The University of the State of New York

The State Education Department
State Review Officer
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No. 13-229

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, Francesca J. Perkins, Esq., of counsel

Law Offices of George Zelma, attorneys for respondent, George Zelma, 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 assigned public school site for respondent's (the parent's) son and ordered it to reimburse the parent and directly pay the Aaron School for the remaining costs of the student's tuition for the 2012-13 school year. The parent cross-appeals from the IHO's decision which found that the district offered the student an appropriate educational program. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On March 19, 2012 the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (11th grade) (see Dist. Exs. 3 at pp. 1, 8-9; 4 at pp. 1-2).[1] Finding that the student remained eligible for special education and related services as a student with a learning disability, the March 2012 CSE recommended a 15:1 special class

[1] At the time of the March 2012 CSE meeting, the student was attending the Aaron School (compare Tr. p. 248, with Dist. Ex. 3 at pp. 1, 8-9). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

placement in a community school for mathematics, English language arts (ELA), science, and social studies (see Dist. Ex. 3 at pp. 1, 5-6). In addition, the March 2012 CSE recommended the following as related services: one 45-minute session per week of individual speech-language therapy, two 45-minute sessions per week of speech-language therapy in a small group, one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a small group (id. at pp. 5-6). The March 2012 CSE also recommended strategies to address the student's management needs, as well as testing accommodations of extended time, separate location, use of a calculator, breaks, and revised test directions and format (id. at pp. 2, 7).

On May 18, 2012, the parent executed an enrollment contract with the Aaron School for the student's attendance during the 2012-13 school year (see Parent Ex. L at pp. 1-2).

In a final notice of recommendation (FNR) dated August 8, 2012, the district summarized the special education and related services recommended in the March 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 9). In a second FNR dated August 15, 2012, the district revised portions of the August 8, 2012 FNR, but retained the same information regarding the student's assigned public school site for the 2012-13 school year (compare Dist. Ex. 10, with Dist. Ex. 9).

By letter dated August 24, 2012, the parent indicated that she received the student's March 2012 IEP and FNR, dated August 8, 2012, on August 11, 2012 (see Parent Ex. G at p. 1). The parent noted that she had placed several telephone calls to the assigned public school site, and when she finally connected with "Admissions" on August 23, 2012, she learned that she could not visit until the assigned public school site reopened on September 6, 2012 (id.). However, having visited the same assigned public school site in the past, the parent indicated that it would not be appropriate for the student given his "social, emotional and educational needs" because it housed "nearly 2,500 students" and such a "large setting" was not appropriate (id.). The parent further indicated that she would make "every effort" to visit the assigned public school (id.). In addition, the parent advised the district that the recommended 15:1 special class placement in a community school with related services of speech-language therapy and counseling was not appropriate, and the student required a "small, self-contained, language-based class in a non-public special education school" (id.). Consequently, the parent notified the district of her intentions to continue the student's placement at the Aaron School for the 2012-13 school year, from September 2012 through June 2013, and to seek funding for the student's tuition and transportation costs (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated May 29, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. A at pp. 1-6). Specifically, the parent asserted that the March 2012 IEP failed to consider the student's severe emotional and educational needs in recommending a program and placement; the March 2012 CSE failed to conduct a classroom observation of the student; the 15:1 special class placement was not appropriate to meet his educational, social, and emotional needs; the March 2012 CSE meeting and March 2012 IEP were both procedurally and substantively flawed; the parent did not receive the March 2012 IEP until August 2012, and the parent could not visit the assigned public school site until September 2012 because it was closed in August (id. pp. 3-4). The parent further indicated that the student required a "small, self-contained, language-based class in a non-public

special education school" in order for the student to receive educational benefits (id. at p. 5). As such, the parent averred that the Aaron School was an appropriate placement for the student, and as relief, she requested payment of the costs of the student's tuition at the Aaron School for the 2012-13 school year, as well as payment of the student's transportation costs and related services' costs (id. at pp. 5-7).

B. Impartial Hearing Officer Decision

On July 26, 2013, the parties proceeded to an impartial hearing, which concluded on August 23, 2013 after three days of proceedings (see Tr. pp. 1-405). In a decision dated November 6, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, the Aaron School was an appropriate unilateral placement for the student, and equitable considerations weighed in favor of the parent's request for payment of the student's tuition costs at the Aaron School (see IHO Decision at pp. 11-15).

Initially, the IHO determined that the March 2012 CSE and IEP, overall, recommended an appropriate program for the student for the 2012-13 school year, and furthermore, that the March 2013 CSE was properly composed and had reviewed sufficient and appropriate evaluative information to determine the student's needs (see IHO Decision at pp. 9-10). More specifically, the IHO found that the recommended 15:1 special class placement was appropriate, and the March 2012 IEP accurately reflected the student's present levels of educational performance and needs based upon a psychoeducational evaluation report and information provided by an Aaron School report, the student's Aaron School teacher, the parent, and the student, who attended the meeting (id. at p. 10). The IHO also found that the March 2012 IEP recommended testing strategies and accommodations to assist the student with his "retention and distraction difficulties," the March 2012 IEP included annual goals to address the student's identified "academic and social[-]emotional needs" (id.). In addition, the IHO found that the March 2012 IEP included recommendations for the student to receive speech-language therapy and counseling services to support his academic and social-emotional needs (id.). Finally, the IHO found that the March 2012 IEP also contained postsecondary goals and offered transition activities to allow the student to move from high school to college and a working environment (id.). Consequently, the IHO concluded that the March 2012 IEP provided an "accurate picture" of the student's needs and deficits and "devised an appropriate program" to address his needs (id.).

However, to support the conclusion that the district failed to offer the student a FAPE, the IHO found that the district failed to offer testimonial evidence regarding the assigned public school site, and failed to present evidence that the assigned public school site had had a seat available for the student for the 2012-13 school year or that it could implement the March 2012 IEP (see IHO Decision at p. 10). Moreover, the IHO noted that regardless of whether the parent's due process complaint notice included a request to find that the assigned public school site was not appropriate, the district retained the burden to establish that it offered the student a FAPE, which included establishing that the assigned public school site had a seat available and could implement the student's IEP (id. at p. 11). As a result, the IHO determined that the district failed to present sufficient evidence to establish that it offered the student a FAPE for the 2012-13 school year (id.).

In determining the appropriateness of the unilateral placement, the IHO found that the Aaron School provided the student with education instruction specially designed to meet his unique needs (see IHO Decision at pp. 11-15). Notably, the IHO determined that the Aaron School

provided instruction to students with social/emotional disorders and learning disabilities that followed the State curriculum standards through instructors who either possessed or were working toward a Master's degree (id. at p. 13). The Aaron School offered group lunches and took field trips into the community (id.). The Aaron School also conducted formal and informal assessments of the students, provided transition seminars to prepare students for college, staffed classes with two teachers, and provided integrated related services of speech-language therapy, counseling, and occupational therapy (id.). In addition, staff at the Aaron School were aware of the student's academic and social/emotional difficulties, and designed instruction to address his specific needs (id. at pp. 13-14). For example, the student's English teacher developed a binder system to keep the student organized; a speech-language pathologist worked with the student to address his focusing difficulties; the student received adapted reading material and had access to homework online; and the student received was either provided with class notes or used a template to fill in class notes (id.). According to the IHO, the student also benefitted from the individualized attention he received in all of his class at the Aaron School (id. at p. 14). The IHO also noted, however, that although the student continued to receive "failing grades," he "participated in class, benefited from the multiple ways the material was presented to him and made gains in his classes" (id.).

With regard to equitable considerations, the IHO concluded that the parent attended the CSE meeting, she had previously requested an evaluation of the student to assist in the development of the student's IEP creation process, and she notified the district prior to the start of the school year of her intention to continue the student's enrollment the student at Aaron School for the 2012-13 school year (see IHO Decision at p. 15). Therefore, the IHO ordered the district to reimburse the parent for the monies expended upon proof of payment, and further ordered the district to pay the Aaron School for the remaining costs of the student's tuition (id. at pp. 15-16).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in concluding that the district failed to offer the student a FAPE. The district argues that the IHO exceeded her jurisdiction by addressing issues regarding the assigned public school site, which the parent did not raise in the due process complaint notice. In addition, the district contends that issues regarding its ability to implement the student's March 2012 IEP were speculative and thus, the district had no obligation to present evidence on these issues. Next, the district alleges that the IHO also erred in finding that the Aaron School was an appropriate unilateral placement because the student was not making progress and did not receive all of his mandated related services. Finally, the district asserts that the IHO erred in finding that equitable considerations weighed in favor of the parent's requested relief because the parent had no intention of sending the student to a public school, and in addition, the parent did not demonstrate that she was legally obligated to pay tuition to the Aaron School.

In an answer, the parent responds to the district's allegations and asserts that the due process complaint notice provided sufficient notice of issues for the impartial hearing, including that the assigned public school site was not appropriate. Generally, the parent argues to uphold the IHO's findings that the district failed to offer the student a FAPE, the Aaron School was appropriate, and equitable considerations weighed in favor of the parent's requested relief. The parent also alleges in the answer that the district failed to conduct a classroom observation of the student, the present levels of performance in the March 2012 IEP did not accurately reflect the student's needs and deficits, and the annual goals were formulated and written to be implemented at the Aaron School.

As a cross-appeal, the parent argues that the IHO erred in finding that the 15:1 special class placement was appropriate, and the IHO erred in finding that the 15:1 special class placement was appropriate because the March 2012 IEP accurately reflected the student's present levels of performance and accurately described the student's needs. In addition, the parent argues that the IHO erred in finding that the 15:1 special class placement was appropriate based upon a properly composed CSE, rather than the appropriate legal standard. The parent also alleges that March 2012 CSE did not consider more restrictive placements for the student, such as a nonpublic school. As such, the parent seeks to reverse the IHO's determination that the 15:1 special class placement was appropriate to meet the student's needs.

In an answer to the parent's cross-appeal, the district asserts that the IHO correctly determined that the 15:1 special class placement was appropriate.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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. March 2012 CSE Process

1. Sufficiency of Evaluative Information and Present Levels of Performance

The parent argues that the March 2012 CSE failed to conduct a classroom observation of the student prior to developing the March 2012 IEP. The district contends that the March 2012 CSE had sufficient evaluative information and did not need to conduct a classroom observation because the student, the parent, and the student's then-current teacher from the Aaron School actively participated in the development of the student's March 2012 IEP. A review of the hearing record reveals does not support the parent's contention, and therefore, the IHO's finding will not be disturbed.

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

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

Based upon a review of the hearing record and given that the March 2012 CSE conducted an annual review, rather than an initial evaluation or a reevaluation of the student in this case, the March 2012 CSE was not automatically obligated to perform a classroom observation of the student by operation of law and, as further described below, the CSE otherwise had sufficient evaluative information available to develop the student's March 2012 IEP. Thus, the absence of a classroom observation did not result in a failure to offer the student a FAPE for the 2012-13 school year.[2]

In developing the March 2012 IEP at the CSE annual review meeting, the hearing record demonstrates that the March 2012 CSE relied upon a 2011 psychoeducational evaluation report conducted by a district school psychologist, a 2011-12 Aaron School high school report card narrative (2011-12 Aaron School report), as well as input from the student, the parent, and the student's then-current English teacher at the Aaron School (Aaron School teacher) (see Tr. pp. 33-37, 146-47; Dist. Exs. 3 at pp. 1-2, 11; 4 at pp. 1-2; 5 at pp. 1-11; 7 at pp. 1-5). The following individuals attended the March 2012 CSE meeting: a district special education teacher, a district school psychologist (who also served as the district representative), an additional parent member, the parent, the student, and the student Aaron School teacher (via telephone) (see Tr. pp. 43-44; Dist. Ex. 3 at p. 11; compare Dist. Ex. 3 at pp. 11, with Dist. Ex. 5 at pp. 1, 11).[3]

As part of the 2011 psychoeducational evaluation, the district school psychologist administered the Stanford-Binet Intelligence Scales, Fifth Edition (SB-5), the Woodcock-Johnson

[2] Although the March 2012 CSE was not required to conduct a classroom observation of the student, in this particular instance, a classroom observation may have provided clarity between the results of 2011 psychoeducational evaluation of the student and the portrayal of the student's special education needs and functional levels as described in the 2011-12 Aaron School report (compare Dist. Ex. 7 at pp. 5, with Dist. Ex. 5 at pp. 1-11).

[3] The Aaron School teacher who attended the March 2012 CSE meeting did not testify at the impartial hearing (compare Tr. pp. 1-405, with Dist. Ex. 3 at p. 11).

III Tests of Achievement (WJ-III ACH), and the "TAT" to the student (see Dist. Ex. 7 at pp. 1-4).[4] The administration of the SB-5 yielded a full scale IQ of 96, which placed the student's overall intelligence within the "[a]verage" range (id. at p. 1).[5] The school psychologist noted that the student's nonverbal IQ (standard score, 90) was significantly lower than his verbal IQ (standard score, 102), which indicated that the student had a relative delay in nonverbal knowledge that was negatively affected by his poor attention to detail (id. at pp. 2, 5). In reviewing the student's academic achievement, the school psychologist noted that as measured by the WJ-III ACH, the student's computational mathematics skills and automaticity with basic mathematics facts fell within the "low to very low range" and the student's performance of calculation tasks at a grade level higher than a 6.5 grade level would be "quite difficult" for the student (id. at p. 3). Additionally, although the school psychologist characterized the student's reading as a strength (assessed at approximately two grades below grade level), she characterized the student's mathematics, spelling, and writing skills as "very deficient" (id. at p. 5). According to the school psychologist, when compared to peers at his grade level the student's academic skills and fluency with academic tasks were both within the "low average range" (id. at p. 4).

Socially, the school psychologist described the student as a "capable cooperative, deeply discouraged adolescent male, who encounter[ed] insurmountable barriers in concentrating on structured academic tasks," and further reported that student appeared to be "irresponsible for his academic progress" and did not make "serious efforts to address the alarming state of his academic dysfunction" (Dist. Ex. 7 at p. 4). The school psychologist also noted that the student demonstrated poor attention to detail and worked at a slow rate, yet still produced poor results (id. at p. 5). According to the school psychologist, the student admittedly missed "'a lot of instruction in the primary grades,'" and due to his difficulties with attention and focusing, the student understood that he could not "'catch up'" (id.). The school psychologist commented that the student produced better results when working one-on-one with an adult, while also noting that the student's discouragement and lack of motivation contributed to his academic difficulties (see id.).

With regard to the student's school performance after the psychoeducational evaluation, the 2011-12 Aaron School report described the student's performance in the first term of 10th grade at the Aaron School (see Dist. Ex. 5 at p. 1). According to the report, the student's classes primarily consisted of 7 students, while he attended one class of 5 students and one class of 11 students (see id. at p. 11). Notably, the report indicated that in English—despite the difficult nature of assigned texts—the student was often motivated to read the stories, make predictions, and identify the ultimate outcome (id. at p. 1). However, the 2011-12 Aaron School report also noted that the student "struggled to complete his homework assignments consistently with sufficient detail," due, in part, to his failure to take notes during class (id.). As a result, the student could not independently generate responses to questions that required extensive detail, or that he was unable to recall from memory (id.). According to the report, the student struggled with organizing

[4] Although not specifically described in the hearing record, the acronym "TAT" appears to refer to the Thematic Apperception Test, which the school psychologist used in this case to assess the student's social/emotional functioning (see Tr. pp. 39-41; Dist. Ex. 7 at p. 4; Application of the Dep't of Educ., Appeal No. 12-210).

[5] The 2011 psychoeducational evaluation report indicated that based upon a 2007 administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), the student's overall cognitive functioning at that time fell within the "lower limits of the [a]verage to [l]ow [a]verage [r]anges" (Dist. Ex. 7 at p. 1). The 2011 psychoeducational evaluation report also noted that the student had been diagnosed as having an attention deficit hyperactivity disorder (ADHD) that had not responded well to various medical treatments (see id.).

information for written assignments (id. at pp. 2-3). However, despite the student's reluctance to complete written assignments, he was highly motivated to complete the final project for the class and took a leadership role with peers in doing so (id. at p. 1). In addition, the report indicated the student was receptive to assistance from teachers, and benefitted from direct instruction in the use of organizers to plan his responses, sentence starters, and typing his assignments (id. at p. 2).

In reading enrichment, the 2011-12 Aaron School report indicated that the student had been introduced to topics and skills—such as "discussion question answering and formation, thematic interpretation, and plot development—that were intended to guide his note-taking skills while reading a chosen book (Dist. Ex. 5 at p. 2). According to the report, the student initially struggled with the note-taking process and required prompts from teachers (id.). However with prompting, the student could produce careful and thoughtful notes that included personal and global connections and thematic references (id.). In integrated mathematics, the 2011-12 Aaron School report indicated that the student could acclimate well to his new environment given his good natured character and ability to engage peers (id.). However, the report also indicated that the student exhibited more difficulty acclimating himself to the curriculum, which focused on money and its relationship to daily life, while engaging in a review of basic operations (id.).

With respect to biology, the 2011-12 Aaron School report indicated that although the student's in-class participation was often off-task or unrelated to the topic at hand, the student devoted his full attention to the task at hand when working one-on-one with a teacher or peer (see Dist. Ex. 5 at p. 3). The report also noted that although the class spent two weeks of direct instruction on targeted study strategies, the student had difficulty independently selecting the best options for him (id.). Over time the student could process his thoughts and attempted several individual and group strategies (id.). According to the report, the student self-advocated and sought additional assistance when required (id.).

Additionally, the 2011-12 Aaron School report indicated that the student demonstrated difficulty with note-taking and homework completion in social studies (see Dist. Ex. 5 at pp. 3-4). The student also struggled with research skills, including identifying appropriate sources of information, as well as identifying key information within the sources (id. at p. 4). The report indicated that the student benefited from breaking down information into smaller chunks for analysis and the use of predetermined questions to focus his research (id.). The language lab/writing workshop and library narratives in the 2011-12 Aaron School report echoed the student's difficulties with developing and organizing his thoughts and with writing tasks (see id. at pp. 5-6). The report also indicated that the student benefitted from attending homework club (id. at p. 4).

In addition to the student's academic classes, the 2011-12 Aaron School report reflected the student's active participation in his "Responsibilities and Choices" class, which focused on "values and commonsense thinking" (Dist. Ex. 5 at p. 5). The report noted that although the student enjoyed thinking of, and sharing solutions to problems, at times his responses were centered on "egregious" or inappropriate solutions to problems and unrelated personal experiences (id.). The 2011-12 Aaron School report also noted that the student began receiving one 45-minute session per week of individual counseling in October 2011 (see Dist. Ex. 5 at p. 7). In sessions, the student expressed concerns about organization as it related to adulthood, and he worked on time management skills (id.).

Turning to the development of the March 2012 IEP, the hearing record indicates that the March 2012 CSE first obtained the Aaron School teacher's presence on the telephone, introduced fellow members, and identified the materials for review (see Tr. pp. 45-46; Dist. Ex. 4 at p. 1). The parent was given a draft copy of the March 2012 IEP, and the March 2012 CSE proceeded to review the student's "last evaluation"—the 2011 psychoeducational evaluation—and asked the parent if she had any questions and provided answers to those questions (Tr. pp. 45-46, 100; see Dist. Exs. 4 at p. 1; 7 at pp. 1-5). The Aaron School teacher then presented information about the student's current academic functioning in reading, mathematics, and writing to the CSE, and then the March 2012 CSE developed the annual goals (see Tr. pp. 45-46; Dist. Ex. 4 at pp. 1-2). The district special education who attended the March 2012 CSE meeting testified that the student's present levels of performance reflected the scores from the student's most recent psychoeducational evaluation report, as well as information from the Aaron School report, the Aaron School teacher, and the student (see Tr. pp. 49-52; Dist. Exs. 3 at pp. 1-2; 4 at p. 1).

A review of the evaluative information available to the March 2012 CSE compared to the information included in the present levels of performance in the March 2012 IEP reflects that the March 2012 CSE accurately memorialized the information presented, as well as accurately memorializing the input by the Aaron School teacher provided at the meeting in the March 2012 IEP (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 5 at pp. 1-7 and Dist. Ex. 7 at pp. 1-4). Notably, the Aaron School teacher indicated that Aaron School personnel had decreased the student's course load and increased the number of study halls and counseling services available to the student to assist him with executive functioning skills, which the March 2012 CSE reflected in the IEP (see Dist. Ex. 3 at p. 1). In addition, the Aaron School teacher reported that the decreased course load allowed the student to complete his coursework, and he did not exhibit attendance issues (id.). According to the March 2012 IEP, both the student and the parent expressed satisfaction with the student's experience at the Aaron School (see id. at pp. 1-2).

With respect to the student's social development, the present levels of performance in the March 2012 IEP adopted the July 2011 psychoeducational evaluation description of the student as "capable, cooperative and deeply discouraged" (compare Dist. Ex 3 at p. 2, with Dist. Ex. 7 at p. 5). In addition, the March 2012 IEP reflected information from the 2011-12 Aaron School report, which indicated that he needed reminders to take the perspective of others and to think about how his peers felt in response to his comments (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 5 at p. 1). However, the March 2012 IEP also reflected the Aaron School teacher's report of positive changes observed in the student since the start of the school year, noting that initially he was "quiet," but he had become the class vice president (see Dist. Ex. 3 at p. 2). The March 2012 IEP also described "self-advocacy" as a strength of the student, and noted that the student had improved his ability to demonstrate his patience and understanding of peers (id.). The March 2012 IEP also reflected the parent's belief that the student made a lot of progress at the Aaron School and was more positive about his future (id.).

Based on the above, the hearing record shows that the March 2012 CSE had sufficient evaluative information upon which to develop the student's March 2012 IEP, and furthermore, that the March 2012 IEP adequately and accurately reflected evaluation results and incorporated information directly from the 2011-12 Aaron School report, as well as the input of CSE participants (see Dist. Ex. 3 at pp. 1-2; compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 5 at pp. 1-7 and Dist. Ex. 7 at pp. 1-5). While I have no quarrel with the idea that an observation conducted by district personnel of a student attending a private school by parent choice would provide yet another source

of information regarding the student, it cannot be said that the such observational information mandated in this instance.[6] Accordingly, the evaluative information relied upon by the March 2012 CSE and the input from the CSE participants during the meeting provided the March 2012 CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

B. March 2012 IEP

1. 15:1 Special Class Placement

The parent contends that the IHO erred in finding that the 15:1 special class placement was appropriate to meet the student's needs. The district rejects the parent's contention. A review of the hearing record supports the parent's argument that the 15:1 special class placement recommended by the March 2012 CSE was not appropriate, and therefore, the IHO's finding must be reversed.

According to State regulation, a 15:1 special class placement is designed for those students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6 [h][4]). Although the hearing record demonstrated that the March 2012 CSE had sufficient evaluative information, and accurately and adequately reflected that information in the present levels of performance in the March 2012 IEP to identify the student's needs, the evaluative information does not support the March 2012 CSE's decision to recommend a 15:1 special class placement. As detailed below, a review of the hearing record weighs against a finding that the 15:1 special class placement was reasonably calculated to enable the student to receive educational benefits, and therefore, the IHO improperly concluded that the 15:1 special class placement was appropriate.

In the present case, to address the student's identified needs in the areas of executive functioning and academics, the March 2012 CSE recommended a 15:1 special class placement for instruction in English language arts (ELA), mathematics, social studies, and science (see Dist. Ex. 3 at p. 5). In addition, to address the student's management needs the March 2012 CSE recommended the following strategies: the use of: graphic organizers for writing, teacher generated organization tools for assignments, the use of sentence starters for writing, the use of a planner for

[6] There are other proceedings in which it appears that the district, for whatever the reasons, has relied very heavily, indeed almost exclusively, on scant evaluative information obtained from a private school without so much as even considering whether such information meets the regulatory requirements and, as a result, it is almost impossible to determine the student's needs as they relate to special education services. The risk to the district is that the private evaluative information presents a picture of the student that is so incomplete that there is procedural noncompliance with under federal and State law, or even worse, that an IEP meeting the Rowley standard cannot be designed. In such cases an observation of the student by a teacher, psychologist or other qualified expert may be a good start to mitigating the risk of both technical non-compliance as well as substantive inadequacy by suggesting to CSE what other evaluative information, if any, may be needed to complete the IEP. However, as noted above, this is not such a case in which the evaluative information before the CSE was insufficient and thereby denied the student a FAPE.

organization, opportunities to read aloud or use a tape recorder to listen, visual and auditory input, supplication of content to real life or areas of interest, visual support and hands-on experience, and direct instruction in the use of tools and supports (id. at p. 2). Based on the student's identified needs, the March 2012 CSE developed annual goals targeting the student's reading, writing, mathematics, language processing, time management and self-advocacy skills (id. at p. 3-5). In addition, the March 2012 CSE recommended individual and group counseling to help improve his time management and self-advocacy skills, as well as speech-language therapy to assist him with language processing (id. at pp. 4-6). Finally, the March 2012 IEP included a coordinated set of transition activities for the student (id. at p. 7).

In describing the student, the district special education teacher who attended the March 2012 CSE meeting testified that according to the Aaron School report and the Aaron School teacher's representations of the student's present levels of performance stated at the CSE meeting, the student had two major difficulties: executive functioning, including poor organizational skills (i.e., writing, organizing his thoughts) and difficulty completing assignments; and poor retention of information he has learned (see Tr. pp. 35-37, 50-51). She also testified that according to the Aaron School teacher, the student's executive functioning—and referring specifically to the student's organizational skills—"really impacted his learning" (Tr. pp. 50-51). In addition, the special education teacher testified that based on her understanding of the 2011 psychoeducational evaluation, the student exhibited cognitive abilities in the average range; however, although the student exhibited academic delays, he had developed basic skills in reading, writing, and mathematics (see Tr. pp. 38-43). According to the special education teacher, the Aaron School teacher provided the March 2012 CSE with the student's instructional functional levels as reported in the IEP for both reading (seventh grade level) and mathematics (seventh grade level) (see Tr. pp. 59-60; Dist. Ex. 3 at p. 9). Generally, the special education teacher characterized the student as a "smart kid" whose academic functioning fell below his cognitive abilities and whose ADHD was a "big piece to impact his learning" (Tr. pp. 91-92; see Tr. pp. 98-100). Based solely upon the 2011 evaluation report, however, the special education teacher did not think the student had a "history of academic delays and disruptions" (Tr. p. 84).

In reaching the decision to recommend a 15:1 special class placement, the district special education teacher testified that the March 2012 CSE discussed integrated co-teaching (ICT) services because the student's cognitive abilities fell solidly within the average range and due to the student's independent learning skills established in reading, mathematics, and writing (see Tr. pp. 62-63). However, the Aaron School teacher was "very specific" about the student requiring "small group instruction," and both the parent and student indicated that the student could not learn in a "large class" (Tr. p. 63). Therefore, the March 2012 CSE recommended a 15:1 special class placement, which the district special education teacher characterized as a "small class" (id.; see Tr. pp. 145-46). The special education teacher testified that in a 15:1 special class placement the student would receive instruction from a special education teacher, who could group students with similar academic functioning, as well as following the general education curriculum (see Tr. p. 64). She also testified that a 15:1 special class used modified textbooks with a "lower readability," but retained the general education curriculum (Tr. pp. 63-64). She further testified that the March 2012 CSE did not consider more restrictive placement options, such as a specialized school because the student would not have access to nondisabled peers (see Tr. pp. 64-65). The parent did not agree with this placement recommendation, and the Aaron School teacher indicated the student's needs required a class smaller than a 15:1 ratio (see Tr. pp. 65-66, 106-07).

The district special education teacher also testified that the student's significant difficulty retaining information could be addressed in a class with 14 other students because the annual goals in the March 2012 IEP noted that "everything was repeated" (Tr. p. 112). She confirmed that the student struggled during the 2011-12 school year at the Aaron School with respect to his ability to complete assignments, to concentrate, to initiate work, and to finish work independently, and noted that although the student made progress, he continued to struggle and his ADHD factored into his continued struggles (see Tr. p. 116; see also Tr. pp. 119-20). When asked about the information the special education teacher relied upon to determine that the student would not be overwhelmed by the size of a 15:1 special class—in comparison to the smaller class sizes he attended at the Aaron School in which he continued to struggle—the special education teacher opined that "class size" was not the most important consideration, rather, it was more important to tailor the instruction within the class in order to meet a student's individual needs (id.; see also Tr. pp. 119-22, 130, 142). She further testified that in a small class, the special education teacher would group students according to their functioning levels, tailor instruction to their individual needs, and implement management strategies in the students' IEPs (see Tr. pp. 117, 121).

In addition, the special education teacher testified that the student's needs could be met in a 15:1 special class, for example, by teaching him to attend to "relevance" when brainstorming and providing him with sentence starters (see Tr. pp. 133-35). She acknowledged the student's discouragement as a manifestation of his frustration level, and reported that she gave "a lot" of weight to the student's opinion about his placement (Tr. p. 136).

The parent testified that she told the March 2012 CSE that she was very happy with the student's current setting at the Aaron School, and she hoped it would continue the following year because he made such progress (see Tr. p. 251). The parent also testified that the Aaron School teacher did not "state exactly" the type of program the student needed, but the Aaron School teacher did state that the student benefitted from attending the Aaron School (id.).

The parent testified that her concern about the recommended 15:1 special class placement was based, in part, on what she described as a series of unsuccessful public school placements (see Tr. pp. 274-79, 301). However, although the district special education teacher who attended the March 2012 CSE testified that she was aware the student had attended public schools in the past, she was not aware of the "types of programs" he had attended, the March 2012 CSE did not review or consider the student's program and placement recommendations in the 2011-12 school year IEP, and she was not aware that in the previous school year the CSE deferred the student's placement to the Central Based Support Team (CBST) (see Tr. pp. 117-19, 124-27). The district special education teacher also testified that information about the size of the student's classes at the Aaron School was an "important factor to consider" in the development of the student's IEP (see Tr. p. 130). She further testified that a 15:1 special class placement was a "small class" (Tr. pp.

As noted above, the hearing record established that during the 2011-12 school year at the Aaron School, the student primarily attended classes composed of seven students, and in some instances, the student's classes were staffed with two adults (see Dist. Ex. 5 at p. 11). In addition, the 2011 Aaron School report indicated that the student received a significant amount of adult support in his classes in the form of prompting, direct instruction of organizational strategies, and one-on-one teacher assistance to complete classroom tasks (see id. at pp. 2-3, 5). Yet, despite the additional adult support and multiple strategies used at the Aaron School, the student continued to struggle with attending, organization, and work completion to the extent that Aaron School staff

modified the student's schedule by decreasing his overall course load and by increasing the number of study halls and counseling services available to the student to assist with the global effects of his executive functioning skills (see Dist. Exs. 3 at p. 1; Dist. Ex. 5 at pp. 1-7). In this case, while the district special education teacher testified that the size of the student's classes at the Aaron School was an important factor to consider in the development of the student's IEP, the hearing record fails to contain sufficient evidence regarding how the student's continued difficulties with executive functioning and organizational skills—addressed with additional adult support and the use of various strategies at the Aaron School—weighed into the decision to recommend a 15:1 special class placement. The hearing record also establishes that although the March 2012 CSE had sufficient evaluative information upon which to develop the student's IEP, it does not appear from the evidence that the March 2012 CSE included in its calculus the nature and scope of the student's deficits with respect to executive functioning and organizational skills, or the global effects upon the student's ability to function within the classroom setting—regardless of the student-to-teacher ratio—in order to create an IEP that met the student's needs. Notably, the hearing record fails to contain evidence that the March 2012 CSE considered any additional supports and services for the student within the 15:1 special class placement, such as additional adult support, special education teacher support services (SETSS), or an individual or shared paraprofessional, despite its awareness of the student's well documented difficulty attending to academic instruction and materials, as well as his difficulty employing learned compensatory strategies. Given the student's difficulties, the hearing record does not support a finding that the March 2012 CSE's recommended 15:1 special class placement, without additional supports and services, was reasonably calculated to enable the student to received educational benefits. To be clear, I do not hold that the evidence clearly shows that a 15:1 special class setting would be a categorically unworkable option on the continuum, but at the very least, to address the reasonably address the student's needs in this instance, I find that the IEP would have required more than just the support of the 15:1 special class setting, the identified related services, and the identified management needs, strategies, and accommodations in order to offer the student a FAPE. Therefore, contrary to the IHO's decision, the hearing record does not support a finding that the district offered the student a FAPE for the 2012-13 school year (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

C. Challenges to the Assigned Public School Site

The district argues that the IHO exceeded her jurisdiction by addressing issues regarding the assigned public school site, which the parent did not raise in the due process complaint notice. Alternatively, the district contends that even if properly raised, the issues regarding its ability to implement the student's March 2012 IEP were speculative and thus, the district had no obligation to present evidence on these issues. The parent asserts that the due process complaint notice provided sufficient notice of issues for the impartial hearing, including that the assigned public school site was not appropriate. Consistent with the district's arguments and for reasons described below, the IHO's findings related to the assigned public school site must be reversed.

With respect to the assigned public school site issues raised and decided sua sponte by the IHO in the decision, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08- 056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice

unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parent's due process complaint notice cannot be reasonably read to include the issues regarding the assigned public school site decided sua sponte by the IHO as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. A at pp. 1-7). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice (see Tr. pp. 1-405; Dist. Exs. 2-24; Parent Exs. A; C; G; I-Q2).

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

issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the assigned public school site was appropriate or could implement the student's March 2012 IEP, and the IHO's findings on these issues must be annulled (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).[7]

I agree with the district's position though that even if the parent had raised issues in the due process complaint notice regarding the assigned public school site, 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., 530 Fed. App'x at 87, 2013 WL 3814669; 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

[7] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6), the district presented no evidence related to the assigned public school site and did not elicit testimony relative to these issues, and therefore, the district did not "open the door" to these issues under the holding of M.H.. (see Tr. pp. 1-405; Dist. Exs. 2-24).

Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 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, 2013 WL 3814669 [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., 2013 WL 5438605, at *17; 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., 2013 WL 4436528, at *9 [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 parent cannot prevail on claims that the district would have failed to implement the March 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x 81, 2013 WL 3814669; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the March 2012 IEP containing the

recommendations of the March 2012 CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. G at pp. 1-3; L at pp. 1-2). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington 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 May 2013 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.

VII. Unilateral Placement

Having found that the district failed to offer the student a FAPE for the 2012-13 school year, a determination must now be made regarding whether the parent's unilateral placement of the student at the Aaron School was appropriate.

A. Applicable Standards

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G.,

459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

1. Program and Related Services at the Aaron School

The district asserts that the Aaron School was not appropriate to meet the student's needs because the student did not receive all of the mandated related services on the March 2012 IEP, such as individual speech-language therapy and counseling.

As a nonpublic, college preparatory school for students from kindergarten through 12th grade, the Aaron School serves students with language, learning, attention and social challenges (see Parent Ex. I at pp. 2-3). The Aaron School provides classes with low student-to-teacher ratios, structured environments, individualized instruction, and multisensory instruction (id.). The Aaron School's integrated services model allows related services' providers, which include school psychologists, social workers, and speech-language pathologists, to collaborate with the instructional team to develop goals and objectives related to the curriculum and provide related services within the classroom (id. at pp. 6-7). The Aaron School assists students with post-secondary transition through course work, internships, and college tours (id. at p. 6). Among other things, students are required to complete 21 academic credits in English, science, mathematics, history, computer science, and foreign language in order to graduate (id. at p. 5). According to

Aaron School staff, classes at the school consist on average of 7 students with one head teacher and one assistant teacher, but may include as many as 11 or 12 students (see Tr. pp. 177-78, 318). In addition, all of the students at the Aaron School are special education students (see Tr. p. 167).

In this case, the student's classes for the 2012-13 school year included English, mathematics, science, history, Spanish, physical education, health, an internship seminar, learning lab, and a "Real World Applications" class (see Dist. Exs. 16 at p. 1; 17 at p. 1). The student also attended an advisory period at the beginning and at the end of the day (id.; see Tr. p. 335). During the 2012-13 school year, the Aaron School employed a number of strategies to address the student's deficits in academics and executive functioning. According to the student's first semester report card, Aaron School staff provided him with sentence starters and idea maps to assist the student with written expression (see Dist. Ex. 16 at pp. 2, 5). The report card indicates that in mathematics, the Aaron School provided the student with outlined processes, computer guided instruction, tutoring, and study guides for assessments (id. at p. 12). In addition, the report card cites the use of one-on-one support, with scaffolded questions read aloud, as a means of helping the student demonstrate his mathematical knowledge (id. at p. 2).

According to the first semester report card, in science the Aaron School provided the student with "scaffolded step-sheets/outlines," direct instruction, adapted materials, one-to-one teacher assistance, and extended deadlines (Dist. Ex. 16 at p. 2). With respect to history, the report card shows that the staff provided the student with individualized support, frequent repetition of material, scaffolded notes, and direct instruction in study skills (id. at p. 3). The report card further notes that the student benefitted from having tests read to him and dictating his responses to short answer questions (id.). The report card further indicates that the student was provided with counseling, where he discussed his difficulties with homework and particular classes (id. at p. 4). Among other things, the student's first semester goals for the 2012-13 school year targeted his written expression, knowledge of geometric expression, understanding of Chemistry, ability to organize and formulate his thoughts, and time management and self-advocacy skills (see Dist. Ex. 19 at pp. 1-3). In addition, the student's first semester report card shows that despite the strategies employed by Aaron School staff, the student's attendance was problematic and affected his schoolwork, and the student had difficulty independently initiating and completing school assignments, which contributed to the student receiving a failing grade in English (see Dist. Exs. 16 at pp. 1-6; 18).

According to the Aaron School learning specialist who taught the student's English class during the 2012-13 school year, the first semester was used to do "a lot of figuring out how much independence was expected of [the student]" (Tr. p. 194; see Tr. pp. 166-68). She noted that the student was resistant to doing things independently because he was anxious about getting things wrong (see Tr. p. 194). The English teacher testified that once Aaron School staff figured out how the student best expressed his knowledge, they adapted to make sure the student was able to best express his understanding of material taught (id.).

In addition, the English teacher provided detailed testimony regarding the instructional supports provided to the student during the 2012-13 school year.[8] She noted that the student did

[8] An administrator from the Aaron School similarly detailed the types of supports available to the student at the Aaron School (see Tr. pp. 325-27). The student's second semester report card also reflected the supports and strategies employed by the Aaron School to address his needs (see Dist. Ex. 17 at pp. 1-5).

not know how to start an assignment, therefore all of his homework assignments were done with her at school (see Tr. p. 183). She described how she would review with the student "what the question was asking," help the student locate the answer in his literature, and also assist him with generating a sentence starter (see Tr. p. 183, 218-19). The English teacher noted that when she began using these tools with the student, his participation increased (see Tr. p. 183). The English teacher also reported that the Aaron School curriculum was individualized for the student, noting that he was provided with an adapted, "toned down" version of literature with notes already taken in the margin (see Tr. p. 185, 228). In addition, all of the student's homework was posted online, the teacher recorded homework questions so that the student could listen to them, and the teacher also color coded the questions within his book (see Tr. p. 186). She reported that the student's understanding of class material increased after these interventions were implemented (id.).

The English teacher also described modifications made by the student's other Aaron School teachers. She reported that in science, the teacher modified the student's tests and allowed the student to do more project-based learning because that was how he could tell the teacher what he understood (see Tr. p. 190). She opined that the interventions increased the student's understanding and the amount of work he was able to do (see Tr. pp. 190-91). The English teacher reported that in mathematics, the student's teacher reduced the number of problems on a page for the student, and the teacher gave him more multiple choice "answers" (Tr. p. 191). According to the English teacher, the student worked with teachers to organize his materials and develop binder systems (see Tr. p. 200). With respect to auditory processing, the English teacher reported that the student's processing time was slow, and he often asked for things to be repeated or written down so that he could look at it after it was said (see Tr. p. 201). She opined that having an extra teacher in the classroom was helpful for the student because both teachers could repeat the question for the student (id.).

Among other things, the student's second semester goals at the Aaron School targeted the student's ability to comprehend literature, to compose an appropriate high school resume, and to advocate for himself (see Dist. Ex. 20 at pp. 1-3). The student's second semester report card indicated that he was frequently absent from his classes and had difficulty completing his assignments, which contributed to the student receiving a failing grade in English and a failing grade in science (see Dist. Exs. 17 at pp. 1-5; 18).

With respect to related services, the hearing record shows that during the 2012-13 school year the student received one 45-minute session per week of individual counseling services in which the student worked toward his goals of improving time management and advocacy skills (see Tr. p. 374; Dist. Exs. 16 at p. 4; 17 at p. 4). The student's counselor reported that the student "embraced the concept of talk therapy" and was engaged during counseling sessions (Dist. Ex. 16 at p. 4). According to the counselor, the student used therapeutic discussion to process why he had trouble completing homework and staying focused, and to brainstorm possible solutions (id.). The counselor noted that although the student believed that he could not complete assignments on his own, his teachers believed he was capable of this task (id.). The counselor also reported that the student had difficulty utilizing learned self-advocacy skills (see Dist. Ex. 17 at p. 4).

With respect to the student's language needs, the hearing record shows that a speech-language pathologist worked in the student's English and history classes (see Tr. pp. 183-84, 209-10, 225, 334; see also Tr. p. 177; Parent Ex. I at p. 6). According to the English teacher, the speech-language pathologist helped students in the classroom with understanding by rephrasing and

scaffolding information in a more effective way (see Tr. p. 210). The English teacher reported that the student was slow to process information and that having speech-language pathologists in the classroom was helpful to the student, as they were able to break down questions for him and help him participate (see Tr. pp. 213-14).

Based on the foregoing and given that parents need not show that the unilateral placement provided every special service to maximize the student's potential, the hearing record establishes that although the student did not receive related services of speech-language therapy and counseling consistent with the duration and frequency as recommended in the March 2012 IEP the Aaron School addressed the student's needs in these areas through an integrated services model by staffing his English and history classes with a speech-language pathologist and by providing the student with individual counseling services on a weekly basis.

2. Progress

Here, the district asserts that the Aaron School was not appropriate because the student was not making progress and was "failing or barely passing" many of his classes. Regardless of the district's focus on the student's grades, a review of the hearing record demonstrates that the student made progress at the Aaron School during the 2012-13 school year.

With respect to the student's progress at the Aaron School, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[9] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The hearing record shows that although the student's grades fluctuated, he received one failing grade in English as a final grade due in part to his tardiness and absence from classes (see Dist. Exs. 16 at pp. 1-6; 17 at pp. 1-5; 18).[10] The student's science teacher reported that even with

[9] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

[10] The student was administered the "GMADE," which typically refers to the Group Mathematics Assessment and Diagnostic Evaluation, and the "GRADE," which typically refers to the Group Reading Assessment and

tasks broken down, positive feedback and praise, extended deadlines and processing with his counselor, the student could not complete the majority of class assignments, regularly missed class, and was late for the final exam (see Dist. Ex. 17 at p. 2). The student's English teacher testified that the biggest impact on the student's grade in her class was his tardiness because he missed a lot of class discussion (see Tr. p. 226). The student's attendance report indicates that he was absent for 28 days during the 2012-13 school year (see Dist. Ex. 21). Although Aaron School staff reported that the student was frequently tardy, the school attendance report did not reflect these incidences (see Tr. pp. 208, 226, 321-22; Dist. Ex. 21). In addition, the hearing record shows that the Aaron School tried to address the student's tardiness by calling the parent into school and recommending "different people she could see for that" (Tr. p. 328). When the student was late, Aaron School staff would also call home to determine his whereabouts (id.).

At the impartial hearing, the parent testified that the student's insomnia altered his sleep patterns, which affected his ability to get up in the morning (see Tr. pp. 267-68). The parent sought medical attention for the student's insomnia, including medication trials that were discontinued due to side effects, and the student had not returned for follow-up treatment (see Tr. pp. 285-86). The parent explained that although she attempted various techniques to get the student to bed earlier, none had been successful (see Tr. p. 287).

The tone of the district's argument with regard to the lack of progress appears be based on the principle that parents failed to show that the Arron School services were ultimately successful because they resulted in some particular level of success or benefit that was in fact achieved by the student, and therefore appears closer to "Monday morning quarterbacking," so to speak.[11] But that would be a higher standard than even a district would be required to meet (Walczak, 142 F.3d at 130 [noting that for a district the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP"]; see Rowley, 458 U.S. at 189). Once again, as stated by the Second Circuit, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112), and for these reasons I find the district's argument regarding a lack of progress is not a sufficient reason to hold that the Aaron School was inappropriate.

3. LRE Considerations

The district contends that the Aaron School was not appropriate because the student had no access to nondisabled peers, and constituted an overly restrictive placement for the student. However, even if it is possible that the student could benefit from a less restrictive setting, and the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (Frank G., 459 F.3d at 364; Rafferty, 315 F.3d

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Diagnostic Evaluation, in May 2012 and again in April 2013 (see Dist. Ex. 15 at pp. 1-2). The student's percentile rank on the concepts and communication and process and applications subtests of the GMADE decreased during that time period (see id. at p. 2). However, on the GRADE, the student's percentile rank increased on the vocabulary and comprehension subtests (id. at p. 1).

[11] It might be different if one argued that the student not making progress at a unilateral placement in a prior school year, and the unilateral placement failed to recognize that lack of progress and thereby unreasonably repeated the same services again, but that is not the kind of progress argument asserted in this case.

at 26-27; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. East Ramapo Cent. Sch. Dist., 700 F.Supp.2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]. Here, while the Aaron School might not have maximized the student's interaction with nondisabled peers, in this instance, it does not weigh so heavily as to preclude the determination that the parent's unilateral placement of the student at the Aaron School for the 2012-13 school year was appropriate (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[12]

Based on the above, hearing record indicates that the instruction at Aaron School was reasonably calculated to enable the child to receive educational benefits, and therefore was an appropriate placement for the student for the 1012-13 school year, (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

VIII. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year and that the Aaron School was an appropriate unilateral placement for the student, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the

[12] Moreover, in this instance, hearing record does not contain evidence regarding the extent to which the student would have had access to nondisabled peers through the district's recommended placement in a 15:1 special class in a community school as the March 2012 IEP fails to provide any information as to how, or if, the student would participate in activities with nondisabled peers, other than noting "[s]mall class placement" (see Dist. Ex. 3 at p. 8).

student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the parent had no intention of enrolling the student in a public placement. The hearing record shows that both the district and parent dispute whether the parent would have accepted a public school placement (compare Tr. p. 65 with Tr. p. 251; see Dist. Ex. 4 at p. 2). However, the evidence also shows that the parent cooperated with the CSE process and actively participated in creating the March 2012 IEP, and provided timely notice of her disagreement with the recommended program and placement and unilateral placement (Dist. Ex. 4; Parent Ex. G). While the district contends that the parent would not have enrolled the student in the public school, the hearing record also shows that the parent did not actually execute an enrollment contract with the Aaron School until approximately two months after the March 2012 CSE meeting, on May 18, 2012 (compare Dist. Ex. 3 with Parent Ex. L at pp. 1-2). Accordingly, I find no reason to disturb the IHO's conclusion that the equitable considerations favor an award of tuition reimbursement and do not support a reduction under the circumstances of this case.

IX. Relief

Finally, the district alleges that the parent was not entitled to the relief requested because she failed to establish that she was legally obligated to pay the Aaron School for the costs of the student's tuition for the 2012-13 school year.

With regard to fashioning equitable relief, in a case of first impression, one court has recently addressed whether it has the authority under the IDEA to grant relief it deems appropriate, including ordering a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative

hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[13] Since the parent has selected the Aaron School as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of the Aaron School and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).[14]

In particular, the district alleges that the parent did not establish the fourth element of the test enunciated in Mr. and Mrs. A, namely, that due to a lack of financial resources, she has not made tuition payments to the Aaron School, but is legally obligated to do so. The district argues that the parent was not legally obligated to pay any tuition to the Aaron School, and further, the parent testified that she understood that she did not have the money to pay the student's tuition when she executed the enrollment contract with the Aaron School. However, under the terms of the enrollment contract, the plain language indicates that the parent remained obligated to pay the tuition costs if the parent "d[id] not qualify financially for prospective payment of tuition" or she was denied payment "by a final decision resolving her claim for prospective payment" (Parent Ex. L at p. 2). As such, the district's assertion must fail.

Next, with respect to whether the parent lacked the financial resources to front the costs of the student's tuition, a review of the parent's tax returns submitted into evidence, as well as her testimony, belies the district's assertion (see Tr. pp. 195-96, 281; Parent Ex. M at pp. 1-2). Therefore, under the circumstances presented, equitable considerations do not preclude the parent's claim for direct funding of the student's tuition at the Aaron School for the 2012-13 school year.

[13] The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

[14] Although unnecessary to my determination in this case, the court Mr. and Mrs. A. did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F. Supp. 2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

X. Conclusion

In summary, the evidence in the hearing record supports a conclusion that the district failed to demonstrate that it offered the student a FAPE in the LRE for the 2012-13 school year for reasons other than set forth by the IHO.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 6, 2013, is modified by reversing that portion which found that the 15:1 special class placement was appropriate to meet the student's needs; and

IT IS FURTHER ORDERED that the IHO's decision, dated November 6, 2013, is modified by reversing that portion which found that the district failed to sustain its burden to establish that the assigned public school site was not appropriate and resulted in a failure to offer the student a FAPE for the 2012-13 school year.

Dated: **Albany, New York**
February 26, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER