The University of the State of New York

The State Education Department
State Review Officer
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No. 14-103

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Melvyn W. Hoffman, attorneys for petitioner, Melvyn W. Hoffman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determinations that Mary McDowell was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for relief. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

This appeal arises from a decision of an IHO that was issued upon remand (see IHO Decision # 2; see also Application of a Student with a Disability, Appeal No. 14-004). Therefore, the parties' familiarity with the facts procedural history will not be repeated again in detail (see Application of a Student with a Disability, Appeal No. 14-004).

During the 2011-12 school year, the student attended Mary McDowell at district expense pursuant to a prior IHO Decision in the parent's favor (see Parent Ex. L at p. 12).[1] On January 27, 2012, the parent signed an enrollment contract with Mary McDowell for the student's attendance during the 2012-13 school year (Parent Ex. D at pp. 1-2).

On April 4, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for 2012-13 school year (see Tr. p. 61; Parent Ex. B). Finding the student eligible for special education and related services as a student with a learning disability, the April 2012 CSE recommended integrated co-teaching (ICT) services in a general education setting for mathematics, English language arts (ELA), social studies, and science (Parent Ex. B at p. 6).[2] In addition, the April 2012 CSE recommended related services comprised of three 30-minute sessions of individual speech-language therapy per week and two 30-minute sessions of individual occupational therapy (OT) per week (id. at p. 7). The April 2012 CSE also developed annual goals related to the student's auditory, fine motor, social pragmatic, expressive/receptive language, reading, writing, mathematics, and organizational skills, and recommended testing accommodations, which included extended time, testing in a separate location, revised testing format and the use of auditory amplification (id. at pp. 3-6, 8).

In a final notice of recommendation (FNR) dated August 3, 2012, the district summarized the ICT services, speech-language therapy, and OT recommended in the April 2012 IEP and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. C).

In a letter dated August 22, 2012, the parent informed the district that the student needed "a small school [and] small class environment" with "an appropriate special education program and services," which the April 2012 IEP did not offer (Parent Ex. J at p. 1). Therefore, the parent advised the district that she "had no alternative but to unilaterally place the student" at Mary McDowell for the 2012-13 school year and seek reimbursement for the costs of the student's tuition, transportation, and related services (id.).

In a letter dated October 25, 2012, the parent also notified the district that she visited the assigned public school site and proposed classroom (Parent Ex. K). The parent indicated that, after encountering difficulty arranging a visit, she finally "took it upon" herself to visit the school (id.). As a result of the visit, the parent rejected the assigned public school site as not appropriate for the student because the observed classroom was too large and the student would not have been properly functionally grouped with the other students in the classroom (id.). The parent indicated that the student required a "small school [and] small class environment with multisensory teaching techniques" (id.). The parent concluded that she had "no alternative" but to continue the student's enrollment at Mary McDowell for the 2012-13 school year (id.).

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

[2] 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]).

A. Due Process Complaint Notice

In a due process complaint notice dated June 20, 2013, the parent alleged that the district failed to offer the student a free appropriate public education for the 2012-13 school year (see generally Parent Ex. A). Specifically, the parent asserted that: the April 2012 CSE was improperly constituted; the annual goals contained in the April 2012 IEP were not appropriate for the student's needs and were too generalized and immeasurable; the district did not send her an FNR in a timely manner; and the assigned public school site was not appropriate for the student because the student would not have been functionally grouped for instructional purposes in mathematics and reading and the proposed classroom was too large for the student to receive educational benefit (see id. at pp. 1-2).

B. Previous Proceedings

On September 11, 2013, an impartial hearing convened in this matter and concluded on November 7, 2014, after three days of proceeding (Tr. pp. 1-216). In a decision dated December 2, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year, that Mary McDowell constituted an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision # 1 at pp. 7-9).

Upon appeal by the parent and a cross-appeal by the district, by decision dated March 12, 2014, the undersigned SRO determined that the IHO's decision left unaddressed or unclear certain issues raised in the parent's due process complaint notice (Application of a Student with a Disability, Appeal No. 14-004). Therefore the matter was remanded to the IHO to make determinations on the issues of CSE composition and annual goals, if it was determined that the parties had not intended to abandon or concede them (id.). In addition, it was noted that it remained unclear whether or not "ICT placement," as used by the parties and the IHO, referred to the particular classroom at the assigned public school site selected by the district or a placement on the continuum of special education services as determined in the CSE process and set forth on the proposed IEP, and, if the latter, whether or not the issue was properly raised in the parent's due process complaint notice in the first instance (id.). Therefore, the undersigned directed the IHO to clarify the status of such claims on remand (see id.).

C. Impartial Hearing Officer Decision # 2

A one day conference was held on March 27, 2014 to address the issues outlined on appeal and to determine if additional evidence or briefing was required (see Tr. pp. 217-241). The parties set forth their respective positions in closing briefs to the IHO (see generally IHO Exs. II; III).

In a decision dated June 6, 2014, the IHO again found that the district offered the student FAPE for the 2012-13 school year and affirmed his previous determinations that Mary McDowell constituted an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision # 2 at pp. 3-6; see IHO Decision # 1 at p. 9).

With respect to the composition of the April 2012 CSE, the IHO noted that the district acknowledged that a regular education teacher who could have implemented the student's IEP did not attend the meeting, since the regular education teacher who attended was not actively engaged in teaching, and that such absence constituted a procedural violation (IHO Decision # 2 at p. 3). However, the IHO found that this procedural violation did not rise to the level of a denial of FAPE (id. at p. 6).

As to measurability of the annual goals, the IHO indicated that, while the April 2011 IEP "could have contained a more detailed plan for implementing and evaluating the goals," it did set forth "how the[] [annual] goals w[ould] be addressed" and that the teacher implementing the IEP could "work to develop more detailed plans" (IHO Decision # 2 at p. 4). Further the IHO noted that the annual goals directed to the student's auditory processing and social pragmatic skills "appear[ed] to be without foundation," in that the IEP did not describe otherwise that the student had deficits in these areas (id.). However, the IHO indicated that the presence of these goals did not invalidate the IEP. The IHO determined that the annual goals included in the April 2012 IEP were "not perfect" and seemed to contradict the promotion criteria, which the IHO found to be a "real problem" (id. at p. 6). Specifically, the IHO noted that the expectation in the annual goals that the student achieve 80 percent mastery of fourth grade goals seemed reasonable given that he was reported to function at a third grade level but that this appeared inconsistent with the promotion criteria in the April 2012 IEP, which expected the student to achieve most of the sixth grade standards (id. at pp. 3-4). However, the IHO indicated that, with "good will," the parent could have asked the CSE to revisit the promotion criteria "in light of what were realistic goals," and that it was not the intent of the CSE "to create a scenario in which the student would achieve all of his [annual] goals" and yet not meet promotion criteria (id. at p. 6). Thus, the IHO found the contradiction between the annual goals and the promotion criteria to be a procedural violation which "could have been remedied" (id.).

With respect to whether the appropriateness of the ICT services recommended on the April 2011 IEP was appropriately raised in the parent's due process complaint notice, the IHO found that "both parties understood" and the district conceded that the parent's allegations targeted both the recommended placement set forth in the IEP, as well as the assigned public school site's ability to implement the IEP (IHO Decision at p. 5). In the alternative, the IHO found that the district also opened the door to the issue, a fact to which, the IHO noted, the district also conceded (id.).

With regard to the parent's arguments in opposition to the IHO's original decision that her claims with regard to the assigned public school site were speculative since she rejected the placement prior to the time when the district was obligated to implement the IEP, the IHO rejected the parent's contention that he misidentified the parent's August 2012 letter as a rejection of the recommended placement, noting again, the parent's testimony during the impartial hearing that she had rejected the placement and went to the assigned public school site "to see if I made the right decision. . . . You second guess yourself a lot," and that nowhere in the letter did the parent say the decision was not final or that she remained open to a public school placement (id. at pp. 5-6).

The IHO held that, having considered the issues on remand, there was no basis to depart from the conclusion in the December 2, 2013 decision, which denied the parent's request for tuition reimbursement (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The details of the parent's appeal and the district's cross-appeal, relative to the IHO's decision dated December 2, 2012, are set forth in Application of a Student with a Disability, Appeal No. 14-004 and will not be repeated here, although the merits of the arguments articulated by the parties will be addressed to the extent necessary to accomplish a thorough and careful review of the relevant issues.

The parent also appeals the from IHO's second decision (after remand), seeking to overturn the determination that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parent asserts that the IHO erred in finding that the absence at the April 2012 CSE meeting of a regular education teacher capable of implementing the student's IEP was not a procedural violation that resulted in a denial of FAPE. The parent asserts that "the student's educational plan lacked input from his regular education teacher in the CSE discussions on how to modify the . . . curriculum in the [general] education environment for this student, thereby denying his educational benefit. The parent also asserts that the IHO's statements and conclusions regarding this issue demonstrated bias.

The parent also appeals the IHO's determinations regarding the annual goals found on the April 2012 IEP. Specifically, the parent asserts that, because the IEP did not specify the origin of the student's grade levels set forth on the IEP and the CSE did not have current evaluative information, the annual goals did not correlate with the student's present levels of performance. The parent emphasizes that the April 2012 IEP did not describe that the student exhibited deficits in auditory processing or social pragmatic skills and, therefore, the teacher responsible for implementing the IEP would not have a baseline understanding of the student's needs by which to measure the student's progress towards the annual goals in these areas. Likewise, the parent argues that the annual goal targeted to address expressive/receptive language skills could not be measured. With regard to the inconsistency between the grade level expectations in the annual goals and the promotion criteria, the parent asserts that the IHO erred in finding that the contradiction could be remedied and, therefore, did not result in a denial of a FAPE.

The parent also reiterates her arguments with regard to whether the recommendation for ICT services in the IEP was properly raised or whether the district opened the door to the issue and asserts that, although the IHO determined that the recommendation was in issue, he failed to discuss the appropriateness of the ICT services in a general education placement for the student. The parent argues that the recommended ICT services in a general education classroom placement were not appropriate for the student due to the size of such a setting.

With respect to the IHO's determination that the parent's August 2012 letter constituted a rejection of the IEP before the district was obligated to implement the program and services, the parent asserts that the letter could not have rejected the placement, as she was not able to visit the assigned public school site until September 2012. The parent asserts that the IHO further "arbitrarily and capriciously ignored" her October 2012 letter rejecting the placement for good cause after visiting the assigned public school site.

Based on the foregoing, the parent seeks an order reversing the IHO's decision that the district offered the student a FAPE and directing the district to reimburse her for the costs of the student's tuition at Mary McDowell for the 2012-13 school year.

In an answer, the district responds to the parent's petition by denying the allegations and asserting that the IHO correctly determined that it offered the student a FAPE for the 2012-13 school year. The district asserts that, although the regular education teacher who attended the April 2012 CSE meeting was not able to provide or supervise the student's general education, this was not a procedural violation that rose to the level of a denial of FAPE, as the teacher was certified, and the parent and private school teacher fully participated in the CSE meeting. With respect to the parent's assertion that the April 2012 CSE did not have current evaluative data, the district asserts that the CSE utilized a recent Mary McDowell mid-year school report and that the student's then-current Mary McDowell teacher participated. The district also asserts that the annual goals contained on the April 2012 IEP were appropriate. The district argues that the annual goals were measurable and that, even if the progress criteria did not line up with the promotion criteria, the hearing record shows that a student functioning below grade level, as is the case here, is not responsible for completing 100% of the criteria for promotion. The district also asserts that inadequacy of annual goals is generally not a flaw that rises to the level of a denial of FAPE. With respect to the issue of the assigned public school site, the district asserts that the IHO correctly found that the parent rejected the April 2012 IEP prior to the start of the school year and that, only after the IHO originally made this determination, did the parent "invent" the argument that the August 2011 letter did not constitute a rejection. The district also asserts that IHO properly found that the recommended ICT services, as recommended on the IEP were at issue in this case, and it does not appeal this finding. The district further asserts that the IHO correctly determined in his original decision that the ICT services were appropriate for the student.

While the district asserts that the IHO's remand determinations were correct, it renews its cross-appeal of the IHO's original determinations that Mary McDowell was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for tuition reimbursement.

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. CSE Composition

The parent asserts that the district's failure to ensure the attendance of a regular education teacher of the student at the April 2012 CSE was a violation of the IDEA that denied the student a FAPE. The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also E.A.M. v. New York City Dep't of Educ., 2012 W.L. 4571794, at *6 [S.D.N.Y. Sept. 29, 2012]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and

support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, a review of the hearing record demonstrates that attendees at the April 2012 CSE meeting included a district school psychologist (who also served as the district representative, a district general education teacher, the parent, an additional parent member, and, by telephone, the student's then-current special education teacher from Mary McDowell (see Tr. p. 62; Parent Ex. B at p. 12). The parties appear to agree that the district general education teacher, who attended the CSE meeting, held a dual certification in general and special education but worked specifically for the CSE and did not teach in a classroom and, as such, would not actually be responsible for implementing the student's IEP and thus would not be a regular education teacher "of the student" (see Tr. pp. 222, 224-25; IHO Ex. II at p. 2; see also Parent Ex. B at p. 12). The hearing record reflects that the April 2012 CSE recommended a general education classroom placement with ICT services (Parent Ex. B at pp. 6, 10), and, therefore, the April 2012 CSE should have included a regular education teacher "of the student," whose absence in this case is a procedural violation (see E.A.M, 2012 W.L. 4571794, at *6-*7; see also IEP Team, 71 Fed. Reg. 46670, 46675 [Aug. 14, 2006

However, the absence of the regular education teacher of the student at the April 2012 CSE meeting in this case constitutes a procedural inadequacy, which, standing alone, does not rise to the level of a denial of a FAPE. The hearing record shows that the parent and the student's then-current special education teacher from Mary McDowell had an opportunity to fully participate in the April 2012 CSE meeting (see Tr. pp. 176, 180-82; see also Parent Ex. B at p. 12). The question of whether this procedural violation rose to the level of a denial of a FAPE is tempered by the parent's own assertion that the regular education teacher was qualified to "weigh into the meeting" but not to fulfill the role of a regular education teacher (see IHO Ex III at p. 3). The evidence does not lead to the conclusion that the attending regular education teacher at the CSE meeting acted in any manner inconsistent with the duties and responsibilities of a regular education teacher. Thus, while the regulations require that the regular education teacher be "of the student," in these circumstances the hearing record does not lead to the conclusion that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[2]; 8 NYCRR 200.5[j][4][ii]; see also Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 15, 2011 WL 2164009 [2d Cir. June 3, 2011]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that, even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M., 2012 WL 4571794, at *6-*7 [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular

education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

B. April 2012 IEP

Initially, as noted above, the burden of proof is placed upon 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). Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Reyes v. New York City Dep't of Educ., 2014 WL 3685943, at *6 [2d Cir. July 25, 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 F. App'x 2, 4, 2014 WL 53264 [2d Cir. 2014]). This case may, indeed, represent one of those few. The district did not submit any documentary evidence during the impartial hearing and presented only one witness who attended the April 2012 CSE, who admitted that she did not have an independent recollection regarding the CSE meeting (see Tr. pp. 72-75). More egregious in this instance is the fact that the district had a second opportunity to offer additional evidence to meet its burden on remand but declined to do so (see Tr. pp. 228, 239). As neither party submitted any evaluative information regarding the student, it is difficult to decipher the student's needs from the IEP alone. The parent did not raise an issue in her due process complaint notice regarding the sufficiency or consideration of evaluative information before the CSE or the adequacy of the student's present levels of performance as set forth in the April 2012 IEP; accordingly, these claims are not in and of themselves a basis for finding a denial of a FAPE (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d at 188-89 & n.4). Nonetheless, based on the hearing record before me, I decline, after reviewing the entire record, to presume that the April 2012 IEP included a full and complete description of the student's needs by which to assess the placement recommendations at issue in this case. This is especially so given the unexplained discrepancies in the IEP between the student's present levels of performance and the recommended program and the annual goals, described below. Based on this failure and, consequently, the undeveloped record with regard to the relevant issues, addressed further below, I find that the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2013-13 school year.

1. Annual Goals

With respect to the parties' contentions regarding the annual goals found on the April 2012 IEP, 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]).

In this case, a review of the annual goals included in the student's April 2012 IEP revealed that, although some were vague and overly broad, the academic goals appeared measureable and aligned to the student's present level of academic performance (see Parent Ex. B at pp. 1-2, 3-6). However, the remaining nonacademic annual goals were not aligned to any evaluative information, were vague and overly broad, and not sufficiently measurable (id. at p. 1-5). For example, while the April 2012 IEP did not describe the student's needs in these areas, the IEP included annual goals that targeted the student's fine motor skills, auditory processing skills, social pragmatic skills, expressive/receptive language skills, and personal academic organizational skills (id. at pp. 3-5).

The April 2012 IEP shows that the student functioned at the third grade level in reading, comprehension, and written expression, and at the end of the third grade level in calculation and applied problems (Parent Ex. B at p. 1). The IEP also indicated that, according to the student's then-current classroom teacher, the student: wrote using a computer which helped in address his graphomotor deficits; was able to independently generate a topic sentence and structure his writing; and, in mathematics, was working on place value, advanced addition/subtraction, estimation, variables, lattice multiplication with multiple numbers, division with remainders and long division, and advanced addition/subtraction of fractions with like and unlike denominators (id.). The IEP also noted that the parent agreed with the student's then teacher's assessment and indicated that the student also struggled with spelling and used a spell check program in school (id.).

While this recitation of the student's present levels of performance in the April 2011 IEP is lacking in specificity and the hearing record is unclear as to whether it encompassed all of the student's needs, the academic goals included in the IEP were not inconsistent, per se, with the student's articulated needs. One academic goal addressed the student's writing needs by targeting the length of his written work using content-specific vocabulary words and newly acquired decoded/encoded words across the curriculum (Parent Ex. B at p. 4). Another academic goal targeted the student's reading needs specific to his concrete/inferential reading comprehension by expecting him to identify story components and use text-specific vocabulary in oral/written formats (id.). A third academic goal targeted the student's decoding/encoding needs specific to increasing his understanding and use of newly encoded/decoded multisyllabic vocabulary words by use of sight word lists, nonsense-word lists, and dictionaries (id.). In regards to mathematics, the IEP included an annual goal that targeted the student's mathematics needs by expecting him to use number sense and numeration skills in order to develop solutions in basic operations/calculations (id. at p. 5). Yet another academic goal targeted the student's use of mathematical reasoning to analyze mathematical problems and develop a mathematics vocabulary as an aid to problem solving (id.). All of the academic goals included the projected expectation that the student would be 80% successful at the fourth grade level (id. at pp. 4-5).

With respect to social/emotional levels of performance, the April 2012 IEP indicated that the student: did not exhibit any overt behavioral concerns; was well liked in his class; was sought out as a friend; and was able to comply with all of the school rules and adult authority figures in

school (Parent Ex. B at pp. 1-2). The IEP also indicated that the parent expressed no concerns regarding the student's social/emotional functioning (id. at p. 3).

Although the IEP indicated that the social/emotional area was not an area of concern for the student, the April 2012 IEP included a general and overly broad annual goal that targeted the student's social pragmatic skills (Parent Ex. B at pp. 1-2). Moreover, while the April 2012 IEP did not specify that the student exhibited graphomotor or auditory processing deficits, the CSE nonetheless recommended speech-language therapy and OT, as well as goals and testing accommodations that were not clearly aligned to any identified need in the IEP (id. at pp. 3-5, 7-8). For example, although the April 2012 IEP did not specify anything about the student's difficulties with auditory processing, the April 2012 CSE recommended an array of testing accommodations some of which were related to such needs, including extended time for all testing (50 percent), separate location for all testing, directions and questions read and re-read aloud, and use of an auditory amplification FM unit during all testing (id. at pp. 1-2, 8). According to the hearing record, at Mary McDowell, 90 percent of the classrooms contain an FM unit for purposes of highlighting teachers' voices during direct instruction (Tr. pp. 92, 105). The April 2012 CSE did not recommend the student use an FM unit in the ICT classroom, where direct instruction would occur (see Parent Ex. B at p. 7). It is unclear why the CSE recommended the FM unit as a testing accommodation (id. at p. 8). Presumably, when the student would be in a separate location during testing, that location would be quieter than the ICT classroom, and direct instruction would be less likely to occur (see Tr. p. 105; Parent Ex. B at p. 8).

Overall, the student's needs were not sufficiently described in the April 2012 IEP out, thus resulting in annual goals that were questionable in terms of their appropriateness for the student and immeasurable. This and of itself, would not, by itself, necessarily amount to a denial of a FAPE (see P.K. v. New York City Dep't of Educ. (Region 4), 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011] [noting courts' reluctance "to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"], aff'd, 526 F. App'x 135, 2013 WL 2158587 [2d Cir. May 21, 2013]). However, in combination with fact that I am unable to determine the appropriateness of a general education class placement with ICT services for this student, the hearing record indicates that the inadequacy regarding the annual goals contributes to a cumulative finding that the district failed to offer the student a FAPE (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

2. ICT Services

Initially, I note that the parties agreed upon remand that the appropriateness of the general education placement with ICT services as set forth in the May 2012 IEP was placed in issue at the impartial hearing.

With respect to the parties contentions regarding the recommendation that the student be placed in a general education class with ICT related services, the hearing record does not support

a finding that the placement recommendation was appropriate.[3] 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]).

According to the April 2012 IEP, the CSE considered a special class in a community school, but rejected that option (Parent Ex. B at p. 11). The district representative indicated that the April 2012 CSE recommended the general education placement with ICT services because the student required access to general education peers to benefit from peer modeling and interactions on a daily basis (Tr. p. 70). She further testified that, in light of information that the student acquired and maintained learned academic skills, the CSE had no reason think he would not continue to do so in an ICT class, which was a less restrictive environment than a special class (id.). The district representative testified that, in the ICT class, the student would have full time access to a general education teacher and a special education teacher and that the class broke into small groups for instructional purposes (id.). However, given the district representatives lack of recollection regarding the April 2012 CSE meeting at issue, it is unclear the extent to which these justifications are based on the student's needs, as opposed to generalities. Given the dearth of information regarding the student's needs in the hearing record, including the IEP, the district representative's testimony does not provide illumination into the April 2012 CSE's recommendation.

This lack of information is highlighted by the IHO's reasoning, supporting his original decision that the general education class placement with ICT services was appropriate for the student. The IHO relied heavily on testimony from the district witness from the assigned public school site who purportedly would have implemented the student's April 2012 IEP. However, this testimony is retrospective in nature and does not explain the reasons for the CSE's recommendation of the ICT placement, in light of the student's needs, based on the information before it (R.E., 694 F.3d at 185-88 [explaining that the adequacy of an IEP must be examined prospectively as of the time of the parents' placement decision and that "retrospective testimony" regarding services not listed in the IEP may not be considered, but rejecting a rigid "four-corners rule" that would prevent consideration of evidence explicating the written terms of the IEP]; see Reyes, 2014 WL 3685943, at *6-*7; F.L., 553 Fed. App'x at 5-6; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-77 [S.D.N.Y. 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *10 [W.D.N.Y. Sept. 26, 2012], adopted at, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]). While LRE

[3] It is noted that a great deal of unnecessary confusion, questioning, and multiplicity of effort occurred in this case due to the imprecise use of the word "placement." The Second Circuit has already established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]); see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]).

considerations, as noted by the IHO, may have been a relevant factor in considering ICT setting, it does not suffice alone without additional information, for example, regarding the student's management needs, his success or weakness in educational settings other than Mary McDowell, the extent to which he would benefit from peer modeling, it is not possible to conclude, in this instance, that the general education setting with ICT services, while perhaps a less restrictive setting, would have been appropriate to address the student's special education needs.

C. Challenges to the Assigned Public School Site

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; 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 in which a student would be placed 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]

[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., 584 F.3d at 420; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. 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

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 parent cannot prevail on her claims regarding implementation of the April 2012 IEP because a retrospective analysis of how the district would have implemented 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 student did not attend the district's assigned public school site. Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87).

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.,

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.

906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the April 2012 IEP.[5]

Finally, the parent contends that she did not reject the recommended IEP and placement until after her October 2012 visit and that the IHO misconstrued her August 2012 letter as a rejection of the April 2012 IEP. The IHO, having a second chance to review the hearing record did not alter his determination and a review of the hearing record supports the IHO's conclusion. The hearing record shows that the parent informed the district that the student needed "a small school [and] small class environment" with "an appropriate special education program and services," which the April 2012 IEP did not offer (Parent Ex. J at p. 1). Therefore, the parent advised the district that she "had no alternative but to unilaterally place the student" at Mary McDowell for the 2012-13 school year and seek reimbursement for the costs of the student's tuition, transportation, and related services (id.). Under these circumstances, the parent cannot claim neither that she did not reject the district's offered IEP until after she visited the assigned public school site, nor that she rejected the IEP only after she later acquired additional information concerning the assigned public school site. As noted by the IHO, the parent's argument is also belied in her own testimony that she visited the assigned public school site simply to confirm that the decision she made, as articulated in her August 2012 letter, was correct (Tr. p. 202).

D. Unilateral Placement

Having concluded that the district failed to offer the student a FAPE for the 2012-13 school year, a determination must be made regarding whether Mary McDowell was an appropriate unilateral placement for the student. The district asserts that the IHO erred in finding Mary McDowell appropriate because it did not constitute the student's LRE and the student did not receive certain related services.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must provide an educational program which

[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 P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. July 24, 2014]; 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., 2014 WL 1301957, at *12; 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, 2013 WL 1182232, at *5; A.D., 2013 WL 1155570, at *13; J.L., 2013 WL 625064, at *10; Ganje, 2012 WL 5473491, at *15; 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., 910 F.Supp.2d at 676-78; E.A.M., 2012 WL 4571794, at *11).

meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at p. 14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement . . . .'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

1. Related Services

The district argues that Mary McDowell was not an appropriate unilateral placement for the student because it did not offer sufficient related services to meet the student's needs. However, a parent need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9).

Initially, as noted above, the district failed to offer any reliable evidence of the student's needs during the impartial hearing. Under these circumstances, the district cannot controvert the evidence submitted by the parent indicating the student's needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs (see A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). As the district does not point to anything in the hearing record other than the April 2012 IEP indicating a need for speech-language therapy or OT, the district's argument that Mary McDowell was inappropriate because it did not provide the student with these related services also fails for this reason.

In addition, the hearing record shows that the student did receive some related services at Mary McDowell. The co-director of the middle school program at Mary McDowell testified that the student received one 40-minute session per week of speech-language therapy in a group of three and that, in addition, the "speech teacher pushed in to one of [the student's] content area classes each trimester" (Tr. p. 103-04). The co-director testified that, for "a third of a trimester," the student additionally received a second push-in session of speech-language per week (id.). As for OT, the co-director testified that a consultant observed the students in their classrooms for the purpose of making recommendations for OT services (Tr. p. 106). The student's teacher at Mary McDowell further indicated that, although the student did not receive OT, she implemented "various techniques" relevant to OT needs with the students (Tr. pp. 142-43).

2. Least Restrictive Environment

In addition, the district argues that Mary McDowell did not constitute the student's LRE. The hearing record shows that Mary McDowell caters to "high functioning learning disabled students" (Tr. pp. 81-82; see generally Parent Ex. E). The co-director of the middle school program at Mary McDowell testified that the students have access to nondisabled peers during sports but that the student had not yet participated in such activities (Tr. pp. 79-80). However, in this regard, the Second Circuit recently held that, while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]; Frank G., 459 F.3d at 364 ; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000] [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]; Schreiber v. E. Ramapo Cent. Sch. Dist.,

700 F. Supp. 2d 529, 552 [S.D.N.Y. 2010]; W.S. v. Rye City School Dist., 454 F. Supp. 2d 134,138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]). Consequently, under the facts and circumstances of this case the restrictiveness of Mary McDowell does not otherwise preclude a finding that it was appropriate to meet the student's needs.

E. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. Of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district asserts that the parent never intended to enroll the student at a district public school, pointing to evidence that the parent signed an enrollment contract with Mary McDowell and submitted a deposit toward the student's tuition in January 2012 (see Tr. p. 189; see generally

Parent Exs. D; H; I). In addition, the district cites testimony from the parent that originally she intended only to secure a spot for the student but that by August 2012, prior to receiving the FNR, she decided to keep the student enrolled at Mary McDowell (see Tr. pp. 190-92). However, as the district acknowledges, the parent testified that, had the district offered the student an appropriate placement, she would have attempted to work with Mary McDowell and she believed that "it could have been worked out if it came to that" (Tr. pp. 196-97). Moreover, it appears that the parents acted reasonably under the circumstances of this case (see, e.g., C.L., 744 F.3d at 840; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *9-*10 [S.D.N.Y. Sept. 23, 2013]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *28-*30 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, R.E. 694 F.3d 167; C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *9 [S.D.N.Y. Jan. 3, 2013], aff'd, 552 Fed. App'x 81 [2d Cir. Jan. 27, 2014], as amended [Feb. 3, 2014]).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2012-13 school year, Mary McDowell constituted an appropriate unilateral placement, and equitable considerations weigh in favor of the parent's request for relief.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decisions dated December 2, 2013 and June 6, 2014 are modified by reversing that portion which found that the district offered the student a FAPE for the 2012-13 school year.

Dated: **Albany, New York**
August 27, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER