



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-231

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

### **Appearances:**

Law Offices of Regina Skyer & Associates, LLP, attorneys for petitioners, Lara Damashek, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to direct respondent (the district) to reimburse them for the costs of the student's tuition at Standing Tall for the 2012-13 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

On May 21, 2012, the CSE convened to conduct the student's annual review and develop an IEP for the 2012-13 school year (see Parent Ex. E at pp. 1, 13-14, 17).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with multiple disabilities, the May 2012 CSE recommended a 12-month school year program in a 12:1+4 special class placement in a specialized school with the services of a full-time, 1:1 registered nurse (id. at pp.

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<sup>1</sup> On April 15, 2012, the parents executed an enrollment contract with Standing Tall for the student's attendance during the 2012-13 school year (see Tr. pp. 452-54). At the time of the May 2012 CSE meeting the student was attending Standing Tall (see Tr. pp. 424-40; see also Dist. Ex. 5 at p. 1). The Commissioner of Education has not approved Standing Tall as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

1, 13-14, 17-18).<sup>2</sup> The May 2012 CSE also recommended the following related services: four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a small group, four 60-minute sessions per week of individual physical therapy (PT), two 60-minute sessions per week of individual occupational therapy (OT), and two 45-minute sessions per week of individual vision education services (*id.* at pp. 13-14, 16-18). The May 2012 IEP included annual goals and corresponding short-term objectives and recommendations that the student receive special education transportation and adapted physical education (*id.* at pp. 5-13, 16-18).

By letter dated June 15, 2012, the parents notified the district of their intentions to unilaterally place the student at Standing Tall beginning July 2012 for the 2012-13 school year and to seek reimbursement for the costs of the student's tuition (*see* Parent Ex. A at p. 1). The parents indicated that the May 2012 IEP failed to provide the student with the "level of specialized and individualized support" she required, and recommended a "less restrictive program option" that was not consistent with the student's individual needs or documentation provided (*id.* at p. 2). At that time, the parents had not received the May 2012 IEP or a final notice of recommendation (FNR), and the parents asserted that as a result of the district's failure to "offer a specific placement by the beginning of the school year," the district failed to offer the student a free appropriate public education (FAPE) (*id.*). The parents agreed, however, to visit the "placement" if issued by the district (*id.*).

By final notice of recommendation (FNR) dated June 15, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (*see* Dist. Ex. 1).

On June 19, 2012, the parents visited the assigned public school site, and in a letter of the same date, notified the district that it was not appropriate because, based upon their "observations of the school," it could not "provide the level of special education support" the student required (*see* Parent Ex. D at p. 1). The parents indicated that the assigned public school site would not provide the consistent level of assistive technology support the student needed to successfully communicate and did not provide a "formal" augmentative communication program or methodology; the assigned public school site did not offer a "conductive education program;" the observed classrooms with 12 students were too large, too distracting, and did not offer sufficient individual support; the assigned public school site was too large; the student would not have an appropriate peer group because she would be the most medically fragile; and the parents were told that the student would not receive all of the related services set forth on her IEP if she missed the first day of school (*id.*). Overall, the parents indicated that the assigned public school site was not appropriate because the student required a "high level" of individual support in a "highly individualized and highly therapeutic program" (*id.* at p. 2).

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

By due process complaint notice dated July, 24, 2012, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year (*see* Parent Ex. B at p. 1). In addition to reasserting concerns already set forth in the June 15, 2012 notice of unilateral placement and

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (*see* 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

June 19, 2012 letter rejecting the assigned public school site, the parents asserted that the annual goals in the May 2012 IEP did not include a "grade level baseline" or "appropriate grade level performance standards;" the May 2012 CSE was not properly composed due to the absence of an additional parent member; and the May 2012 CSE did not consider all program options available, including a nonpublic school placement (compare Parent Ex. A at pp. 1-3, and Parent Ex. D at pp. 1-2, with Parent Ex. B at pp. 1-5).<sup>3</sup> The parents also asserted that Standing Tall was an appropriate unilateral placement and that equitable considerations weighed in favor of their request for reimbursement of the costs of the student's tuition for the 2012-13 school year (id. at pp. 4-5).

## **B. Impartial Hearing Officer Decision**

On October 23, 2012, the parties proceeded to an impartial hearing, which concluded on February 28, 2013, after four days of proceedings (see Tr. pp. 1-516). By decision dated November 6, 2013, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 21-30). Initially, the IHO found that although the May 2012 CSE did not include an additional parent member, such procedural violation did not result in a failure to offer the student a FAPE (id. at pp. 23-26). Next, the IHO determined the May 2012 CSE reviewed and considered evaluative information and reports about the student, accurately reflected the same in the May 2012 IEP, and developed annual goals and short-term objectives to address the student's needs as evidenced in the evaluations and reports (id. at pp. 27-28). With respect to the 12:1+4 special class placement, the IHO found that the parents agreed with this recommendation at the May 2012 CSE meeting, and furthermore, the student's social awareness, her ability to engage with other students, and her responsiveness within the classroom all supported the May 2012 CSE's recommendation (id. at pp. 28-30). Having concluded that the district offered the student a FAPE for the 2012-13 school year, the IHO did not reach the issues of whether the student's unilateral placement at Standing Tall was appropriate or whether equitable considerations weighed in favor of the parents' requested relief (id. at p. 30).

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

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. Specifically the parents assert that the IHO erred in finding that the 12:1+4 special class placement was appropriate for the student. The parents also argue that the assigned public school site was not appropriate because the evidence demonstrated it would not be "appropriately suited to [the student's] medical fragility;" the assigned public school site was too large, and "encouraged exposure to the greater student population would in fact pose a serious health risk to [the student];" and, the observed classrooms either failed to use a communication device accessible to the student, were too small to accommodate a wheelchair, or contained "too many" students. The parents assert that the IHO erred in concluding that the May 2012 IEP was appropriate because the annual goals were vague and failed to include a grade level baseline; the May 2012 CSE did not include an additional parent member; the May 2012 CSE did not consider all program options available, including a nonpublic school placement; and the annual goals could not be implemented at the assigned public school site, since the annual goals required the use of a "communican and conductive education program." In addition, the parents argue that

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<sup>3</sup> To the extent that the due process complaint notice also raised issues related to the May 2012 CSE's failure to issue related services authorizations (RSAs) to the parents to obtain these services as set forth in the May 2012 IEP, the parents affirmatively abandoned the same in the petition for review on appeal (compare Parent Ex. B at pp. 1-4, with Petition ¶ 21 n.2).

Standing Tall was an appropriate unilateral placement for the student for the 2012-13 school year and that equitable considerations weigh in favor of their requested relief. Alternatively, the parents allege that because the IHO who presided over the testimony at the impartial hearing did not ultimately draft the IHO decision—which infringed upon their due process rights—the case could be remanded to another IHO for a new impartial hearing.

In an answer, the district responds to the parents' allegations, and asserts that the IHO properly concluded that the district offered the student a FAPE for the 2012-13 school year. The district also asserts that while speculative, the assigned public school site would have properly implemented the student's May 2012 IEP had the student attended. In addition, the district argues that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement at Standing Tall, equitable considerations preclude an award of tuition reimbursement in this case, and the parents' request to remand the matter for a new impartial hearing is not warranted.

## **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. May 2012 CSE Composition**

Without elaboration, the parents assert that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year because the CSE failed to comply with procedural requirements, such as failing to include an additional parent member at the May 2012 CSE meeting.<sup>4</sup> The district argues that the IHO reached the correct result on this issue. Contrary to the parents' assertion, a review of the hearing record supports the IHO's finding that the absence of an additional parent member at the May 2012 CSE meeting did not rise to the level of a denial of a FAPE because it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at \*8-\*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at \*2; E.H., 2008 WL 3930028, at \*7; Matrejek, 471 F. Supp. 2d at 419).

At the time of the May 2012 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], *aff'd*, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at \*5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at \*5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of

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<sup>4</sup> I note that blanket assertions that an IHO erred without clearly identifying alleged missteps in the IHO's findings of fact or legal analysis is unhelpful insofar as it is not an SRO's role to research and construct the parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752-53, 2009 WL 3634098 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Adver., Inc. v. City of Brewton, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]).

Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042).<sup>5, 6</sup>

In this case, it is undisputed that an additional parent member did not participate in the May 2012 CSE meeting in violation of both State law and regulations in place at the time of the meeting (see Parent Ex. E at pp. 19-20; see also Tr. pp. 31-35, 93-96; Dist. Ex. 3 at p. 1). However, it is also undisputed that the following individuals did attend the May 2012 CSE meeting: a district school psychologist (who also acted as the district representative), a district special education teacher (who was also certified as a speech-language pathologist), the nurse currently working with the student, the student, and both parents (see Parent Ex. E at pp. 19-20; see also Tr. pp. 34-35, 434; Dist. Ex. 3 at p. 1). The educational director of Standing Tall, who was also the student's primary educational teacher at Standing Tall, and another special education teacher from Standing Tall participated in the meeting by telephone (Tr. p. 175; see Parent Ex. E at p. 20). The hearing record also indicates that the May 2012 CSE reviewed the following in the development of the May 2012 IEP: a 2011 classroom observation; a 2011 social history update; a 2011 neurological evaluation; a 2012 speech-language progress note; a 2010 Columbia Medical School report; a 2011 Vineland-II Adaptive Behavior Scales report (Vineland-II); a 2011 West End Pediatrics report; an OT progress report; a 2012 vision therapy progress report; a 2012 physical examination report; a 2012 PT progress report; and a January 2012 Standing Tall progress report (see Tr. pp. 35-37; Dist. Exs. 4-7; 9-13; 17-18).<sup>7</sup> Moreover, the hearing record indicates that the parents actively participated at the May 2012 CSE meeting (see Tr. pp. 433-44). Thus, while an additional parent member may have been able to provide support or information to the parents during the May 2012 CSE meeting, it is unclear from the hearing record how an additional parent member could have contributed any more knowledge, expertise, or support to the parents than they already had available to them, such that the absence of an additional parent member impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student and resulted in a failure to offer the student a FAPE for the 2012-13 school year.

## **B. May 2012 IEP**

In this instance, although the present levels of performance and individual needs section of the May 2012 IEP are not a disputed issue, a discussion thereof provides context for the discussion of the ultimate issues to be resolved—that is, whether the annual goals were appropriate and

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<sup>5</sup> Although not applicable to the facts of this case, I note that effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

<sup>6</sup> Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>).

<sup>7</sup> The May 2012 IEP also indicates that the May 2012 CSE reviewed a 2012 updated orthopedic evaluation and a 2012 updated neurological evaluation, which were not submitted as evidence at the impartial hearing (see Parent Ex. E at p. 2; see also Tr. pp. 67-68).

whether the 12:1+4 special class placement with a full-time, 1:1 nurse as recommended in the May 2012 IEP, were appropriate.

### **1. Annual Goals**

The parents contend that the IHO erred in concluding that the May 2012 IEP was appropriate because the annual goals were vague, failed to include a grade level baseline, and could not be implemented at the assigned public school site because implementation of the annual goals required the use of a "communican and conductive education program." The district rejects these contentions, and argues that the IHO reached a proper conclusion with respect to the annual goals in the May 2012 IEP. A review of the hearing record supports the IHO's conclusion, and the parents' contentions must be dismissed.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Turning first to the parents' assertion that the May 2012 IEP was not appropriate because the annual goals failed to include a "grade level baseline from which to provide an appropriate program," the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." As discussed more fully below, the annual goals in the May 2012 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from her disability, enabled her to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability.

Next, addressing the parents' contention that the May 2012 IEP was not appropriate because the annual goals—which required the use of a "communican and conductive education program"—could not be implemented at the assigned public school site, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf> [stating,

among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

To address the student's needs set forth in the present levels of performance, the May 2012 IEP contained 15 annual goals and, consistent with the CSE's determination that the student participate in alternate assessments, approximately 47 corresponding short-term objectives in the areas of vision, fine motor skills, social/emotional skills, communication, activities of daily living (ADLs), gross motor skills, reading, mathematics, self-awareness, play skills, sensory processing, oral motor skills, and feeding skills (see Parent Ex. E at pp. 5-13, 15-16). The hearing record reflects that the annual goals and short-term objectives in the May 2012 IEP were specifically developed from the verbal and written information provided by the student's then-current teachers and related service providers (see Tr. pp. 36-37, 46-49; see generally Dist. Exs. 4-7; 9; 11-14). According to the district school psychologist, the annual goals included in the May 2012 IEP resulted from either the "family providers" or Standing Tall, the annual goals were discussed at the meeting with the parents and Standing Tall participants, and no one participating at the May 2012 CSE meeting disagreed with the annual goals as discussed (see Tr. pp. 34, 51-52, 54-56; see also Tr. pp. 436-44, 478-79, 482).

According to the May 2012 IEP, the student's present levels of academic performance were at a pre-K level and included the ability to play with simple cause-effect toys, identify pictures by feeling tactile cues, play different instruments and listening to songs during circle time, recognize and respond to her name by smiling or eye widening, and make a choice from a field of two tangible, sound-making items (see Parent Ex. E at pp. 1-2). A review of the annual goals and short-term objectives in the May 2012 IEP reveals that they were consistent with the student's academic needs as set forth in the present levels of performance (compare Parent Ex. E at pp. 1-2, with Parent Ex. E at pp. 8-9). For example, the annual goal for the student to develop phonics knowledge, phonemic awareness, and listening comprehension skills targeted the student's ability to respond to her name, and the annual goal to improve the student's number and mathematics sense addressed to her ability to count and complete one-to-one correspondence tasks (id.).

The communication present levels of performance in the May 2012 IEP indicated that the student did not communicate verbally, but that she expressed her immediate needs and emotions through laughs, smiles, cries, vocalizations, and body gestures (see Parent Ex. E at p. 2). According to the May 2012 IEP, the student also used a communication book and a "pre-recorded switch" to communicate (id. at pp. 1-2). In addition, the May 2012 IEP indicates that tactile and object cues were used to facilitate the student's receptive language skills (id. at p. 2). A review of the annual goals and short-term objectives in the May 2012 IEP reveals that they were consistent with the student's communication needs set forth in the present levels of performance (compare Parent Ex. E at pp. 1-2, with Parent Ex. E at pp. 6, 8-9, 12). For example, the May 2012 IEP included annual goals and short-term objectives to develop the student's ability to recognize basic information about herself and her environment and to communicate using a variety of techniques—including augmentative communication devices—to respond to social greetings, and to express preferences (id.).

The May 2012 IEP present levels of social performance indicated that the student sought adult interaction by vocalizing; enjoyed the social atmosphere of the classroom and interacting with familiar adults; worked best in a 1:1 setting; explored a variety of textures, vibrating and soft

toys; and played with musical toys (see Parent Ex. E at pp. 1-2). The student was further described as requiring hand-over-hand and maximum adult support to participate in sensory activities, all ADL tasks, small and large group activities, and interactions with peers and the environment (id. at pp. 2-3). A review of the annual goals and short-term objectives in the May 2012 IEP reveals that they were consistent with the student's social/emotional needs as set forth in the present levels of performance (compare Parent Ex. E at pp. 2-3, with Parent Ex. E at pp. 6, 8-10). As an example, the May 2012 IEP included annual goals and short-term objectives designed to improve the student's ability to engage and respond in social situations, participate in shared reading activities, and identify classmates (id.).

The student's physical present levels of performance indicated that she had received diagnoses of myoclonic encephalopathy and restricted lung disease; was fed via "G-tube;" had a tracheotomy and required the use of a ventilator for the majority of the day; and exhibited severe muscle weakness, kyphosis and scoliosis, spasticity of her extremities, proximal hypotonia, and myoclonic seizures (see Parent Ex. E at p. 3). According to the May 2012 IEP, the student used a wheelchair and required maximum adult assistance for mobility and to complete ADL tasks (id. at pp. 1-3). The visual present levels in the May 2012 IEP indicated that the student visually fixated on illuminated objects for 50 percent longer than items that were not illuminated, gazed toward a specific target for four to eight seconds, and momentarily tracked items as they moved across mid-line (id. at p. 3). Further, although the May 2012 IEP described the student as having a comfortable forward gaze, she was not able to shift her gaze effectively between two targets in order to make a choice (id.). A review of the annual goals and short-term objectives in the May 2012 IEP reveals that they were consistent with the student's physical needs as set forth in the present levels of performance (compare Parent Ex. E at pp. 1-3, with Parent Ex. E at pp. 5-7, 10-13). For example, the May 2012 IEP included annual goals and short-term objectives to increase the student's ability to visually track items and shift her gaze and complete fine motor tasks; develop self-help skills; and improve gross motor function and range of motion, sensory processing skills, and oral-motor/feeding skills (id.).

Specific regarding the measurability of the annual goals and short-term objectives, a review of the May 2012 IEP shows that the annual goals and short-term objectives included the required evaluative criteria, evaluation procedures, and schedules to measure progress (Parent Ex. E at pp. 5-13; see 8 NYCRR 200.4[d][2][iii][b]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*8 [S.D.N.Y. Sept. 22, 2011]). The annual goals and short-term objectives provided criteria for measurement to determine if an annual goal had been achieved (i.e. 80 percent accuracy, 3 out of 4 trials), the method of how progress would be measured (i.e. observation, homework, classroom participation, portfolio of collected work), and a schedule to measure progress toward the annual goals (i.e. one time per week, every four weeks) (id. at pp. 5-13).

Therefore, a review of the May 2012 IEP demonstrates that, contrary to the parents' assertions, the annual goals, combined with their corresponding short-term objectives, contained "sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress" (Tarlowe, 2008 WL 2736027, at \*9 [internal quotations omitted]; see R.B., 2013 WL 5438605, at \*13-\*14; D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at \*11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*17-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7,

\*13-\*14 [S.D.N.Y. Aug. 19, 2013]; see also M.Z., 2013 WL 1314992, at \*6; A.D., 2013 WL 1155570, at \*11; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; C.D., 2011 WL 4914722, at \*8; P.K. v. New York City Dep't of Educ. (Region 4), 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

## **2. 12:1+4 Special Class Placement with a Full-Time, 1:1 Nurse**

The parents argue that the IHO erred in finding the 12:1+4 special class placement recommended in the May 2012 IEP was appropriate because it lacked the level of specialized and individualized support the student required. The district rejects this argument, and asserts that the IHO properly concluded that it offered the student a FAPE for the 2012-13 school year. As discussed more fully below, a review of the hearing record supports a conclusion that the 12:1+4 special class placement with the services of a full-time, 1:1 nurse offered the student a FAPE for the 2012-13 school year.

As noted above, the district school psychologist who participated in the May 2012 CSE meeting testified that the CSE consulted various reports and documents—including the student's recent medical reports, related service reports, a school progress report, a classroom observation, a social history, and the results of an administration of an adaptive behavior scale—in order to develop the student's May 2012 IEP (Tr. pp. 35-38; see Dist. Exs. 4-7; 9-13, 17; 18). According to the district school psychologist's testimony, the May 2012 CSE reviewed the available documents and discussed the student's present levels of performance with the parents and Standing Tall staff who participated during the entire CSE meeting (Tr. pp. 34-35, 37-38). As stated previously, the May 2012 CSE recommended a 12-month school year program in a 12:1+4 special class placement in a specialized school with the services of a full-time, 1:1 registered nurse (see Parent Ex. E at pp. 13-14). State regulations provide that a 12:1+4 special class placement is designed to address students "with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, to the extent that in addition to the teacher, the staff student ratio shall be one staff person to three students" (8 NYCRR 200.6[h][4][iii]). A district assistant principal from the assigned public school site testified that 12:1+4 special class placements provided services to students who exhibited a variety of conditions, including medical fragility, and limited mobility, communication, and ADL skills (see Tr. pp. 107-09). The district school psychologist testified that the student's significant developmental delays and her high level of medical and safety needs warranted a placement with a "high complement of paraprofessionals, given that [the student] was dependent for all of her self-help needs, and [was] a medically fragile child" (Tr. pp. 45-46, 57-58). In addition to the number of paraprofessionals within the 12:1+4 special class placement, the district school psychologist testified that the May 2012 CSE recommended the services of a full-time, 1:1 registered nurse for the student because she was fed through a "G-tube" and used a ventilator for breathing (Tr. p. 45).

The hearing record shows that the May 2012 CSE also considered home instruction for the student, which the May 2012 CSE rejected in light of the information presented at the meeting that described the student as very social and responsive to other students in a classroom situation (Tr. p. 58; see Dist. Ex. 3; Parent Ex. E at pp. 18-19). Additionally, the hearing record reflects the parents' desire for the student's educational program to include opportunities for the student to interact with other students, which the nurse who worked with the student at Standing Tall and the student's physicians agreed was important for her (Tr. pp. 58, 148, 153-54, 242, 263-64, 393, 396, 405, 479-80; Parent Ex. E at p. 2). Notably, the educational director of Standing Tall, who attended

the May 2012 CSE meeting, testified that "if the staffing ratio was significant and [the student] had someone with her who was capable of helping to instruct her in a way that she was capable of understanding, and she had the right support systems and the right equipment with her, [a classroom with 12 students] could possibly work for her" (Tr. pp. 173-75, 303; Parent Ex. E at p. 20).

In addition to the five-adult support inherent within a 12:1+4 special class placement, the May 2012 CSE recommended a number of strategies in the IEP to address management needs of the student (see Parent Ex. E at pp. 3-4). State regulations define management needs for students with disabilities as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). The district school psychologist testified that management needs referred to "aspects of the environment that needed to be manipulated . . . to maximize [the student's] functioning in the classroom" (Tr. p. 42). The district school psychologist testified that the May 2012 CSE developed the student's management needs during discussions with Standing Tall staff and based upon the documents available to the May 2012 CSE (Tr. p. 43). In this case, the May 2012 IEP included the following as management needs: modifying all activities by using switches, auditory and tactile stimulation, and physical prompting to engage the student; allowing the student additional time to process new information; providing the student with verbal and tactile cues during the day to assist with transitioning from one activity to the next; and providing the student with time out of her wheelchair and to be repositioned (see Parent Ex. E at pp. 3-4).

Additionally, the May 2012 CSE recommended that the student receive four 60-minute sessions per week of individual speech-language therapy, and one 60-minute session of speech-language therapy in a small group (see Parent Ex. E at p. 13). Pursuant to the May 2012 IEP, the student would have also received four 60-minute sessions per week of individual PT services, two 60-minute sessions per week of individual OT services, and two 45-minute sessions per week of individual vision education services (*id.* at pp. 13-14).

Based upon the foregoing, the hearing record supports the IHO's finding that the recommended 12:1+4 special class placement in a specialized school—in conjunction with the services of a full-time, 1:1 registered nurse, the IEP management needs, and substantial amounts of related services—was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

Furthermore, although the parents assert that the May 2012 CSE failed to consider "all the programs available" within the district, despite its knowledge that at the time of the May 2012 CSE meeting the student was attending a nonpublic school, a review of the hearing record does not support the parents' assertion. Here, the district was not required to consider placing the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The

statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education" [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*19-\*20 [S.D.N.Y. Sept. 16, 2013]; A.D., 2013 WL 1155570, at \*7-\*8; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31).

The district school psychologist testified that if the May 2012 CSE determined that it had exhausted the district's continuum of services, the May 2012 CSE could then consider a nonpublic school placement option (Tr. p. 84). In this instance, according to the district school psychologist, the May 2012 CSE determined that the 12:1+4 special class placement with the services of a full-time, 1:1 registered nurse was an appropriate placement option within the continuum of services, therefore, the May 2012 CSE did not need to consider a nonpublic school placement option (see Tr. pp. 84-85). Although the parents might have preferred otherwise, as determined above, given the availability of an appropriate placement and program for the student within the public school, in this instance, the district was not required to consider a nonpublic school placement.

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

Finally, although not addressed by the IHO, the parents assert that the assigned public school site was not appropriate because the evidence demonstrated it would not be "appropriately suited to [the student's] medical fragility;" the assigned public school site was too large, and "encouraged exposure to the greater student population would in fact pose a serious health risk to [the student];" and, the observed classrooms either failed to use a communication device accessible to the student, were too small to accommodate a wheelchair, or contained "too many" students. As discussed below, the parents' arguments are not persuasive and must be dismissed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*6 [2d Cir. July 24, 2013]; Reyes, 2012 WL 6136493, at \*7; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K., (Region 4), 2013 WL 2158587, at \*4), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 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. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the May 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at \*6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the May 2012 IEP containing the recommendations of the May 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. A-B; D). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting

and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

I can readily sympathize with what appears to be the desire of loving parents to know beyond the shadow of a doubt that the district professionals will utilize every precaution that can be conceived when services are provided to their daughter, who clearly experiences profound deficits. 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 2012 IEP through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's May 2012 IEP at the assigned public school site when the parents rejected it and unilaterally placed the student.<sup>8</sup>

## **VII. Conclusion**

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

### **THE APPEAL IS DISMISSED**

**Dated:**            **Albany, New York**  
                         **January 15, 2014**

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

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<sup>8</sup> To the extent that the parents' expressed concerns relate to the health or safety issues had the student attended the assigned public school site, there is nothing in the May 2012 IEP that would prohibit, restrict, or preclude the district from using alternate strategies to address these concerns, in addition to those already contemplated by the May 2012 CSE giving rise to the recommendation in the May 2012 IEP that the student receive the services of a full-time, 1:1 registered nurse (see Parent Ex. E at pp. 1-3, 13-14).