The University of the State of New York

The State Education Department
State Review Officer
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No. 14-091

**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 Offices of Neil Howard Rosenberg, attorneys for respondents, Marc Gottlieb, 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 appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Stephen Gaynor School (Stephen Gaynor) for the 2013-14 school year. The appeal must be sustained in part.

### 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 respect to the student's educational history, the evidence in the hearing record shows that the student attended a general education classroom in a district public school and received integrated co-teaching (ICT) services during the student's second through fourth grades (see Tr. p.

64; Dist. Ex. 4 at pp. 1, 3-5).[1] For the 2012-13 school year, the student attended Stephen Gaynor (id. at pp. 5, 6).[2]

On February 8, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 6 at pp. 1, 14). Finding the student eligible for special education as a student with a learning disability, the February 2013 CSE recommended a 12:1 special class for English language arts (ELA), social studies, and sciences, and a general education classroom placement with ICT services for mathematics, art, music, and physical education (id. at p. 10).[3] The February 2013 CSE also recommended related services of counseling and speech-language therapy, as well as testing accommodations, modified promotion criteria for ELA and mathematics, support for management needs, 11 annual goals, and special transportation (id. at pp. 1, 3-4, 10-13, 15).

On March 16, 2013, the parents signed an enrollment contract with Stephen Gaynor for the student's attendance during the 2013-14 school year (Parent Ex. D at pp. 1-4).

In a final notice of recommendation (FNR) dated July 24, 2013, the district summarized the 12:1 special class, ICT services, and related services recommended in the February 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Dist. Ex. 7).

In a letter dated August 5, 2013, the parents summarized their concerns with the February 2013 IEP, including that the recommended program offered insufficient "individualized attention" and required "transition[s] from class to class," which the parents opined would be difficult for the student (Parent Ex. B at p. 1). In addition, the parents notified the district that, as it was summer and the assigned public school site was closed, they had not been able to schedule a visit; however, they requested "any additional information . . . about the program[,] including a class profile" (id.). In the meantime, the parents indicated their intent to enroll the student at Stephen Gaynor in September and seek reimbursement for the costs of the student's tuition "if no appropriate IEP and program [were] offered" (id.).

After visiting the assigned public school site, the parents notified the district, via letter dated September 18, 2013, that they rejected the assigned school as not appropriate for the student (Parent Ex. C at p. 1). Specifically, the parents indicated that the parent coordinator at the assigned public school site informed them that the school could not "offer both the ICT and 12:1 to [the student] as it would be too disruptive" (id.). The parents also indicated their belief that the ICT classroom they observed was not the proposed classroom and that a teacher at the assigned public school site indicated that the "general ICT class had student[s] with conduct issues" (id.). The

[1] The terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (see, e.g., Tr. p. 67; Dist. Ex. 4 at pp. 2-4). For consistency with State regulations, the term ICT will be used in this decision (see 8 NYCRR 200.6[g][1][i][ii]).

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

[3] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

parents opined that a classroom consisting of "students acting out" would "exacerbate [the student's] attention and anxiety issues" (id.). According to the parents, the student previously attended an ICT classroom at a different public school site during the 2011-12 school year and experienced "many academic and social difficulties" and that the size of the class would district and overwhelm the student (id. at p. 2). As to the observed 12:1 special class, the parents noted that the "special education teacher was not certified to teach language issues," which the student needed in order to succeed (id.). Further, the parents asserted that the student needed a second special education teacher in the classroom, rather than "just a paraprofessional" (id.). Finally, the parents expressed concern that the other students in the observed 12:1 classroom appeared to function "way below" the student's levels (id.). Based on the foregoing, the parents notified the district that the student would remain at Stephen Gaynor and they would seek reimbursement for the costs of the student's tuition same (id.).

**A. Due Process Complaint Notice**

In a due process complaint notice dated October 8, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year on both substantive and procedural grounds (Dist. Ex. 1 at p. 1). Among other things, the parents alleged that the February 2013 CSE was improperly constituted; the IEP lacked a sufficient number of annual goals and short-term objectives to address all of the student's deficits; and the recommended general education classroom with ICT services was an inappropriate placement for the student (id.). The parents also alleged that the assigned public school site would not have been able to implement the student's IEP, reiterating the specific objections outlined in their September 18, 2013 letter to the district (id. at pp. 1-2). As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's related services and tuition at Stephen Gaynor for the 2013-14 school year and provide the student with transportation (id. 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**

An impartial hearing convened on January 16, 2014 and concluded on March 24, 2014 after three days of proceedings (Tr. pp. 1-161). In a decision dated May 16, 2014, the IHO found that the district failed to offer the student a FAPE for the 2013-14 school year, that Stephen Gaynor was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (see IHO Decision at pp. 8-10).

Initially, the IHO found no denial of a FAPE based on the February 2013 CSE process or the recommendations contained in the IEP (IHO Decision at pp. 8-9). The IHO determined the lack of a regular education teacher at the February 2013 CSE meeting constituted a procedural error but that such error did not rise to the level of a denial of FAPE, as one of the CSE members was familiar with the ICT program and "neither party was advocating for [the student] to attend a general education class" (id. at p. 8). The IHO also found that the annual goals contained in the student's February 2013 IEP were adequate and that the recommended combined program of "ICT classes and special classes" was an appropriate placement for the student in the least restrictive environment (LRE) (id. at pp. 8-9).

However, the IHO found that the district "failed to present any evidence" that it would have been able to properly implement the student's IEP at the assigned public school site (IHO Decision at p. 9). The IHO noted that the parents' testimony "that the school did not recognize the combination program for [the student]; that ICT classes did not exist for specials (as recommended in the IEP) and that [the student] would not be appropriately grouped in the recommended classes was not contradicted by any [district] witness" (id.).

With respect to the unilateral placement, the IHO found that Stephen Gaynor offered the student "small classes, with teachers trained in special education, language and reading," support to address the student's organization skills and anxiety, as well as speech-language therapy and psychologists "on staff" to address the student's social/emotional needs (IHO Decision at p. 10). The IHO also noted that the student made progress at Stephen Gaynor during the 2013-14 school year (id.). With respect to equitable considerations, the IHO found that the parents cooperated with the district, participated in the CSE meeting, visited the assigned public school site, and provided sufficient notice of their intent to unilaterally place the student (id.). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2013-14 school year, reduced to reflect a scholarship that was awarded to the student (id.).

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

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year and that equitable considerations weighed in favor of an award of tuition reimbursement. Specifically, the district asserts that, since the parents rejected the February 2013 IEP, the district was not required to demonstrate at the impartial hearing that the assigned public school site was appropriate. As to equitable considerations, the district asserts that the parents did not cooperate with the CSE and lacked a genuine intent to send the student to a district school.

In an answer, the parents respond to the district petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year. The parents review the case law relating to assigned school claims and assert that the district misconstrued the law to imply that such a claim is always speculative unless the student has actually attended the particular school. The parents argue that, because that they did not reject the assigned public school site until after their visit, the district remained obligated to offer a school that could implement the February 2013 IEP. The parents further argue that, because the assigned public school site was not able to implement the IEP, the district failed to meet this burden.

**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 Scope of Review

The parents do not assert a cross-appeal relative to the IHO's determinations that the procedural violation arising from the absence of a regular education teacher at the February 2013 CSE meeting did not rise to the level of a denial of FAPE, that the annual goals in the February 2013 IEP were adequate, or that the placement recommended on the February 2013 IEP, consisting

of 12:1 special classes and general education classes with ICT services, was appropriate. Accordingly, these determinations, which were adverse to the parents, are final and binding on the parties and will not be addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore this review is limited to the issue raised by the district; that is, whether the IHO erred in her determination that the district failed to offer the student a FAPE because it did not demonstrate that it could have implemented the student's IEP at the assigned public school site.

**B. Assigned Public School Site**

The parents assert that the assigned public school site would not have been able to implement the student's February 2013 IEP largely based on information from a parent coordinator at the assigned public school site that the school could not offer the student the combined program included on the IEP, consisting of 12:1 special classes, as well as general education classes with ICT services. In addition, the parent raised concerns about the assigned public school site based on functional grouping, the size of the classroom, and the qualifications of the teachers.

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., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; 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"]).

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., 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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). 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]).[4] When the Second Circuit spoke 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., 553 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 their claims regarding implementation of the February 2013 IEP because a retrospective analysis of how the district would have implemented the student's February 2013 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, 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. C; D). 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, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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). Accordingly, the parents

[4] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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., 584 F.3d at 420 [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.

cannot prevail on their claims that the assigned public school site would not have properly implemented the February 2013 IEP.[5]

## VII. Conclusion

Because the appropriateness of the February 2013 IEP was not at issue, and having found that the IHO erred in her determination that the district failed to offer the student a FAPE for the 2013-14 school year based on an implementation argument, I find that the district offered the student a FAPE, and I need not consider the parties remaining contentions and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 05-038; Application of a Child with a Disability, Appeal No. 03-058).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated May 16, 2014, is modified by reversing those portions which determined that the district failed to offer the student a FAPE and ordered the district to reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2013-14 school year.

**Dated:** **Albany, New York**
**August 11, 2014**

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

[5] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; 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]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 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] [holding that "[a]bsent 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]; 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]).