The University of the State of New York

The State Education Department
State Review Officer
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No. 14-073

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

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

Law Offices of Neal H. Rosenberg, attorneys for respondent, Neal H. Rosenberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an free appropriate public education (FAPE) to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the West End Day School (West End) for the 2013-14 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

With regard to the student's educational history, the hearing record indicates that the student attended a nonpublic parochial preschool and a nonpublic kindergarten and began attending West End in December 2010, during his first grade year (see Tr. pp. 180-81, 200-01; Dist. Ex. 7 at p. 2).[1] On February 5, 2013, the parent signed an enrollment contract with West End for the student's attendance during the 2013-14 school year (see Parent Ex. F at pp. 1-3).

[1] The Commissioner of Education has not approved West End as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On May 8, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the student's 2013-14 school year (see Dist. Ex. 3 at pp. 1, 16). Attendees at the May 2013 CSE meeting included a district school psychologist (who also served as the district representative), a district special education teacher, the parent, an additional parent member, and, by telephone, representatives from West End, including the educational head and the student's then-current special education teacher, social worker, and speech-language pathologist (id. at p. 19; see Tr. pp. 27-28). Finding the student eligible for special education as a student with an other health-impairment, the May 2013 CSE recommended integrated co-teaching (ICT) services in a general education classroom for the student's core academic subjects, as well as the provision of a 1:1 full-time crisis management paraprofessional (Dist. Ex. 3 at pp. 1, 12-13).[2] In addition, the May 2013 CSE recommended related services of one 30-minute session per week of individual counseling, one 30-minute session per week of group (3:1) counseling; two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of group speech-language therapy (id. at p. 12). The May 2013 CSE also recommended support for management needs, such as access to a keyboard, use of graphic organizers and help with brainstorming his written products, pre and post review of work particularly with regard to writing, visual and verbal prompts to remain focused and persist with task, and verbal prompts to control verbal outbursts (id. at 5). The May 2013 IEP also indicated that the student required a behavioral intervention plan (BIP) and special transportation and included 13 annual goals and testing accommodations (id. at pp. 5-12, 14, 16-17; see Dist. Ex. 4 at pp. 1-3). The May 2013 IEP indicated that the "[p]aren't [was] in agreement with [the] IEP as developed and [the] [p]rogram [r]ecommendation though she [was] apprehensive about [the student] making progress in a large class setting" (Dist. Ex. 3 at p. 17).

By final notice of recommendation (FNR) dated August 14, 2013, the district summarized the ICT and related services recommended in the May 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 6).

By letter dated August 19, 2013, the parent notified the district of her concerns with the May 2013 IEP, including that the ICT services would not offer the student "the individualized attention" he required, the student required "special education techniques to learn to control his behavior," as opposed to redirection from a crisis-management paraprofessional, and that the CSE ignored recommendations set forth in a psychoeducational evaluation that the student required "a full time special education setting in a small classroom environment with a low student to teacher ratio" (Parent Ex. B at p. 1). In addition, the parent also informed the district that, because the assigned public school site was closed, she was unable to schedule a visit and requested that the district provide "additional information" about the proposed "program including a class profile" (id.). The parent expressed her intention to visit the assigned public school site but indicated that "[i]n the meantime" the student would return to West End (id.). The parent informed the district that, if it did not offer the student "an appropriate program and placement" for the 2013-14 school

[2] The student's eligibility for special education programs and related services as a student with an other health-impairment was in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

year, he would remain at West End and the parent would seek reimbursement for the costs of the student's tuition (id.).

After visiting the assigned public school site, by letter dated October 3, 2013, the parent rejected the public school as not appropriate for the student because the ICT setting was "too large" and, given the student's academic and behavioral needs, particularly his frustrations, the student required a "small class environment and one-on-one support" (Parent Ex. C at p. 1). The parent also indicated that during her visit, the special education teacher failed to address student behaviors, such as by "identify[ing] the source of the improper conduct and develop[ing] appropriate behavior modifications" (id.). The parent also indicated that the fact that the reading materials "in the 'classroom library' ranged from first to fourth grade" suggested that "many of the students ha[d] significant learning disabilities" and that, in contrast, her son performed "on grade level" in reading and required "lessons . . . tailored to his level" (id.). The parent also indicated that the student would be distracted by the "set-up" of the observed classroom, which consisted of four student at a small table with supplies in a pouch on their chairs, and that the "daily" agenda for the observed classroom was not "formalized or well-structured" (id. at p. 2). Based on the foregoing, the parent informed the district that she was "unable to accept this placement or the IEP" and that she intended to continue the student's enrollment at West End at public expense (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated December 17, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2013-14 school year (see Dist. Ex. 1 at p. 2). Specifically, the parent alleged that the May 2013 CSE "failed to appropriately consider the evaluative data and reports prepared at the meeting detailing the student's significant behavioral and emotional needs that require[d] a therapeutic full-time special education setting" (id. at p. 1). Given the student's needs, the parent asserted that the May 2013 CSE should have deemed the student eligible for special education as a student with an emotional disturbance, rather than with an other health-impairment (id.). The parent also asserted that the May 2013 IEP included "insufficient goals and objectives," particularly goals to address the student's behavioral needs (id.). With respect to the assigned public school site, the parent asserted that the school and classroom setting were "too large" for the student who "require[d] a small class environment and one on one support" (id.). In addition, the parent asserted that the "cognitive levels of the lessons, class, and other students [were] significantly below [the student's] level," in that the student required special education to address his behavioral needs that "affect his academics" but that otherwise the student functioned "on grade level for reading" (id. at pp. 1-2).

As relief, the parent requested that the IHO order the district to reimburse her for the costs of the student's tuition at West End for the 2013-14 school year, as well as the provision of transportation (Dist. Ex. 1 at p. 2). The parent also requested the costs of the student's tuition pursuant to pendency to the extent applicable (id.).

B. Impartial Hearing Officer Decision

On January 21, 2014, an impartial hearing convened in this matter and concluded on March 25, 2014, after two days of proceedings (Tr. pp. 1-223).[3] By decision dated April 14, 2014, the IHO fount hat the district failed to offer the student a FAPE for the 2013-14 school year, that West End was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 16-22). Initially, the IHO determined that the parent did not "establish[] a reasonable basis" to challenge or change the student's eligibility classification of other health-impairment (id. at p. 18).

The IHO held that the "suitability of the IEP itself [was] secondary because, even assuming an ideal IEP, there [was] no evidence, testimonial or evidentiary, that [the assigned public school site] could implement it" (IHO Decision at p. 16). The IHO found that an IEP "may exist in pristine format" but was not a "theoretical document" and was "only as good as its ability to be implemented" (id.). As such, the IHO found that she had "no alternative but to accept the unrebutted testimony of the [p]arent" with regard to the appropriateness of the assigned public school site (id.). In this regard, the IHO found the parent's testimony persuasive as to the "over-crowded conditions" of the assigned public school site, as well as the "inability of [the school's] paraprofessionals to executed a meaningful [BIP] which d[id] not rely solely upon reactive reprimand" (id.). The IHO further detailed the problems with the proposed classroom and particularly its size, mismanagement of the students, and the lack of therapeutic interventions, in light of the student's needs (id. at pp. 16-17). The IHO also indicated that "the frequent pull-outs" for related services mandated on the student's IEP "present[ed] multiple opportunities for difficult transitions, stigmatization and further depression of [the student's] low self-esteem" (id. at p. 17). However, the IHO dismissed the parent's objections to the "academic profile of the recommended class" in light of the "three year range" set forth in State regulation (id.). The IHO also indicated that "given the unanimous testimony offered by [West End] personnel," she did "not believe the collaborative paradigm [could] provide [a] FAPE to [the student]" (id.).

The IHO also determined that the parent satisfied her burden to establish that West End was an appropriate unilateral placement for the 2013-14 school year (IHO Decision at pp. 20-21). Specifically, the IHO found that West End offered an appropriate "student profile," "small class sizes," "1:1 support" the student required, and "a structured, intensive, repetitive paradigm in which organizational planning, slower pacing and chunking of materials occur[red]" (id. at p. 20). The IHO also determined that the student made progress at West End (id.).

Lastly, the IHO determined that equitable considerations weighed in favor of the parent's request for relief, noting that the parent repeatedly expressed her concerns with the proposed program during the May 2013 meeting and by subsequent letters, attended the scheduled CSE meeting, shared private evaluations, and visited the assigned public school site (IHO Decision at p. 22). The IHO noted that, while "both [West End] personnel and the [p]arent agreed that [the student] should be educated in the least restrictive environment [(LRE)], there is no mandate within the IDEA that requires a child to fail at each level the continuum before an appropriate placement

[3] On January 21, 2014, the IHO attempted to conduct a prehearing conference but a representative from the district did not appear (Tr. p. 3).

is identified" (id.). The IHO also held that the parent's decision to reserve a seat for the student at West End was reasonable (id.).

Consequently, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at West End for the 2013-14 school year (IHO Decision at p. 23).

IV. Appeal for State-Level Review

The district appeals seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2013-14 school year.[4] Specifically, the district asserts that the IHO's decision, which "rest[ed] almost entirely, if not completely," upon the ability of the assigned public school site to implement the May 2013 IEP, erred, in that such considerations were speculative since the student never attended the assigned public school site. As such, the district asserts that it did not need to demonstrate the ability of the assigned public school site to implement the IEP and, as such, the IHO erred in finding that the district failed to meet its burden in this respect. The district further alleges that, to the extent the IHO's decision could be construed as addressing the appropriateness of the May 2013 IEP, the IHO erred because the recommended ICT services in a general education class setting, along with a 1:1 crisis management paraprofessional, annual goals, strategies to address management needs, testing accommodations, and related services appropriately addressed the student's academic strengths, as well as his social/emotional, attentional, and behavioral needs, and constituted the student's LRE. To the extent the IHO addressed the appropriateness of pull-out related services for the student, the district asserts that the IHO erred as the parent did not raise such a claim in her due process complaint notice. The district also asserts that, although the IHO did not address the remaining issues set forth in the parent's due process complaint notice, the evidence revealed that the May 2013 CSE considered numerous evaluative documents, that the May 2013 IEP included sufficient and appropriate annual goals to address the student's social/emotional and behavioral needs and, furthermore, that he other supports recommended in the IEP, including the 1:1 crisis management paraprofessional, the related service of counseling, and the student's BIP further addressed the student's behavioral needs. Although the district does not appeal the IHO's determination with respect to the student's eligibility classification, it asserts that "the IHO may have arguably misplaced the burden on the issue"; however, the district asserts that the IHO correctly determined that the student was properly deemed eligible for special education as a student with an other health-impairment.

In an answer, the parent responds to the district's petition by admitting or denying the allegations raised therein and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year.[5, 6] The parent asserts that the IHO's decision

[4] The district has not appealed the IHO's determinations that West End was an appropriate unilateral placement or that equitable considerations weighed in favor of the parent's request for relief. Accordingly, these determinations have become final and binding on the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[5] In contravention of State regulation, the parent failed to file an affidavit of service of the answer with the Office of State Review (8 NYCRR 279.5).

[6] Because the parent did not assert a cross-appeal relative to the IHO's finding that the student's eligibility classification was appropriate, which was adverse to the parent, this determination is final and binding on the parties and will not be addressed (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

should be interpreted as finding that the ICT services recommended on the May 2013 were not appropriate for the student and argues that such determination was correct. The parent denies the district's assertion that the May 2013 CSE considered the evaluative information about the student, arguing that if the CSE had, it would have recommended "a small, self-contained class in a special education school" as indicated by the evaluative information. The parent also asserts that the annual goals and the 1:1 crisis management paraprofessional recommended in the May 2013 IEP were not appropriate for the student. As to the district's claim that the parent failed to raise an issue in her due process complaint notice relating to the related services recommended in the May 2013 IEP, the parent asserts that the district, through direct examination, "opened the door" to a consideration of the issue. With respect to the assigned public school site, the parent disputes the district's suggestion that the parent's claims relating thereto were speculative, setting forth her interpretation of the relevant case law and arguing that the parent's observations during her visit to the public school and her provision of notice to the district regarding her concerns resulting from such visit obligated the district to establish that the school could implement the student's IEP.

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 2013 IEP

1. Consideration of Evaluative Information

While not addressed by the IHO, the district asserts that the May 2013 CSE considered numerous evaluative documents, which the IEP reflects.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). In developing the student's IEP, the district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). In developing a student's IEP, a CSE must also consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

In this case, consistent with the documentary evidence, the district school psychologist who attended the May 2013 meeting testified that the CSE reviewed a May 2012 privately obtained psychoeducational evaluation, a September 2012 classroom observation, a May 2013 West End progress report, and May 2013 West End related services progress reports (Tr. pp. 28-29; Dist. Ex. 5; see Tr. p. 27; Dist. Ex. 3 at p. 19; see generally Dist. Exs. 7; 8; 9; 10). The district school psychologist also indicated that the May 2013 had the student's "cumulative folder," containing the student's previous IEP, as well as other information pertaining to the student (Tr. p. 29). The parent recalled that the May 2013 CSE discussed the "difficulties that would manifest in [the student's] school performance[,] . . . the various things that people had to say about him in his existing school and some of the reports from the [district] people . . . ." (Tr. p. 183).

On the May 2013 IEP, the student's present levels of performance consisted of a detailed description of cognitive and academic testing results taken directly from the May 2012 private psychoeducational evaluation report (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 7 at pp. 4-9, 14-16). Specifically, the May 2013 includes the results, set forth in the May 2012 psychoeducational evaluation report, of the student's performance relative to administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WIC-IV), including results on the student's verbal comprehension index (superior range), perceptual reasoning index (high average range), working memory index (average range), and processing speed index (average range) (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 7 at pp. 4-5, 14). The student's full scale IQ was 114 (Dist. Ex. 7 at p. 14). The May 2013 IEP also set forth the specific observations of the psychologist, set forth in the psychoeducational evaluation report, relating to the student's subtest performance, including that the student's "abstract and concrete verbal reasoning skills were well developed"; the student's "responses on verbal tasks brought up some questions about his expressive language abilities" and that some of the student's "language usage was idiosyncratic"; on a task involving the student's ability to recreate designs using blocks, the student approached the task in an almost disorganized or haphazard manner; the student's pattern of performance on tasks related to working memory was "remarkable"; the student was more engaged by added complexity of certain tasks, which helped him remain focused and engaged, leading to improved performance; the student performance was less than expected on a task of learning and copying symbols due to graphomotor difficulties (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 7 at pp. 4-5). In addition, consistent with the psychoeducational evaluation, the May 2013 IEP reported that the student exhibited well-developed language abilities, variable visual perceptual skills, average constructional skills, and attentional and executive function skills below expectation (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at pp. 6-8). The psychoeducational evaluation report and the May 2013 IEP noted that the student's impulsivity, exacerbated by the student's uncertainty about his abilities related to a task, contributed to his lower scores (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at p. 6). The May 2013 IEP also reflected the student's performance on measures of academic achievement, including the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), where the student's scores reflected performance in the average to high average range, specifically noting that the student's reading skills were "adequate but below expectation" (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at pp. 8-9, 15-16). Also consistent with the May 2012 psychoeducational evaluation report, the May 2013 IEP reported that the student received diagnoses of attention deficit hyperactivity (ADHD), combined type, developmental coordination disorder (graphomotor skills/handwriting), and disorder of written expression (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at p. 12; see also Tr. p. 29).

With respect to academic achievement, functional performance and learning characteristics, the May 2013 IEP included grade level estimates from the May 2013 West End progress report, indicating that, with support and structure, the student functioned at a 3.5 grade level in both reading and mathematics (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 8 at p. 1). Also taken directly from the May 2013 West End progress report, the May 2013 IEP reported that the student was a "bright and energetic student who has difficulty controlling his impulses," (id.). As to reading, consistent with the progress report, the May 2013 IEP indicated that the student often rushed through reading notwithstanding his preference for the activity, read without expression or intonation, did not "self correct and over-guesse[d] on words that he d[id] not know," struggled with waiting for "his turn in a read aloud," was easily distracted by peers during reading, and needed to keep punctuation in mind, but was able to recall details and sequent events from a passage, "make appropriate predictions for how a story will go," and was "improving his ability to find the main idea of a passage" (compare Dist. Ex. 3 at pp. 2-3, with Dist. Ex. 8 at p. 1). As to mathematics, consistent with the progress report, the May 2013 reported that the student exhibited the ability to tell time up to the minute, understood dollars and cents, and was able to solve additional and subtraction problems, but needed help in division, struggled with multiple step word problems, and became frustrated when reading mathematics problems (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 8 at p. 2). As to writing, consistent with the progress report, the May 2013 IEP noted that the student struggled, finding the activity stressful, which led to upset and agitation, which, in turn, led to the student's refusal to write anything (id.). The May 2013 IEP and the progress report also indicated that, although the student understood rules of grammar and syntax, he was careless with them in his writing, tended to interchange similar letters and capitals and lowercases, could write his own compositions but had difficulty generating ideas, could be overly literal in his writing and not as imaginative as he could be, struggled writing on the line, and benefited from the use of graphic organizers (id.). Also consistent with the progress report, the May 2013 IEP included information that the student "tend[ed] to rush through his reading and math," "ma[d]e careless errors," and quickly became upset if his attention was drawn to such mistakes (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 8 at pp. 1-2). Consistent with information in the progress report, the May 2013 IEP indicated that the student was easily districted, needed teacher prompts to remain focused, and could lash out verbally or engage in "explosive tantrums resulting in physical outburst" (Dist. Ex. 3 at p. 3; Dist. Ex. 8 at pp. 1-3; see also Dist. Ex. 7 at pp. 2-3).

In the area social development, the May 2013 reported information from the May 2013 West End progress report that the student was very impulsive and could become aggressive toward peers when frustrated or angry, becoming "verbally abusive or physically unpredictable, kicking or throwing objects, slamming doors, etc." (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 8 at pp. 2-1; see also Dist. Ex. 9 at p. 1). As noted in the progress report, the May 2013 IEP indicated that the student could be intolerant of classmates with whom he did not feel close and could throw verbal tantrums when interactions with peers did not go his way (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 8 at p. 3).

With respect to physical development, the May 2013 IEP include detailed information reportedly from a September 2012 OT evaluation, a copy of which was not included in the hearing record (see Dist. Ex. 3 at p. 4).

The parent argues that the district's assertion that the May 2013 considered the evaluative information about the student is belied by the fact that the May 2013 CSE recommended ICT services, which was not supported by the evaluative information. Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W., 2013 WL 1286154, at *19; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10-*11 [noting that while the CSE is required to consider recommendations made in evaluative information provided by the parents, the IDEA does not require the CSE to adopt each recommendation made]). In this instance, as described above, it is clear that the May 2013 CSE utilized the May 2012 psychoeducational evaluation, as well as the May 2013 West End progress report, in describing the student's present levels of performance. Although the May 2012 psychoeducational evaluation included a recommendation that the student attend a "full-time special education setting[,] . . . in a small classroom environment, with a low student to teacher ratio, within a school tailored to meet the educational needs of students with such difficulties" and the West End progress report recommended a "therapeutic special education setting," (Dist. Ex. 7 at p. 12; 8 at p. 3; 9 at p. 2), the May 2013 CSE was not obligated to adopt these recommendations.

Accordingly, a review of the information considered by the May 2013 CSE, as detailed above, shows that the May 2013 CSE considered the evaluative information before them and that, as viewed as a whole, the student's needs and abilities were accurately documented throughout the IEP, which resulted in an IEP designed to help the student progress (34 CFR 303.306[c][2]; 8 NYCRR 200.4[d][2]; see DiRocco v Bd. of Educ., 2013 WL 25959, at *20 [S.D.N.Y. Jan. 2, 2013]; E.A.M., 2012 WL 4571794, at *9-*10; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

2. Annual Goals

While not addressed by the IHO, the district argues that the May 2013 IEP included sufficient annual goals targeted to address the student's behavioral needs. Further, the district asserts that, even if such annual goals were not sufficient, the additional supports in the May 2013 IEP, including the 1:1 crisis management paraprofessional, the related service of counseling, and the development of a BIP, sufficiently targeted the student's behaviors. The parent asserts that many of the annual goals included in the May 2013 IEP were "meaningless window-dressing," while others were "hybrid goals that [were] not capable of meaningful implementation." The parent further argues that the annual goals could not be implemented in an ICT class setting because they were drawn from the student's experience at West End.

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]).

The district school psychologist testified that the May 2013 CSE developed the annual goals included in the IEP by utilizing the May 2012 psychoeducational evaluation report, as well as the West End teacher and related service provider progress reports (Tr. p. 41). He indicated that, the West End representatives "walked" the CSE through the reports, "highlighting particular features of [the student's] functioning," and the district members of the CSE inquired of the West End representatives how the student's needs "should . . . be addressed in the education plan going forward" (id.).

A review of the hearing record indicates that the May 2013 IEP included annual goals that targeted the student's identified needs as reflected in the present levels of performance (see Dist. Ex. 3 at pp. 1-5). To address the student's social/emotional functioning and behavioral needs, the May 2013 IEP included an annual goal designed to improve the student's social interactions with peers and to promote the student's own feelings of self-worth with strategies such as role playing, modeling, direct instruction, and feedback used in both classroom and social interactions (id. at p. 6). The goal further specified that the student would achieve this goal by "decreasing instances of lashing out either physically or verbally" (id.). To improve the student's ability to regulate his behavior and impulses in accordance with the social and academic demands of the classroom, the IEP included an annual goal that called for the use of strategies in the classroom and counseling, such as modeling, role playing, feedback, and verbal mediation, to help the student follow teacher directives, speak to teachers in an appropriate manner, and exhibit zero to low incidents of talking back to teachers (id. at p. 7). Also addressing the student's identified behavioral needs, an annual goal indicated that the student would improve group participation by not calling out during small group activities and being respectful to adults, as well as by not overreacting when classroom assignments were presented to him (id. at p. 11). Another annual goal indicated that, with explanation and demonstration from counseling and instructional staff, the student would learn to utilize his special education supports, and to meet his academic and social/emotional goals (id.). While the parent correctly argues that the latter annual goal is somewhat vague, in the context of the May 2013 IEP as a whole, it is not so deficient so as to warrant a finding that the IEP as a whole was not appropriate for the student (see id.). Furthermore, the district school psychologist testified that the CSE intended this annual goal to relate to the student's ability to "understand and accept" the provision of the 1:1 crisis management paraprofessional (Tr. p. 43).

Further with respect to the student's behaviors, the district correctly notes that the student's BIP further targeted the student's needs in this area, complimenting the relevant annual goals (see Dist. Exs. 3 at pp. 6-7; 4 at p. 1). For example, the BIP identified various target behaviors, including incidences of aggressiveness, slamming his chair, verbal outbursts, negative self-statements, incidents of heightened anxiety and upsets and, for each, set an expectation of zero to low incidence with strategies and interventions developed "by the FBA staff" (Dist. Ex. 4 at p. 1). The student's functional behavioral assessment (FBA) identified triggers for the student's behaviors such as social and academic challenge and identified environmental conditions that may

affect the behaviors as low structure or unclear demands (id. at p. 2). The FBA indicated that the "presumed purpose" of the student's behaviors was task avoidance of attention (id.).

In addition, the May 2013 IEP included annual goals targeting the student's needs set forth in the present levels of performance, related to: retention and comprehension of reading materials; language proficiency in relation to reading comprehension; writing; mathematics word problems; pragmatic, receptive, and expressive language skills; and graphomotor skills (handwriting) (Dist. Ex. 3 at pp. 7-11). Review of the evidence in the hearing record indicates that many of the annual goals included in the IEP were based upon or related to those proposed in the West End progress reports (compare Dist. Ex. 3 at pp. 6-11, with Dist. Ex. 9 at pp. 1, 3-4, 6).

Nothing in the hearing record supports the parent's contention that the annual goals could not be implemented in the recommended program, given the support available from both a special education teacher and a regular education teacher, a 1:1 crisis management paraprofessional, and the related service providers. With respect to those annual goals based on the West End progress reports, the district school psychologist testified that the district requested submissions from the West End providers with the understanding that a placement setting had not yet been determined (Tr. p. 75). The West End social worker who attended the May 2013 CSE meeting testified that the goals submitted by West End were "obviously based in our program and how we do things" but also indicated that the counseling goals could be used in a larger setting but opined that they "would have to be adjusted" (Tr. p. 176). Notwithstanding this testimony, there is no specific evidence in the hearing record that addresses why the annual goals could not be implemented in the recommended ICT setting with the relevant supports (cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570 [S.D.N.Y. Mar. 19, 2013] [affirming the SRO's rejection of the parents' contention that the assigned TEACH classroom could not implement the annual goals, which were related to the DIR methodology]). This is particularly the case, since the submitted West End goals were specific to the student's related services and, pursuant to the May 2013 IEP, would be implemented, at least in part, in pull-out counseling, OT, and speech-language therapy sessions (see Dist. Exs. 3 at pp. 6-12; 9 at pp. 1, 3-4, 6).[7]

The May 2013 IEP also identified strategies relevant to help the student achieve certain goals, such as use of graphic organizers, post-it notes, highlighting, guided questions, self-

[7] As to related services, to the extent that the IHO addressed the appropriateness of the pull-out nature of the sessions recommended on the May 2013 IEP, the district correctly asserts that the appropriateness of the related services recommended on the May 2013 IEP was outside the scope of impartial hearing because the parent did not raise the issue in her due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]; see IHO Decision at p. 17; see generally Dist. Ex. 1). Contrary to the parent's assertion that the district "opened the door" to the issue (M.H.v. New York City Dep't of Educ., 685 F.3d 217, 250-51; see D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 328; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270,283-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6), the transcript pages cited by the parent in her answer refer to the testimony of the district school psychologist in response to the district's broader questions regarding what program the May 2013 CSE recommended for the student and that the district did not, in fact, elicit any direct testimony on the issue of related services of the purpose of defeating a claim in the due process complaint notice (Tr. pp. 37, 47-48).

advocacy through requests for repetitions and rephrasing, rereading, use of a book mark, prewriting tools, checklists and/or rubrics, underlining, and use of graph paper (Dist. Ex. 3 at pp. 7-9). Such strategies were in addition to those set forth in the May 2013 IEP to address the student's management needs, which included access to a keyboard, graphic organizers and help with brainstorming his written products, pre and post review of work particularly with regard to writing, visual and verbal prompts to remain focused and persist with tasks, and verbal prompts to control verbal outbursts (id. at p. 5).

In addition, the hearing record supports a finding that the annual goals in the May 2013 IEP targeted the student's identified areas of need and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress several times over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F.Supp.2d 344, 360-61 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at, 334-35; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

3. Integrated Co-Teaching Services

The district argues that, to the extent the IHO's statement that she did "not believe the collaborative paradigm c[ould] provide a FAPE to [the student]," constituted a determination regarding the appropriateness of the recommended ICT services on the continuum of services, such a finding was in error (see IHO Decision at p. 17). The district argues that, given the student's strengths, the May 2013 CSE properly recommended ICT services in order to "support [the student's] ability to function in a general education class." The district further asserts that, given the additional supports included in the May 2013 IEP, including the 1:1 crisis management paraprofessional, related services, supports for management needs, annual goals, and testing accommodations, the CSE recommended a program that provided the student with "maximum support" in the LRE. The parent asserts that the evaluative information before the May 2013 CSE did not support a recommendation of ICT services. Further, the parent argues that hearing record lacks evidence that the May 2013 CSE discussed the student's low self-esteem, which, argues the parent, precluded the student's ability to succeed in an ICT setting. The parent asserts that the district's failure to appeal the IHO's determination that West End was an appropriate unilateral placement for the student belies their assertion that a small class size was too restrictive for the student.

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities who receive ICT services within a class may not exceed 12 students, and an ICT classroom must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][1]-[2]). Consistent with the description in State regulations, the district school psychologist testified that ICT services were delivered in a general education setting, consisting of 12 student's "with IEPs" in a classroom with approximately 20 to 25 students and staffed with a regular education teacher and a special education teacher (Tr. pp. 37, 44-45). The district school psychologist explained that

"[t]he special education teacher reiterates the curriculum and helps to adjust [and] help the children with IEPs absorb the curriculum" (Tr. p. 37).

Review of the evidence in the hearing record indicates that the May 2013 CSE also considered a general education class placement with special education teacher support services (SETSS) but determined that such a placement did not offer adequate support for the student (Dist. Ex. 3 at pp. 17-18). Furthermore, the May 2013 CSE considered a 12:1 and a 12:1+1 special class placement in a community school but rejected these options because they were "overly restrictive and not warranted at th[at] time (id.). The district school psychologist testified that, given the student's strengths, the May 2013 CSE wanted to provide the student with maximum support to access his potential without denying him access to the general education setting (Tr. pp. 37-38, 45-46). The district school psychologist elaborated that, given the student's "very strong abilities" and his "strong desire to participate . . . in the community with his peers," the CSE did not want to "segregate him into a special class and in any way compromise that experience for him either academically or socially" (Tr. p. 47). Furthermore, the district school psychologist testified that the West End representatives who attended the May 2013 CSE meeting, while "apprehensive about the program," agreed that the student should have maximum access to typically developing peers (Tr. p. 91; see Dist. Ex. 3 at p. 17).

The classroom observation conducted by a district employee, as well as other evaluative information before the CSE, did reveal the student's distractibility and impulsivity in a small class setting (see Dist. Ex. 10); however, there is also evidence in the hearing record indicating that the student's distractibility was more prominent when he lacked academic challenge (see Dist. Ex. 7 at pp. 4, 7, 10-11). Reconciling this information, it was reasonable for the CSE to conclude that, given the student's cognitive and academic strengths, a general education setting with the aforementioned supports would offer an appropriate balance to challenge the student academically, while likewise addressing the student's behavioral and social/emotional concerns. Moreover, two of the annual goals included in the May 2013 IEP identified modeling as a strategy that would help the student succeed (see Dist. Ex. 3 at pp. 6-7). Based on the student's profile and the totality of the evidence in the hearing record, modeling nondisabled peers in a general education setting would likely facilitate the student's ability to use this strategy and achieve educational benefit.

With respect to the 1:1 crisis management paraprofessional, the parent asserts that the assignment of such an individual to the student would have exacerbated the student's negative self-esteem. The district psychologist testified that the May 2013 CSE recommended the 1:1 paraprofessional for the student because he exhibited "significant difficulties with attention, focusing[,] and sometimes bringing his strong abilities to fully realize [his] potential . . . ."(Tr. pp. 37-38). He further explained that the paraprofessional would "assist with prompting, refocusing, [and] coaching through social and academic aspects of the day (Tr. p. 26). He also indicated that while the May 2013 CSE discussed the student's self-esteem, he could not recall if such discussion

took place as it related to the 1:1 paraprofessional (Tr. pp. 93-94).[8] The West End social worker who attended the May 2013 CSE meeting testified that she expressed her concerns to the CSE about the 1:1 paraprofessional because of the student's sensitivity to "feeling singled out" and the extent to which a paraprofessional would address the student's emotional needs underlying his behaviors (Tr. pp. 173-74). The parent also expressed her concern with regard to the 1:1 paraprofessional in that the student did not "need somebody to correct his behavior after it happens," rather he required "somebody to help him not get to those uncomfortable places" in the first instance (Tr. pp. 188-89). However, given the supports provided for in the May 2013 IEP, particularly the counseling, the evidence in the hearing record supports the finding that the student would receive the support he needed from a 1:1 paraprofessional, as well as addressing his underlying emotions regarding "feeling singled out".

Based on the foregoing, I find that the May 2013 CSE's recommendation to place the student in a general education classroom with ICT services was appropriate, as were the recommended related services, and that the program created by the CSE was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

B. Challenges to the Assigned Public School Site

The district asserts that the IHO's determination that the assigned public school site could not implement the May 2013 IEP was speculative since the student never attended the public school. As such, the district further argues that it was not required to demonstrate the ability of the assigned public school site to implement the IEP.

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., 552 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; 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. . New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012], rev'd on other

[8] To the extent the IHO based her belief that an ICT setting would not be appropriate for the student on "the unanimous testimony offered by [West End] personnel, the only West End representative who attended the CSE meeting and who testified at the impartial haring was the West End social worker (see IHO Decision at p. 17; see Tr. p. 167; Dist. Ex. 3 at p. 19). Thus, consideration of the testimony of the West End educational head of school or the West End special education teacher would constitute impermissible use of retrospective evidence (R.E., 694 F.3d at 187).

gounds, 2014 WL 3685943 [2d Cir. July 25, 2014]; 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]).

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 V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *3-*4 [E.D.N.Y. June 10, 2014] [finding that the parents were denied the "right to evaluate" the assigned public school site]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [same]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 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, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]).

I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [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]).[9]

As recently explained, "[i]t would be inconsistent with R.E. to require the [district] to proffer 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 (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . 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., 964 F. Supp. 2d at 286; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26 ; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 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'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 552 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on the claims that the district would have failed to implement the May 2013 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. B; C; F). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative.

Furthermore, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013

[9] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

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"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273).

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at West End was an appropriate placement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S, 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find that it is not necessary to consider them in light of my determinations herein

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 14, 2014 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2013-14 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated April 14, 2014 is modified by vacating that portion which ordered the district to pay for the costs of the student's tuition at West End for the 2013-14 school year.

Dated: **Albany, New York**
July 29, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER