



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-066

**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, Brian J. Reimels, 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 the costs of her son's tuition at the Bay Ridge Preparatory School (Bay Ridge) for the 2014-15 school year. The appeal must be dismissed.

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

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

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

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

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

The student, in the 10th grade at the time of the impartial hearing, has continuously attended Bay Ridge since the 2008-09 (fourth grade) school year (see Tr. pp. 96-97, 103-04).<sup>1</sup>

On January 21, 2014, a CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (Dist. Ex. 1 at p. 12).<sup>2</sup> Finding that the student

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<sup>1</sup> The Commissioner of Education has not approved Bay Ridge as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> For purposes of this decision, only district exhibits were cited in instances where a parent and district exhibit were substantively identical. Pursuant to regulation, evidence deemed unduly repetitious should be excluded

remained eligible for special education and related services as a student with a speech or language impairment, the January 2014 CSE recommended a 15:1 special class placement in a community school, as well as counseling and speech-language therapy (id. at pp. 1, 8, 12).

By school location letter and prior written notice dated July 16, 2014, the district summarized the special education and related services recommended in the January 2014 IEP and identified the particular public school to which the district assigned the student to attend for the 2014-15 school year (see Dist Ex. 2).

In a letter dated August 20, 2014, the parent, through her attorney, asserted that because the CSE had not convened to prepare an IEP for the student for the 2014-15 school year and the student had not been offered a public school placement, the district had not offered the student a free appropriate public education (FAPE) (Parent Ex. F at p. 1). The parent informed the district that she was unilaterally placing the student at Bay Ridge and would be seeking reimbursement for the costs of tuition, related services, and transportation (id. at pp. 1-2).

On September 30, 2014, the parent and the student visited the assigned public school, and, by letter dated October 1, 2014, the parent notified the district that the school was not appropriate for the student (see Parent Ex. H). The parent asserted the assigned public school site "cannot meet the CSE mandated 15:1 class," stating that she was informed the 15:1 classroom was "currently overcrowded" and the school would not be able to offer the student a seat (id.). The parent further stated that the school's "large environment" made the student "anxious and he expressed concerns about bullying" (id.). Also on September 30, 2014, the parent executed an enrollment contract for the student's attendance at Bay Ridge for the 2014-15 school year (see Parent Ex. J).

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

By due process complaint notice dated January 14, 2015, the parent alleged that the CSE denied the student a FAPE for the 2014-15 school year (see Parent Ex. A).<sup>3</sup> The parent alleged that the January 2014 IEP expired in January 2015 and therefore would not be effective for the entirety of the 2014-15 school year (id. at p. 1). Next, the parent alleged that the CSE team was improperly constituted because it did not include a teacher who could have implemented the recommended program (id.). Next, the parent alleged that the IEP was "prepared without substantial evaluative data and the evaluative data used was outdated" (id.). Further, the parent alleged that the goals set forth in the IEP "were too generalized and inadequate for the [student]," and the IEP did not contain goals in each of the student's areas of need (id.). Further, the parent alleged that the student's promotional criteria had not been modified despite the fact that the student was functioning behind grade level in math, reading, and writing (id.). Additionally, the parent asserted that the CSE did not provide the parent with written notice of the public school site to which the student was assigned before the end of the school year, preventing the parent from visiting the assigned public school and class placement prior to the start of the 2014-15 school year

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from the impartial hearing (8 NYCRR 200.5[j][3][xii][c]).

<sup>3</sup> Although the due process complaint notice is identified as "corrected," no other version was included in the hearing record submitted to the Office of State Review (Parent Ex. A at p. 1).

(id.). The parent further asserted that the assigned public school was "too large, noisy, crowded and overwhelming" for the student (id.). The parent alleged that she was advised that the 15:1 class in the assigned public school contained "some very low functioning students" and that the "class was already full and that a seat was unavailable for" the student (id.). The parent asserted that the student needed a "small nurturing school, small class environment, grouped with [similarly] functioning peers, intensive special education remediation in order to receive an educational benefit," alleged that Bay Ridge provided an appropriate placement for the student, and requested the district fund the costs of the student's attendance (id. at p. 2).

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

After two preliminary hearing dates, the parties proceeded to an impartial hearing on March 16, 2015, which concluded on April 30, 2015, after two days of proceedings (see Tr. pp. 1-229). In a decision dated May 14, 2015, the IHO found that the district offered the student a FAPE for the 2014-15 school year (see IHO Decision at p. 12). Specifically, the IHO noted that the CSE developed the January 2014 IEP with available evaluative information and input from the student's Bay Ridge teachers (id. at p. 11). Next, the IHO found that the IEP included strategies to address the student's management needs, an annual goal to address his anxiety, and related services to address the student's social/emotional and communication needs (id.). The IHO noted that the parent did not object to the description in the IEP of the student's present levels of performance, the annual goals, or the recommended related services (id.). Additionally, the IHO noted that the parent indicated that the CSE was responsive to her concerns, with the exception of her concerns regarding a 15:1 special class placement in a community school (id.). The IHO found that the parent's concerns regarding the assigned public school site "seem to be based on speculation" (id. at p. 12). With regard to the parent's contention that there were no seats available in a 15:1 special class at the assigned school, the IHO found that the district was under no obligation to maintain a seat for the student, as the parent rejected the January 2014 IEP and indicated her intention to send the student to Bay Ridge at district expense prior to the time she visited the public school (id. at p. 10). Furthermore, the IHO found credible the testimony of a district witnesses that there were vacancies available in the school had the parent chosen to send the student to the public school (id.). Finally, the IHO found that the student could be successful in a 15:1 class setting in the assigned public school because of the strategies used by the school (id. at pp. 11-12).

Having determined that the district offered the student a FAPE for the 2014-15 school year, the IHO declined to address the appropriateness of the parent's unilateral placement or whether equitable considerations favored the parent's request for relief (IHO Decision at p. 12).

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

The parent appeals, contending that the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school year. Initially, the parent asserts that the student's IEP "expired" in January 2015, and the CSE failed to reconvene and develop an updated IEP prior to the time the IEP expired, depriving the student of a FAPE. The parent also contends that the "delayed implementation" of the January 2014 IEP until September 2014 violated the requirement that the CSE develop an IEP annually because delaying the implementation of the IEP "essentially made the IEP valid for 17 months." Further, the parent contends that the student should have been evaluated prior to the January 2014 CSE meeting to determine his functional levels and alleges

that the CSE meeting was held in January in order to circumvent the need to conduct a mandatory evaluation of the student.

The parent further asserts that the recommended 15:1 special class placement in a community school setting was "not supportive enough or reasonably calculated" to provide the student with educational benefits. Specifically, the parent asserted that the recommended placement would not be sufficient to address the student's educational needs, executive functioning deficits, distractibility, or anxiety. Moreover, the parent contends that a 15:1 special class would not be the least restrictive environment for the student. The parent next contends that the IHO erred in finding that her August 2014 letter constituted a rejection of the January 2014 IEP, and asserts that she did not reject the offered program until after she visited the assigned public school site. The parent further contends that the timing of the school location letter deprived her of the opportunity to visit the assigned public school and make an informed decision regarding its appropriateness prior to the start of the 2014-15 school year. The parent also contends that the IHO erred in not crediting her testimony that she was informed that there were no seats available for the student in the 15:1 special class in the assigned public school. The parent also contends that the assigned school was not appropriate because of the number of students in the school, which would be overwhelming for the student and cause anxiety.

Finally, the parent asserts that Bay Ridge was an appropriate unilateral placement for the student and that equitable considerations support her request for relief.<sup>4</sup>

In an answer, the district responds to the parent's allegations with admissions and denials, interposes a counter-statement of facts, and generally argues to uphold the IHO's decision in its entirety.

## **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,

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<sup>4</sup> The parent does not assert on appeal any argument relating to the contentions raised in her due process complaint notice regarding the composition of the January 2014 CSE, annual goals, and promotional criteria; accordingly, these claims have effectively been abandoned and will not be further addressed.

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 [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 [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 [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 [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]).

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. January 2014 CSE Process**

#### **1. Timeliness of CSE Meeting and IEP**

The parent contends that the January 2014 IEP expired in January 2015 and the district was in violation of its obligation to develop an IEP for the student annually. Upon review, the evidence in the hearing record does not support the parent's contentions.

While the IDEA and State regulations require a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), neither the IDEA nor State regulations preclude additional CSE meetings, prescribe when a CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (see 20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). A school district must have an IEP in effect for each student with a disability within its jurisdiction at the beginning of each school year (see 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194).

In this case, the January 2014 IEP specified an implementation date of September 3, 2014 (Dist. Ex. 1 at p. 1). The parent does not identify any changes in the student's functional levels

between the time of the January 2014 CSE meeting and the time the IEP was to be implemented that required the district to reconvene the CSE to amend the IEP. The parent does not raise any challenges to the adequacy of the present levels of performance or annual goals contained in the January 2014 IEP, and the parent testified that she did not object to the present levels of performance or annual goals (Tr. pp. 113-14).

With respect to the parent's claim that the district failed to offer the student a FAPE because the January 2014 IEP expired on January 20, 2015, the hearing record shows that the parent filed her "corrected" due process complaint notice on January 14, 2015, less than one year from the date of the January 2014 CSE meeting (Parent Ex. A at p. 1; Dist. Ex 1 at p. 1). Therefore, at the time of the parent's due process complaint notice, the district was not yet obligated to review the January 2014 IEP. Furthermore, the district representative at the January 2014 CSE meeting testified that the January 2014 IEP was developed for implementation in September to cover the entire 2014-15 school year (Tr. pp. 40-41).

Next, it is unclear whether the district conducted an annual review or developed an IEP for the student in January 2015; however, no claim regarding a failure to timely reconvene a CSE is before me in this proceeding, and the parent may file a separate due process complaint notice in the event that the district failed to do so. In addition, a review of the evidence in the hearing record does not reflect that the parent objected to the timing of the CSE meeting. Accordingly, the timing of the student's annual review, even if a procedural violation of the IDEA, did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or deprive the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

## **2. Sufficiency of Evaluative Information**

Turning to the dispute regarding evaluative information, the parent contends that the student should have been evaluated prior to the January 2014 CSE meeting since the student had not been evaluated since April 2011 and was now a high school student rather than an elementary student. The parent argues that new evaluations were necessary to assess the student's functional levels and his progress since he was last evaluated. Further, the parent asserts that the district held the CSE meeting in January in order to "circumvent" the mandatory reevaluation process.<sup>5</sup> The district generally denies this allegation. The parent's position is not supported by the evidence in the hearing record.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must reevaluate a student at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information

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<sup>5</sup> This claim was not raised in the due process complaint notice and a review of the hearing record does not reveal any evidence supporting the parent's claim that the CSE convened in January 2014 specifically to "circumvent" the triennial evaluation process.

provided by the parent, that may assist in determining the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In this case, a psychologist conducted a psychoeducational evaluation of the student in April 2011, such that the January 2014 CSE meeting was within the three year regulatory timeframe (Dist. Ex. 4 at pp. 1-7). There is no evidence in the hearing record to indicate that the parent made a request either before, during, or following the January 2014 CSE meeting for any additional testing to assess the student's educational or functional levels. Thus, it does not appear that the district failed to comply with its procedural obligation to evaluate the student. However, even if the district were not in compliance with its obligation, a review of the information considered by the CSE demonstrates that the district did not fail to offer the student a FAPE thereby.

Concerning the parent's argument that the January 2014 CSE did not have sufficient evaluative information to assess the student's educational and functional levels, the district representative who participated in the January 2014 CSE meeting testified that the January 2014 CSE considered and relied upon a January 2014 Bay Ridge speech-language progress report (2014 speech-language report), an April 2013 Bay Ridge counseling report (2013 counseling report), the April 2011 psychoeducational evaluation report (2011 evaluation report), and the input of Bay Ridge staff (Tr. pp. 30-32). In addition, the January 2014 IEP reflected the input of the Bay Ridge staff as well as that of the parent (Dist. Ex. 1 at pp. 1-2).

Within the 2014 speech-language report, the speech-language pathologist reported that, receptively, the student demonstrated good auditory comprehension, yet had difficulty understanding themes and identifying the main idea (Dist. Ex. 3 at p. 1). The pathologist also reported that the student exhibited difficulty understanding abstract meanings, inferencing, and thinking critically (*id.*). The pathologist noted that the student's attention deficits appeared to have a large impact on his comprehension abilities and that the student benefitted from class discussions, repetition of instructions, teacher prompts and redirection (*id.*). Regarding expressive language, the pathologist reported that the student benefitted from detailed outlines to support his writing and required prompts and models to support the editing process (*id.*). The pathologist stated that the student struggled with expressive organization in both verbal and written form, and required prompts in order to plan and organize lengthier written assignments (*id.*). The pathologist reported that the student was most successful in smaller, more structured environments that provided short, concrete steps and increased support (*id.* at p. 2). The report indicated that the student benefitted from direct organization support, prompts to expand on his ideas, explanation of errors, and editing checklists for use in the proofreading process (*id.*). In addition, the pathologist noted that the student demonstrated the use of more sophisticated sentence structure and vocabulary in his

writing and that his ability to participate in conversations with his peers and express his opinion had improved and had led to increased confidence (id.). The pathologist recommended continued services within a small class placement in a supportive environment with accommodations of preferential seating, additional time to process material, frequent breaks, pre-teaching, and the use of manipulatives, visual materials, computers, graphic organizers, and written lists of assignments and upcoming projects (id.).

The 2013 counseling report indicated that the student's counseling sessions focused on several issues, particularly interpersonal relationship and social skills (Dist. Ex. 5 at p. 1). The provider reported several "themes" surfaced during the year, including the student's negative feelings of self-worth, his difficulty in reading social nuances and navigating social situations, and his anxiety regarding social situations and managing workload (id.). The provider found that the student had done well in examining social scenarios in retrospect and hypotheticals, yet continued to struggle in implementing those skills "in the moment" (id.). The provider reported that the student had made progress in improving his self-esteem, combating his anxiety, and managing his workload with 1:1 assistance to help him with time management and organizational skills (id. at pp. 1-2). The provider recommended individual and group counseling services, 1:1 academic support, participation in activities that draw on the student's strengths, and utilization of perspective-taking to assist in maintaining healthy interpersonal relationships (id. at p. 2). In addition, the provider recommended continued work toward improving the student's anxiety, self-esteem, and time management, organizational, and social skills (id.).

The psychologist who prepared the 2011 evaluation report indicated that the student maintained good eye-contact, appeared well-motivated and cooperative, responded well to praise and encouragement, and did not exhibit significant attentional problems (Dist. Ex. 4 at p. 1). The psychologist noted that the student exhibited mild speech disfluency at times during the examination (id.). Cognitive testing revealed the student to be functioning in the average range in the verbal domain and below average in the nonverbal and spatial domains (Dist. Ex. 4 at p. 2). Academic testing revealed that the student performed above grade level in spelling and reading recognition, and below grade level in reading comprehension and arithmetic calculations (id. at p. 3). In the area of graphomotor functioning the student attained a standard score of 82 which placed the student in the lower limits of the low average range (id. at p. 2). The examiner recommended that the student continue to receive special education services, receive educational intervention utilizing learning strengths in the areas of reading comprehension and arithmetic calculation, and be evaluated for continued counseling and speech-language therapy services (id. at p. 3).

The January 2014 IEP also included reports from the student's then-current Bay Ridge teachers that the student struggled with executive functioning, organization, writing, multistep tasks, and completion of assignments (Dist. Ex. 1 at p. 1). The staff also noted that the student had poor decoding skills, required one-to-one attention and sentence starters, and was functioning on a seventh grade level in reading and writing (id.). The student was reported to be in a "mainstream integrated" math class, yet was working below grade level, functioning at approximately a mid-6th grade level (id.). The staff noted the student had difficulty with self-starting and multi-step problems, required frequent check-ins with the teacher, and suffered from test-related anxiety (id.). The staff also noted that sometimes the student could be distracted but was receptive to redirection (id.). The parent shared that the student needed to focus more on appropriate communication and pragmatic conversation with peers (id.).

As detailed above, the January 2014 CSE considered and relied upon sufficient evaluative information to identify the student's individual needs and develop his IEP, including information provided by his then-current classroom teachers. In addition, the parent does not argue how the available evaluative information was deficient, other than to assert that the district should have reevaluated the student prior to the January 2014 CSE meeting and, as noted above, the parent testified at the impartial hearing that she did not object to the description of the student's functioning levels in the January 2014 IEP and does not now raise any claim that they were inaccurate (Tr. p. 113). Accordingly, there is no evidence in the hearing record indicating it was necessary for the district to conduct a reevaluation of the student prior to January 2014 CSE meeting or that the failure to do so impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or deprived the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*9-\*10 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572, 575 [2d Cir. Oct. 29, 2014]; M.M. v. New York City Dep't of Educ., 2015 WL 1267910, at \*5-\*6 [S.D.N.Y. Mar. 18, 2015]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]).

### **B. January 2014 IEP—15:1 Special Class Placement**

The parent asserts that the January 2014 CSE's recommendation of a 15:1 special class was not supportive enough or reasonably calculated to provide the student with an educational benefit due to the student's educational needs, distractibility, executive function delays, and anxiety issues. As set forth in greater detail below, the evidence in the hearing record does not support this claim, and instead demonstrates that the January 2014 IEP was reasonably calculated to provide the student with sufficient support to meet his needs and to enable him to receive educational benefits.

The January 2014 CSE recommended a 15:1 special class placement in a community school (Dist. Ex. 1 at pp. 8, 12). State regulations provide that a 15:1 special class placement is intended to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). The district representative stated that the January 2014 CSE considered recommending a 12:1+1 special class for the student and rejected that placement as being "too restrictive" a setting for the student (Tr. p. 35; see Dist. Ex. 1 at p. 13). The district representative also stated that the January 2014 CSE considered recommending integrated co-teaching services but determined a classroom providing those services would be too large of a setting for the student, would not provide enough support, and the student "would get lost within the classroom" (*id.*). The district representative testified that the January 2014 CSE believed that the student needed a small special class setting in order to receive the academic support he required (Tr. pp. 35-36).

To support the student in the 15:1 special class and to address his identified management needs, the January 2014 CSE recommended a number of modifications and resources such as frequent breaks, frequent repetition of previously learned material, refocusing and restructuring, extended time to complete assignments, material broken down into small steps, use of graphic organizers, use of a marker to keep his place while reading, use of a calculator, "check ins" with teachers, positive feedback and encouragement, as well as teacher and staff aid in transitioning into the public school classroom (Dist. Ex. 1 at p. 2). The January 2014 IEP also included testing accommodations of extended (one and one-half) time, separate location of no more than 15

students, use of a calculator, revised test format (questions read aloud except on tests of reading comprehension), and revised test directions (directions read and re-read) (*id.* at pp. 9-10). The director of the Bridge program at Bay Ridge testified that the modifications and resources to address the student's management needs as well as the testing accommodations included in the January 2014 IEP were appropriate for the student (Tr. pp. 134-35).

The January 2014 IEP also included annual goals to address the student's academic needs in the areas of reading comprehension, decoding, math, and expressive writing skills (Dist. Ex. 1 at pp. 4-7). Additionally, to address the student's distractibility and executive function delays the January 2014 IEP included an annual goal designed to improve and maintain focus, and to address the student's anxiety issues the IEP included annual goals to employ relaxation techniques and increase frustration tolerance (Dist. Ex. 1 at pp. 4, 7). Moreover, the January 2014 CSE recommended that the student receive weekly related services of one 45-minute session of individual counseling, one 30-minute session of counseling in a group of three, and two 30-minute sessions of speech-language therapy in a group of three (*id.* at p. 8). Considering the hearing record as a whole, the IHO properly concluded that the recommended program and services addressed the student's needs in the areas of academics, distractibility, executive functioning, and anxiety.

In addition to the claim that the January 2014 CSE's recommendation of a 15:1 special class was not supportive enough for the student, the parent also argues that this placement was not the LRE for the student because he has demonstrated success in classes with regular education students. Initially, as argued by the district, this claim was not raised in the parent's due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i]-[ii], 300.511[d]; 8 NYCRR 200.5[i][7][i][b], [j][1][ii]). However, because the district representative referenced the student's ability to interact with regular education peers when describing how the recommendation for a 15:1 special class in a community school would benefit the student (Tr. p. 36), it is arguable that the district "opened the door" to consideration of this issue (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; M.H., 685 F.3d at 250-51).

In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (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 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044-45 [5th Cir. 1989]). The Second Circuit has adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

In this instance, the parent asserts that because the student had successfully been mainstreamed for certain classes at Bay Ridge, the district erred in not providing the student with similar opportunities. For the 2014-15 school year, the student was enrolled in Bay Ridge and attended both "inclusion" classes that consisted of special education students and "mainstream" students and modified classes that were composed entirely of special education students (Tr. pp. 99-101, 128, 138-40).

The January 2014 CSE recommended that the student be placed in a 15:1 special class in a community school for the 2014-15 school year (Dist. Ex. 1 at p. 7). The district representative and an assistant principal of the assigned school testified that the student would have had his core classes (English, math, social studies, and science) in a 15:1 setting, and he would have been in classes with nondisabled students for subjects such as art, music, and gym, as well as during lunch (Tr. pp. 36, 63). In addition, the January 2014 IEP indicated that the student would have "[f]ull participation" in all school activities and that he would participate in the general education curriculum (Dist. Ex. 1 at pp. 2, 9).

The district representative testified that a 15:1 special class placement would provide the student with "the maximum educational benefit," while placement in a general education classroom with the provision of integrated co-teaching services would not provide sufficient support (Tr. pp. 35-36). The student's program at Bay Ridge during the 2014-15 school year provided opportunity for instruction alongside nondisabled peers in his literature and history classes, in classes containing 17 and 18 students, respectively (Tr. pp. 127-28, 137, 175, 191). Although it is understandable that the parent would desire the student be included with regular education students during his "core" classes, the hearing record supports her assertion that he requires a small, supportive environment to receive educational benefits, such as that provided by the recommended 15:1 special class placement (see, e.g., Tr. p. 36; Dist. Ex. 3 at p. 2). Additionally, although the student participated in an integrated math class at Bay Ridge during the 2013-14 school year, his math teacher reported to the January 2014 CSE that the student was "working below grade level," required frequent check-ins with the teacher, and "suffer[ed] from test related anxiety" (Dist. Ex. 1 at p. 1). Aside from the math class, it is unclear whether the student participated in any other inclusion classes during the 2013-14 school year, as the student's teacher in his inclusion classes for the 2014-15 school year indicated that those classes were "more structured" and moved at a faster pace than the special classes the student had attended the prior school year (Tr. p. 166; see Tr. pp. 127, 160). The hearing record reveals that the CSE appropriately weighed the student's opportunities for participation with nondisabled peers against the greater benefits that he would receive in a special class and chose the "best fit" for the student (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145-46 [2d Cir. 2013]; Newington, 546 F.3d at 121-22). Accordingly, the evidence in the hearing record supports the finding that the January 2014 CSE's recommendation of a 15:1 special class within a community school with opportunities for access to nondisabled peers during non-core classes was reasonably calculated to meet the student's unique needs and offer the student a FAPE in the LRE for the 2014-15 school year.

## C. Claims Regarding the Assigned Public School Site

### 1. Timeliness of Public School Assignment

The parent contends that the school location letter, sent by the district in July 2014, should have been sent closer in time to the January 2014 CSE meeting so that the parent would have been able to visit the school before the end of the 2013-14 school year. As a result, the parent argues, the issuance of the letter in summer 2014 deprived her of the opportunity to visit the assigned public school site and make an informed decision regarding the appropriateness of the school for the student.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at \*6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*8 n.26 [S.D.N.Y. Nov. 20, 2007]).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location where the student's IEP will be implemented, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to the date of initiation of services under an IEP, a district must notify parents of the physical location where the special education program and related services will be delivered (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; Tarlowe, 2008 WL 2736027, at \*6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by a school location letter which is the mechanism adopted by the district in this case—it nonetheless must be shared with the parent before the student's IEP may be implemented.

In this case, it is undisputed that the parent was in attendance at the January 2014 CSE meeting (Dist. Ex. 1 at p. 15), and participated in the meeting (Tr. pp. 113-15). Counsel for the parent stated at the impartial hearing that the school location letter was received by the parent on July 16, 2014 (Tr. p. 92). Although the parent may believe this was not a sufficient amount of time because she was not able to visit the assigned public school prior to the beginning of the 2014-15 school year, the timing of the public school assignment is not a basis for finding a denial of a FAPE (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011] [finding that even if the notice of the assigned public school site was "untimely, it did not interfere with the provision of a FAPE or the Parents' opportunity to participate because the Parents have no right to visit a proposed school or classroom before the recommendation is finalized or prior to the school year"]; see M.P.G., 2010 WL 3398256, at \*9 [finding that a delay in the notice of the public school assignment does not violate the IDEA when the parent receives the notice prior to the beginning of the school year]). Additionally, although the parent contends that she was not

included in the public school site selection process because she was unable to visit the assigned school before the beginning of the school year, the parent's difficulty communicating with the school site selected by the district did not impede her ability to participate in the determination of the type of educational placement (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA does not give parents a "veto" over school choice]). Similarly, the parent's concern that "she could not compare" the level of support that the student would receive in the recommended program to that he received at Bay Ridge is irrelevant, because "[t]he public education offered is not diminished by the option of higher-quality private schooling" (E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at \*8 [E.D.N.Y. Aug. 14, 2015]). The evidence in the hearing record shows that the district satisfied its obligations to have an IEP in effect by the first day of the school year and, further, identified a school location at which to implement the student's IEP prior to the date of initiation of services. In view of the foregoing, the parent cannot prevail on her claim regarding the timing of the school location letter.

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

On appeal, the parent asserts that there was no seat available for the student at the assigned public school site and that the school had too large a student population to be appropriate for the student. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at \*3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has also stated that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[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 [2d Cir. May 21, 2013]) and 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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's speculative concerns that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at \*3). However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 2015 WL 4256024, at \*6-\*7 [2d Cir. July 15, 2015]; 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 C.F., 746 F.3d at 79 [2d Cir. 2014]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they

consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 2015 WL 4256024, at \*7; see Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at \*6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at \*6-\*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at \*12-\*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claim regarding the assigned public school site. It is undisputed that the parent rejected the recommended program and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. F; H). The parent visited the assigned school site following the onset of the 2014-15 school year and alleged that not only did the recommended 15:1 special class not have a seat available for the student, but that the school itself was too large to be "an appropriate setting" for the student and that the large environment of the school made the student "anxious" and concerned about the possibility of bullying (Tr. pp. 105-09; Parent Ex. H). This evidence does not provide support for the proposition that the assigned school was incapable of implementing the student's IEP. Accordingly, the parent's observations regarding the environment at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]). In particular, parental concerns regarding school or class size, when not contrary to a requirement in a student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 2015 WL 4256024, at \*7; Y.F., 2015 WL 4622500, at \*6).

With regard to the ability of the assigned school to accommodate the student, the parent testified that she was told that there were no seats available in a 15:1 special class at the assigned public school site at the time of her visit to the school on September 30, 2014, but admitted she did not ask whether there had been a seat available at the beginning of the school year (Tr. p. 108; Parent Ex. H at p. 1). To the contrary, the assistant principal at the assigned school testified that there were open seats in a tenth grade 15:1 special class at the school (Tr. pp. 57-58). Any conclusion that there were no spaces available for the student at the beginning of the school year, without any evidence of that fact, would necessarily be speculative. Furthermore, since the parent notified the district of her intention to place the student at Bay Ridge at district expense in August 2014 (Parent Ex. F), after the school location letter was sent and prior to the time the district became obligated to implement the January 2014 IEP (Dist. Ex. 2 at p. 1), the district was not required to keep a seat open for the student in the 15:1 special class at the assigned school (see E.H., 2015 WL 2146092, at \*3).

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the parent's contention that the school size would be too overwhelming

for the student or the availability of a space in the school would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 2015 WL 4256024, at \*7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

## **VII. Conclusion**

In summary, a review of the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2014-15 school year. Moreover, the parent's arguments pertaining to the assigned public school site are speculative and need not be entertained on appeal. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether Bay Ridge was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

**Dated:**            **Albany, New York**  
                         **August 28, 2015**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**