The University of the State of New York

The State Education Department
State Review Officer
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No. 14-023

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

Law Office of Lisa Isaacs, PC, attorneys for respondent, Lisa Isaacs, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to sustain its burden of establishing that it offered the petitioners' (the parents') son a free appropriate public education (FAPE) for the 2013-14 school year. The parents cross-appeal from this same decision to the extent that it denied their request for 10-hours of at-home services, and to "dispute" the "dismissal" of other claims. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

Petitioners are the parents of a student with a disability (student) who, at the time that the IEP at issue was developed, was nearly 6 years old and non-verbal (Dist. Exs. 4 at p. 1; 7 at p. 1; Parent Ex. F at pp. 1, 16). According to the record, the student – who is described as a happy, loving and "sweet little boy" (Dist. Exs. 4 at p. 1; 7 at p. 1; 8 at p. 1; Parent Ex. D at p. 8; Tr. p. 171) - presents with a number of delays, including cognitive, as well as receptive, expressive and pragmatic language delays (Dist. Exs. 7 at pp. 2-7; 8 at p. 1). The student began receiving special education services though early intervention when he was six months old, and at the age of 22

months he was diagnosed with autism (Dist. Ex. 8 at p. 1). In the 2011-12 school year, when the student was four years old, he began attending the Seton Foundation for Learning (Seton) as a preschool student where he was educated pursuant to a preschool IEP (Parent Exs. C at p. 1; D at p. 1; Tr. p. 242). The record reflects that in the 2012-13 school year, the student remained at Seton where he was unilaterally placed by his parents as a school-aged student (Tr. p. 209).[1]

On June 18, 2013, a CSE convened to develop the student's IEP for the 2013-14 school year (Parent Ex. F at p. 16).[2] Finding that that the student remained eligible for special education and related services as a student with autism,[3] the June 2013 CSE recommended a 12-month school year program in a 6:1+1 special class (Parent Ex. F. at pp. 11-12). In addition, the June 2013 CSE provided the student with various management supports (id. at pp. 1-3) and recommended, among other things, that the student receive adapted physical education, as well as six 30-minute occupational therapy (OT) sessions per week and six 30-mintue speech-language therapy sessions per week (id. at pp. 11-12). The June 2013 CSE also provided the student with an augmentative communication device, as well as the services of a full-time, individual health paraprofessional (id. at p. 12). The June 2013 CSE further recommended parent counseling and training for the parents (id. at 11).

By final notice of recommendations (FNRs) dated June 14, 2013 and June 15, 2013, the district identified the public school site to which the student was assigned for the 2013-14 school year (Dist. Ex. 3; Parent Ex. I).[4] The record reflects that on June 24, 2013, the student's mother visited this school and, by letter dated June 25, 2013, rejected it (Parent Ex. J at pp. 1-2). Specifically, the student's mother advised the district that as a result of her tour of the school, that she determined that it was not appropriate to meet the student's needs for various reasons (id.). Accordingly, the student's mother indicated that while she still hoped "to secure an appropriate public school program," that due to time considerations she would continue to send the student to Seton and "exercise [her] rights for public funding" (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2013, the parents requested an impartial hearing, contending that the district denied the student a FAPE for the 2013-14 school year because the public school to which he was assigned was ""inappropriate" (Parent Ex. A at p. 2).

[1] It appears from the record that the parents challenged a 2012-13 IEP (Parent Ex. E) developed by the district for the student in a proceeding unrelated to this one, and that the student attended Seton in the 2012-13 school year pursuant to a pendency order issued in that case (Parent Ex. B at p. 5).

[2] The record reflects that the CSE had actually met previously and reconvened on June 18, 2013 to finalize the student's IEP (Tr. pp. 38, 213). However, since none of the previous meetings appear to be relevant for purposes of the issues raised on appeal, I will refer to the CSE as the "June 2013 CSE" and the IEP as the "June 2013 IEP" for simplicity.

[3] The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 8 NYCRR 200.1[zz][1]).

[4] The FNR dated June 15, 2013 identified a public school site for the July and August portion of the 2013-14 school year only, while the FNR dated June 14, 2013 identified the same public school site for the entirety of the 2013-14 school year (compare Parent Ex. I at p. 1 with Dist. Ex. 3 at p. 1).

Specifically, the parents contended that the school was too small, that there were no quiet rooms/sensory gyms at the school, that they believed that behavior therapy (ABA) would not be administered appropriately for a number of reasons (including that the student's individual paraprofessional would be used to administer the therapy, which they did not approve of), that some related services would be provided outside of school hours via related service authorizations (RSAs), that the student would not have the opportunity to interact with non-disabled peers at the school, that the school was not able to show her a curriculum or text books, that the bathrooms at the school were dirty, and that the school was located too far from the student's home (id. at pp 2-3). The parents, therefore, requested that the district pay for the student's 2013-14 tuition and expenses at Seton (id. at p. 1). The parents also requested a "continuation of recommended ten hours of in-home Behavioral Support at public expense" (id.).

B. Impartial Hearing Officer Decision

On August 5, 2013, an impartial hearing convened and after three non-consecutive days of proceedings concluded on November 19, 2013 (Tr. pp. 1-282).[5] By decision dated January 2, 2014, an IHO found that the June 2013 CSE was appropriately constituted and that the IEP developed by that CSE "was appropriate to meet [the] student's educational needs" (IHO Decision at p. 9). In addition, the IHO rejected most of the parents' claims regarding the public school to which the student was assigned, finding that they essentially lacked merit or were unsubstantiated by the record (id. at pp. 10-11). The IHO also rejected the notion that the student required any at-home services in order to receive a FAPE (id. at pp. 15-16). However, the IHO ultimately concluded that the district "failed to sustain its burden of establishing that it offered [the] student a [FAPE]" (id at p. 12). Specifically, and based on testimony given by the student's mother indicating that it took her "about 45 minutes" to drive from her home to the school (Tr. p. 193), the IHO found that since the June 2013 IEP required a travel time of no more than 30 minutes for the student, that the public school to which the student was assigned was "incapable of meeting [the] Student's needs on the travel time limitation basis alone" (IHO Decision at p. 12). Accordingly, and after finding that Seton was an appropriate placement for the student and that no equitable considerations barred relief, the IHO ordered the district "to pay to [Seton] the balance of monies owed to it for the enrollment of [the student] . . . for the 2013-14 school year" (id. at pp. 14-16).

IV. Appeal for State-Level Review

The district appeals and contends that the IHO erred in a number of respects. Regarding the provision of a FAPE, the district contends that the IHO's analysis "focused solely on the [district's] recommended placement to implement the IEP for the 2013-2014 school year," which it argues is an inappropriate basis for finding a denial of a FAPE where, as here, the student never attended the recommended public school. In addition, the district maintains that the IHO's decision is "factually flawed" because while the June 2013 IEP does include a travel time restriction of no more than thirty minutes "there is no indication in the record that if the travel time restriction were

[5] The record reflects that the hearing on August 5, 2013 was limited to the issue of pendency which the IHO decided not to address since the pendency order discussed above (i.e., the one from an earlier, unrelated case) was still in effect (IHO Decision at p. 2; Tr. pp. 1-14).

exceeded, that [the student] would be deprived of a FAPE."[6] The district also argues that the IHO erred in finding that the parents met their burden of demonstrating that Seton was an appropriate placement for the student, erred in finding that equitable considerations did not bar relief, and erred in awarding the parents relief in the form of direct tuition payment to Seton. The district, therefore, requests that the IHO's findings be annulled.

The parents largely deny the district's contentions are argue that the IHO's decision with respect to the June 2013 IEP's travel time limitation and the provision of a FAPE (or the alleged lack thereof) was correct. The parents also maintain that Seton is an appropriate placement for the student, that the equities favor them in this matter, and that prospective payment to a school "is a well-recognized form of relief" that can be awarded. In addition, the parents cross-appeal from the IHO's denial of "ten hours weekly of behavioral support services at [the student's] home," and assert as alternative grounds for the finding of a denial of FAPE that they "dispute the IHO's dismissal of the other defects of the recommended placement."[7] The district, in response, contends that the IHO correctly determined that at-home services were not required for the student, and that the parents' alternative grounds for relief are all speculative as the student never attended the assigned public school.

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

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[6] The district also purports to appeal from the IHO's other FAPE-related findings "to the extent that any of [them] could possibly be read as a finding against the [district] (which they were not)." However, as these issues were decided in the district's favor, it is not entirely clear what the district is appealing in this regard.

[7] The parents do not cross-appeal from the IHO findings that (a) the 2013 CSE was appropriately constituted, and that (b) the IEP developed by that CSE "was appropriate to meet [the] student's educational needs." Although, in general, a prevailing party need not cross-appeal issues raised in its due process complaint notice and not addressed by an IHO (see, e.g., W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *15 [S.D.N.Y. Mar. 31, 2014]; J.M. v. New York City Dep't of Educ., 2013 WL 5951436, at *21-*22 [S.D.N.Y. Nov. 7, 2013]), when an IHO has reached an adverse determination on an issue, the party must cross-appeal that determination or the issue is deemed waived (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 325 [E.D.N.Y. 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*11 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, and except to the extent that the parents' claims for at-home services relate to the sufficiency of the June 2013 IEP, these findings are final and binding and the June 2013 IEP will, therefore, be considered procedurally and substantively sufficient in all respects. This is also consistent with the scope of the parents' due process complaint notice (which, again, does not raise any explicit issues regarding the sufficiency of the June 2013 IEP) and the testimony of the student's mother who, with the exception of the lack of at-home services, generally testified that she felt that the June 2013 IEP was sufficient (Tr. pp. 210-213).

(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. Implementation of Travel Time Limitation

As noted above, the sole basis for the IHO's award of tuition reimbursement in this matter was that the district essentially failed to show that the travel time limitation in the June 2013 IEP would have been implemented. In this regard I note that it is undisputed that the June 2013 IEP contains a 30-minute travel time limitation for the student (Parent Ex. F at p. 14). In addition, it is equally undisputed that the student's mother testified at the impartial hearing that when she drove to the public school to visit it, it took her "about 45 minutes" to get there using "three highways and some residential driving" (Tr. p. 193). The issue, therefore, is whether this testimony alone,

given that the student never attended the assigned public school, is enough to justify the student's unilateral placement. On the record before me, I find that it is not.

As an initial matter, I note that the IHO's decision appears to be based, in part, on the premise that in order to establish that a FAPE has been offered to a student, that a district "must establish not only the appropriateness of the program, but that the placement offered was sufficient to implement that program" (IHO Decision at p. 9). However, the Second Circuit Court of Appeals has held that where, as here, an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must generally be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at 9). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id., citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

In light of the above, two general principals are clear: (1) the sufficiency of a special education program offered to a student must generally be assessed on the sufficiency of the IEP offered to the student, and (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. To that extent, I am unable to agree with the IHO's finding that a district "must establish not only the appropriateness of the program, but that the placement offered was sufficient to implement that program," since to do so would require that one look past an IEP when assessing the sufficiency of a program offered to a student, and would also invite speculation into whether a district would adhere to that IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist.,

906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).[8] Thus, to the extent that the IHO's decision hinges on the finding that the district was required to prove that the June 2013 IEP would have been properly implemented, it must be reversed.[9]

Further, while there are district court cases suggesting that parents may rely on evidence outside of the written plan which is known at the time the decision to unilaterally place a student is made (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]), I note that this issue has not been addressed by the Second Circuit which, at least in once case, left open the question as to whether one of these cases (B.R.) "properly construes R.E." (see F.L., 553 Fed. App'x, at 6).[10] Moreover, and even considering what the parents knew at the time they rejected the student's IEP and placement (i.e., that it took the student's mother "about 45 minutes" to drive from home to the school), I am unable to conclude that this alone would provide an appropriate basis for the student's unilateral placement. Specifically, it is hardly conclusive from the record before me that the travel time limitation in the June 2013 IEP would, in fact, not have been implemented by the district. For example, while it may have taken the student's mother "about 45

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[8] While I recognize that some district courts have reached conclusions which suggest otherwise, the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014], B.K., 12 F.Supp.3d at 370-372; M.L., 2014 WL 1301957, at *12; M.O., 2014 WL 1257924, at *2; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; M.S., 2 F.Supp.3d at 331-32; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] ["Absent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP."]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012])

[9] I note that in T.Y. v. New York City Dep't of Education, 584 F.3d 412, 419 [2d Cir. 2009], the Second Circuit held that districts do not have "carte blanche to assign a child to a school that cannot satisfy [an] IEP's requirement[s]" (584 F.3d at 420), and this is often cited in support of the argument that the ability of a school to implement an IEP is a necessary part of a FAPE analysis. However, and while an IEP must be implemented as written, it does not necessarily follow from this (or T.Y.) that districts must prove that an IEP that has been rejected, and which a district has not been given an opportunity to implement, would have been properly implemented in order to establish that a FAPE has been offered to a student. This is especially true since T.Y. itself does not explicitly hold as such, and such an interpretation is, again, inconsistent with the Court's subsequent holdings discussed above.

[10] The parents, citing to F.L., suggest that the Second Circuit has "reiterated" that a parent may reasonably rely on information known at the time a proposed school is assessed, but F.L. does not hold as such. Rather, the Court in F.L., while acknowledging that the district court had construed R.E in a way consistent with what the parents suggest, stated that "[a]ssuming without deciding that this properly construes R.E., the related services testimony at issue in this case does not contradict anything told to the parents before the placement decision" (F.L., 553 Fed. App'x at 6) (emphasis added).

minutes" to drive from her home to the assigned public school, very little information regarding the route she took, or whether this route was the shortest or most direct route to the school, is provided in the record. Likewise, and while the parent testified that there was "no traffic" when she drove to the school, the record is devoid of any specifics in this regard, and even the IHO had to "presume" that the traffic encountered by the parent would be the same daily traffic conditions that would exist for the student (IHO Decision at p. 12).[11] Accordingly, even considering the testimony of the student's mother, any finding that the travel time limitation in the June 2013 IEP would not have been implanted would still require speculation and, in light of the precedent discussed above, I am unable to find that the parents' claims in this regard constitute an appropriate basis for unilateral placement.

Finally, and assuming without deciding that the record established that the travel time limitations in the June 2013 IEP would not have been properly implemented, and further assuming that this could constitute an appropriate basis for relief, this alone would not end the inquiry. Rather, and as with all claims relating to the implementation of an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, evaluative data submitted by the district (the sufficiency of which is not in dispute) reflects that the student is generally a happy, loving and "sweet little boy" (Dist. Exs. 4 at p. 1; 7 at p. 1; 8 at p. 1; Parent Ex. D at p. 8; Tr. p. 171), and that while he does have a low frustration tolerance and at times has "temper tantrums" (Dist. Exs. 7 at p. 6; 8 at pp. 1-2), there is no indication he exhibits aggressive behaviors or any significant social/emotional instability. In fact, the record reflects that when the student gets upset, he does not lash out (Dist. Ex. 8 at p. 2), and that when he is frustrated he is "relatively easy to redirect back to task" (Dist. Ex. 7 at p. 5). Further, while the record reflects that the student has certain medical conditions - including allergies to milk products and latex, eczema and asthma (Dist. Ex. 8 at p. 1) - the student's overall health is reported

[11] Specifically, the IHO stated that "Parent drove on a Monday morning, and arrived at the school at approximately 8:30 a.m. (T.R. 217) – encountering, I presume, the same traffic conditions that would exist if Student were to be transported on a daily basis to the placement" (IHO Decision at pp. 11-12).

as "good" (id.), and there is nothing to suggest that any of these conditions, by themselves, would necessitate a limited travel time. Accordingly, and based on the evidence before me, I am unable to find that the student required a limited travel time to receive a FAPE, or even that a travel time of "about 45 minutes" would result in the loss of any educational benefit to the student. This is especially true since, while the parents generally assert that a travel time limitation is a "material component of a student's special education program," nowhere do they explain why this is the case for the student at issue here.[12] Accordingly, and again assuming that the district would not have implemented the June 2013 IEP's travel time limitation, I cannot find that this would have amounted to a material or substantial violation of the IEP, much less one that alone would be enough to justify the parents' unilateral placement of the student.

B. Remaining Assigned School Claims

Having found that the travel time limitation in the June 2013 IEP and/or whether it would have been properly implemented does not provide an appropriate basis to justify the student's unilateral placement, I must address a few other claims raised in this matter concerning the public school to which the student was assigned. Specifically, and as noted above, the IHO largely rejected the parents' remaining claims concerning the assigned public school, and the parents indicate in their pleadings that they "dispute the IHO's dismissal of the other defects of the recommended placement" (Answer at ¶ 36). Unfortunately, however, the parents do not provide much argument or detail regarding this "dispute," nor do they clearly identify any specific findings to which they object. Rather, the parents simply suggest that they were entitled to reasonably rely upon information received at the time that they assessed the assigned public school (Pet. at ¶ 36), and they contend that what the student's mother "learned from the school at the time of her visit involved no speculation" (id. at ¶ 37). More specifically, the parents contend that the student's mother "witnessed security, structural and sanitation defects" at the school, that she was told that "some related services would be unavailable during the regular school day," and that the "lack of interaction with non-disabled peers would hold [the student] back" (id.). However, and even considering what the parents allege to have known about the school, I find that none of their assertions provide an appropriate basis for the student's unilateral placement.[13]

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[12] Instead, the parents appear to rely on the fact that the June 2013 IEP contains a travel time limitation as proof of its need, contending that since transportation accommodations require current medical documentation from a physician that "clearly state the basis for the accommodation," that "[b]y its inclusion on the IEP, parent substantiated the need." However, there is no evidence in the record that any such documentation was presented to the June 2013 CSE, and the parents do not provide (or even identify) what documentation might have been considered. In fact, there is no indication in the record that a limited travel time was even discussed at the June 2013 CSE. This is not insignificant as I note that both the June 2013 IEP and the student's previous IEP contain this limitation, and thus it is possible that the limitation was simply carried over from one year to the next without specific consideration as to its continued need (compare Parent Ex. E at p. 12 with Parent Ex. F at p. 14).

[13] Because the parents do not identify specific findings to which they object or even explain how, if at all, any of their allegations may amount to a denial of a FAPE, it is unclear from the papers before me whether the parents' "dispute" is intended to encompass all of the IHO's adverse findings, or whether their arguments are limited to findings related to the specific issues identified above. To that extent I note that it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d

First, it appears from the record that the "structural" defect that the parents refer to relates to the size of the school building, which they suggested in their due process complaint notice was too small for the student who is highly distractible and "requires a controlled and structured environment in which to learn" (Parent Ex. A at p. 2).[14] However, it is undisputed that the student did not attend the assigned public school, and therefore it is difficult to assess how the student would have reacted to the size of the school itself (see, e.g., N.K., 961 F. Supp. 2d at 591-92). This is especially true where, as here, the record before me reflects that the student was offered an IEP (the June 2013 IEP) that recommended a number of supports and services including, as the IHO noted, that the student be educated in a 6:1+1 special class, which is a class placement designed for those students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]) (Parent Ex. F at p. 11). In addition, this same IEP recommends other supports which would help the student attend and learn, including the services of a 1:1 paraprofessional (who would be able to refocus the student) and six 30-mintue sessions of individual speech-language therapy which, in part, would assist the student with his language skills (which the record reflects is a major emphasis of his programing and a factor related to his low frustration tolerance) (Parent Ex. F at p. 12; Dist. Ex. 7 at pp. 5, 7; Tr. p. 162). Furthermore, a review of this June 2013 IEP reveals that it identifies various management needs and techniques to be used to assist the student, including the use of a multi-sensory approach to learning, the use of maximum verbal and visual cues to communicate, and the need for visual and verbal assistance and redirection to task (Parent Ex. F at pp. 1-3). Accordingly, I find the student's needs with respect to his attentional behavior and need for refocusing is addressed by the June 2013 IEP, and there is no indication in the record (or even a suggestion by the parents) that any of these supports or services would not have been provided. Accordingly, and despite what the student's mother may have observed and subjectively thought about the size of the school, what affect (if any) its size may have had on the student is entirely speculative and, therefore, does not provide an appropriate basis for the student's unilateral placement (see, e.g., N.K., 961 F. Supp. 2d at 591-92; see also R.E., 694 F.3d at 195 ["[s]peculation

836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). In any event, I decline to find that any of the issues addressed by the IHO (but not specifically identified by the parents) provides a basis for relief. For example, and since there is no indication in the record (or even an allegation by the parents) that the student requires a sensory gym and/or a "quite room" in order to implement the June 2013 IEP or to otherwise receive an educational benefit, I must agree with the IHO that the lack of such at the assigned public school does not amount to the denial of a FAPE. Likewise, and while the parents claimed in their due process complaint notice that they did not approve of the student's health paraprofessional assisting in the provision of applied behavioral analysis (ABA) to the student (Parent Ex. A at p. 2), I cannot find that this constitutes a sufficient basis to unilaterally place the student. This is especially true where, as here, the record reflects that the student's health paraprofessional would, at most, be conducting discrete trials in conjunction with the student's classroom teacher and classroom paraprofessional (Tr. pp. 98-101), and there is no indication in the record that the use of the student's health paraprofessional in this regard would be detrimental to the student or prevent him from receiving an educational benefit. Also, there is no basis for finding (and the parents do not cite to anything to suggest) that simply because the student's mother may not have been shown a curriculum or text books during her visit to the assigned public school, that this somehow justifies unilaterally placing the student.

[14] I am presuming that the parents' "structural" claims relate to the size of the school since they do not explicitly identify any particular claim as a "structural" claim, and with respect to the issues raised in this matter the size of the school seems to most directly relate to its "structure."

that [a] school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement").

Likewise, to the extent that the parents suggest that the assigned public school lacked adequate security, I am unable to find that this assertion provides a basis for unilateral placement. Specifically, the hearing record reflects that the assigned public school is located in a "mini-building" which is accessed by walking through another building which, according to the student's mother, has a guard or security officer at the front door (Tr. p. 191). Further, and with respect to the mini-building itself, testimony by the school's assistant principal indicates that the school has two doors, including a front door which has a security guard posted at it (Tr. p. 83) and a back door which is generally locked and has an "alarm handle" on it (id.). In addition, the school's assistant principal testified that there are gates all around the entire school yard, and that when children are outside staff members are present to supervise them (id. at pp. 91-92). Further, and while the parents suggest that the student may elope because on the day that the student's mother visited the school she witnessed an unlocked gate that led to the parking lot (Tr. p. 32), such a suggestion is best speculative where, as here, the record reflects that the school does have a number security measures in place, that the student would be supervised, and that while the student's mother testified that the student can be a "runner" at times (Tr. p. 192), there is no indication in the record that the student has a history of eloping (or attempting to elope) from school or the type of environment provided by the June 2013 IEP.[15] Accordingly, I do not find that the parents' claims regarding security at the school provide an appropriate basis for the student's unilateral placement.

The parents, however, also suggest that the assigned public school is inappropriate because the student's mother was told that "some related services would be unavailable during the regular school day." However, assuming that this would have been the case,[16] to the extent that the parents are challenging the use of RSA's to implement the related services required by the student's IEP, I note that a June 2, 2010, "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control ("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html)[17] Moreover, caselaw also

[15] It is also speculative to assume that the school regularly leaves the gate open.

[16] The assistant principal at the assigned school testified that all of the student's speech language therapy sessions could have been provided during the school day, but that it was possible that only five of the six OT sessions recommended by the June 2013 IEP would have been provided during the school day (Tr. pp. 88-89).

[17] According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30),

supports a finding that it is permissible for districts to offer parents vouchers to obtain related services in response to a recognized shortage of service providers (see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011). Therefore, the use of RSAs, alone, would not have denied the student a FAPE. Also, to the extent that the parents are suggesting that the student would not be able to receive an educational benefit without receiving all of his related services during the school day, I find that the record does not support such a contention. In fact, even the student's mother indicated that she did not think that providing related services to the student outside of school would be inappropriate, and testified that she simply would have preferred that the related services be provided during the school day (Tr. p. 223). Accordingly, even if the student's mother was told at the time of her visit to the assigned public school that some related services would have been provided by RSAs, this alone would not provide a basis for the student's unilateral placement.

The parents also argue that there would be a "lack of interaction" with non-disabled peers at the assigned public school which, they contend, would "hold [the student] back" (Pet. at ¶ 37).[18] However, the parents' contentions in this regard are not entirely clear as they do not suggest that the placement recommended for the student by the June 2013 IEP (i.e. a placement in a 6:1+1 special class) would not provide the student with an educational benefit, nor do they suggest that such a setting would be inappropriate. In fact, the student's mother testified to the just opposite at the impartial hearing, contending that it was her belief that the student required a small class and staffing ratio (Tr. p. 211). Accordingly, it appears to be the parents' contention that, unlike at Seton where the record reflects the student is able to attend "special events" that occur from time to time with nondisabled students who attend a general education school located on the same campus as Seton (id. at pp. 129-30; 156), no such opportunities would exist at the assigned public school (Pet. at ¶ 37; Parent Ex. A at p. 2).[19] However, the assistant principal at the assigned school testified that opportunities to interact with other students outside of the assigned public school do exist (Tr. pp. 80-82). Moreover, and while the parents may prefer the type and/or frequency of interactions with nondisabled students that occurs at Seton by virtue of its close proximity to a general education school, districts are not required to replicate the identical setting or services used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). Also, and to the extent that the parents claim that the student would be "held back" at the assigned public school, I find that such an assertion is at best speculative and note that, in any event, school

1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

[18] The parents asserted in their due process complaint notice that the assistant principal at the assigned school told the student's mother that she (the assistant principal) felt that the student would be "limited" at the assigned school due to the lack of social interaction with nondisabled peers (Parent Ex. A at p. 3; see also Tr. p. 195-96). However, in testimony given at the impartial hearing, the assistant principal indicated that she believed that the assigned school would be appropriate for the student (Tr. p. 90).

[19] While the student's mother seemed to express concern at the impartial hearing that the student would eat meals in a "self-contained" setting at the assigned public school (Tr. p. 194), it is not clear from the record that she was suggesting that this, by itself, is inappropriate. This is especially true where, as here, the parents do not explicitly make such a contention, and the record reflects that even at Seton the student eats meals (lunch) in his classroom (Tr. pp. 144-45).

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). Accordingly, I am unable to find that the parents' claim regarding an alleged lack of interaction with nondisabled peers at the assigned public school provides an appropriate basis for unilateral placement.

Lastly, the parents suggest that the condition of the bathroom that was observed by the student's mother on the day of her visit renders the assigned public school inappropriate. However, the IHO found that such conditions do not relate to the educational appropriateness of the school, and the parents offer no evidence or explanation to suggest otherwise. Accordingly, I agree with the IHO and find that the condition of the bathrooms as they may have existed as of the time of the student's mother's visit to the assigned public school does not provide a basis for relief.

C. Home-Based Services

Finally, and as noted above, the parents cross-appeal the IHO's dismissal of their request for "ten hours weekly of behavioral support services at [the student's home]." Specifically, the parents contend that they provided "sufficient documentary and testimonial evidence of the continued need" for such services, citing for example the student's pre-school IEP (Pet. at ¶ 30). However, while the student's pre-school IEP reflects that the student's program at the time included 10 hours of home-based services (Parent Ex. D at p. 1), this by no means establishes that the student required such services in each year going forward in order to receive an educational benefit. Moreover, while some individuals who testified at the impartial hearing did recommend that the student receive home-based services (Tr. pp. 159, 239, 264), information presented to the June 2013 CSE reflects that the reasons that such services were being recommended at the time was to help the student "generalize his cognitive, language and social skills across settings and across people" (Parent Ex. L at p. 1),[20] and even testimony presented at the impartial hearing suggests that "generalization" was the primary reason for the "need" for such services (Tr. p. 58, 159, 239). In that regard, and while it is understandable that the parents may desire greater educational benefits through the auspices of special education, a district is not obligated to pay for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Moreover, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Accordingly, to the extent that the home-based related services sought in this case are for the purposes of generalization of skills learned at school and/or the maximization of potential, I am unable to find that this alone is a basis for the provision of such services.

Further, and perhaps more importantly, a review of the hearing record reflects that the program recommended in the June 2013 IEP was sufficient to enable the student to receive

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[20] IEPs are required to be viewed prospectively (see, e.g.,. R.E., 694 F.3d at 188), so in assessing the sufficiency of the June 2013 IEP, information that was available to the June 2013 CSE is what must be considered.

educational benefits. In this regard I note that the June 2013 recommends both a comprehensive and intensive special education program for the student, including education in a small, structured (6:1+1) environment, the identification of various management needs and techniques, and the inclusion of almost 20 goals (all with related short-term objectives) which address multiple areas of need, including adaptive living skills (toileting, safety, etc.), expressive and receptive language skills, fine motor skills, behavior/sensory processing skills, and academic skills (reading, writing and math) (Parent Ex. F at pp. 1-11). In addition, the June 2013 IEP provides the student (and the parents via parent counseling and training) with various related services, including six sessions each of both OT and speech-language therapy (Parent Ex. F. at pp 1-3, 11-12). Notably, the record reflects that with respect to OT and speech-language therapy, each were increased in the June 2013 IEP from five sessions the year prior (compare Parent Ex. E at p. 9 with Parent Ex. F at pp 11-12). Moreover, and especially with respect to speech-language therapy, I note that the increase in service from one year to the next is not insignificant as the record reflects that many of the student's deficits are speech related and that language skills are a major emphasis of the student's programing (Dist. Ex. 7 at pp. 1, 5; Tr. p. 58, 162). In fact, according to a psychological evaluation in the record, the student's language deficits can be linked to other deficits as well, including deficits that are social and/or behavioral in nature (Dist. Ex. 7 at pp. 1, 5). Accordingly, and based on the totality of the record before me, I find that the June 2013 IEP, as a whole, was sufficient to offer the student a FAPE.

VII. Conclusion

In sum, I find that for the reasons discussed above, the IHO's finding with respect to the implementation of the June 2013 IEP's travel time limitation must be reversed, and that the record as a whole reflects that the district, via the June 2013 IEP, offered the student a FAPE in the 2013-14 school year. Accordingly, I need not consider the parties' remaining contentions, including those related to the appropriateness of Seton or whether equitable considerations support the parents' claim for tuition reimbursement.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated January 2, 2014 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2013-14 school year, and which ordered the district to fund the student's tuition costs at Seton.

Dated: **Albany, New York**
February 18, 2015

HOWARD BEYER
STATE REVIEW OFFICER