar social abilities would, at best, be pure speculation.

Moreover, and with regard to age and academic levels, the teacher of the proposed class testified that, like the student in the instant case, the students in her class ranged in age from five to six years and that they functioned from a preschool to kindergarten level with respect to reading and math (Tr. p. 100; see Parent Ex. B at p. 1). The IEP reflects that the student's functional levels in reading and math were at the pre-kindergarten level, and as such were within the range of functioning of the proposed class (Tr. p. 100; Parent Ex. B at p. 3). Testimony by the teacher in the proposed class also indicated that the students in her class demonstrated language and cognitive delays which she noted were also reflected in the student's IEP (Tr. pp. 111-112; Parent Ex. B at p. 3). Additionally, the teacher testified that at the start of the 2011-12 school year in July 2011, similar to the student in the instant case, all of the students in her class received related services including OT, PT, and speech-language therapy (Tr. p. 109). The teacher also testified that, overall, after having reviewed the student's IEP—which included a review of the student's needs and abilities—the student would have received an educational benefit from being in her class (Tr. pp. 138-139).

Based on the above, the hearing record does not support a finding that the student would have been inappropriately grouped had she attended school 2. The IHO's determination in this regard, therefore, must be reversed.

2. Methodology

Finally, and as noted above, the IHO found that the use of instruction employing an ABA-style methodology with the student was inappropriate, and that it was not appropriate for her to be in a classroom in which the students used PECS or other augmentative communication devices. However, neither of these findings supports an award of tuition reimbursement in this matter.

a. ABA

The parent asserts (and the IHO agreed) that the use of ABA in the proposed class was inappropriate for a student who, like their daughter, has not been diagnosed with autism. However, although the teacher in the proposed class testified that she utilized ABA and discrete trial methodology in her class during summer 2011, and she further testified that had the student attended her class, she would have provided instruction to the student using ABA, she also testified that the methodologies that she used for students differed because students learn in different ways (Tr. p. 144). In fact, the teacher testified that students present with varied ability levels and needs, and that methodology is "not a kind of one hat fits all" determination (Tr. pp. 144-45). Notably, the teacher also testified that teachers "have to assess the kids" and that they "have to know where they are coming from" with regard to determining what methodology to use (Tr. p. 146).

Furthermore, there is nothing in the hearing record that indicates that instruction using ABA methods would have been the only methodology utilized in the proposed class with the

student. The teacher in the proposed class testified that she worked individually with each student using ABA for one 25-minute class period each day (Tr. pp. 105, 147). I note also that the teacher in the proposed class testified that she also used the Structured Method in Language Education (SMILE) methodology to teach reading (Tr. p. 145).

Finally, despite testimony from the director of the Rebecca School that ABA is not appropriate for students who are not on the autism spectrum because the methodology was developed for children diagnosed on the spectrum,[12] based on the description of the student in the hearing record as discussed above, there is nothing to suggest that the student would not receive any educational benefit from ABA, or any other methodology developed for use with students with autism. Accordingly, the hearing record does not indicate that the use of ABA with this student would have resulted in a denial of a FAPE.

b. PECS

Finally, I disagree with the IHO's determination that it would be inappropriate for the student to be in a classroom where the PECS system or other augmentative communication devise was used. In this regard, although testimony by the student's speech-language pathologist at the Rebecca School indicated that, as of the time of her testimony, the student had expanded her vocabulary expressively and receptively since she had started at Rebecca School and was too advanced to be using PECS, she also testified that in September 2011 the student was using mainly one to two-word utterances as well as nonverbal communications such as gestures and nodding to communicate her intent (Tr. pp. 371-73, 378). Consistent with this, the hearing record reflects that at the time of the February 2011 CSE meeting, and based on information available to the CSE, the student's expressive communication consisted of using a combination of gestures, facial expressions, and one to two word utterances or vocal approximations (Tr. pp. 38, 56, 371-73; Parent Exs. B at p. 3; E at p. 2). In addition, both the December 2010 Rebecca School report and the February 2011 IEP reflected that the student had deficits in her articulation skills and that at times, her speech was not intelligible (Parent Exs. B at pp. 3-4, 11; E at pp. 2, 8-9). The December 2010 Rebecca School report reflected that the student was intelligible at the single word level in known contexts (Parent Ex. E at p. 8). Furthermore, the IEP reflects additional information from the December 2010 Rebecca School report indicating that at times when the student was unable to be understood, she became dysregulated, cried and dropped to the floor (Parent Ex. B at p. 4; Parent Ex. E at p. 1). In light of such evidence, the hearing record does not support a finding that the use of the PECS to increase the student's ability to express herself and to be understood would have been inappropriate. I also note that the use of PECS would not preclude the student's use of oral language and that the two can be used in conjunction.

VII. Conclusion

In summary, the IHO's conclusion that the district failed to offer the student a FAPE for the 2011-12 school year is not supported by the hearing record. It is therefore unnecessary to reach the other issues raised in this matter, including whether the parents' unilateral placement was appropriate for the student, or whether equitable considerations support the parents' requests for

[12] The basis for the director's opinion that ABA cannot be used with students unless they have a diagnosis of autism is unclear.

relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 23, 2013, is modified by reversing those portions which found that district failed to offer the student a FAPE for the 2011-12 school year and directed the district to pay for the costs of the student's tuition at Camp Mishkon and the Rebecca School.

Dated: **Albany, New York**
December 31, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER