The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-106

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Richard A. Liese, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to the student and ordered it to reimburse the parents for the student's tuition costs at the Manhattan Day School (MDS) for the 2010-11 school year. The parents cross-appeal from the IHO's disposition of certain claims as well as the IHO's failure to address other claims raised in their due process complaint notice. 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]-[B], [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 279.4[b], 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

With regard to the student's educational history in this case, the hearing record shows that the student attended a general education setting in a nonpublic parochial school prior to the 2010-11 school year (fifth grade) (see Tr. p. 439; see also Dist. Ex. 6 at p. 2).[1]

[1] The evidence in the hearing record indicates that toward the end of the 2009-10 school year, the student received home instruction from a special education teacher for at least a portion of each day and attended the nonpublic school for religious instruction only (see Tr. pp. 95-96).

The CSE convened on May 27, 2010 to conduct the student's annual review and to develop an IEP for the 2010-11 school year (see Tr. pp. 48-50, 110-13, 424-28). However, the May 2010 CSE meeting was adjourned because the parents had not received sufficient advance notice of the meeting (Tr. pp. 48-50, 110-13, 424-25, 428).[2] Accordingly, the CSE reconvened on June 15, 2010 (Tr. pp. 48-50; Dist. Ex. 5 at p. 1; see Dist. Ex. 6 at p. 1). Finding the student eligible for special education as a student with a learning disability, the June 2010 CSE recommended integrated co-teaching (ICT) services for all subjects in a 12:1 ratio in a general education classroom (Dist. Ex. 5 at pp. 1, 13).[3] The June 2010 CSE also recommended two 30-minute sessions per week of individual occupational therapy (OT) (id. at p. 1, 15). In addition, the June 2010 IEP included 10 annual goals, testing accommodations, and support for management needs, including positive reinforcement, refocusing and redirection, preferential seating, and a multi-sensory approach to learning (id. at pp 3-4, 8-12, 15).

In a final notice of recommendation (FNR) dated June 16, 2010, the district summarized the ICT and OT services recommended in the June 2010 IEP and identified the particular public school site to which the district assigned the student to attend for the 2010-11 school year (Dist. Ex. 12).

In a letter dated August 18, 2010, the parents notified the district that they rejected the assigned public school site based upon observations made during a visit (Parent Ex. C at p. 1). The parents indicated that they observed a fourth grade classroom within the assigned public school site and found the environment too large and distracting for the student (id.). Because the assigned public school site could not provide the student with "the level of individual attention and support that he require[d]," the parents indicated that they would send the student to MDS and "seek[ ] reimbursement/funding" for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In an amended due process complaint notice dated May 24, 2011, the parents argued that the district failed to offer the student a FAPE for the 2010-11 school year (see Parent Ex. A at p. 1). Initially, the parents detailed certain factual allegations leading up to the May 2010 CSE meeting, including that the district failed to provide them with written confirmation of the date of the meeting and that the May 2010 CSE meeting was cancelled as a result of the parents' refusal to waive their right to timely written notice of the meeting (id. at p. 2). Regarding the June 2010 CSE meeting, the parent alleged that the CSE was improperly composed, failed to assess the student in all areas of suspected disability, and failed to consider all relevant evaluative information about the student (id. at p. 1). The parents further argued that the district denied them a right to participate in the development of the student's June 2010 IEP (id.). More specifically, the parents alleged that, other than a district special education teacher, the same members attended the June 2010 CSE meeting as the May 2010 CSE meeting, despite assurances that different individual would attend or a supervisor would be present (id. at p. 3). The parents also alleged that the

[2] The evidence in the hearing record indicates that no IEP was created as a result of the May 2010 CSE meeting (Tr. pp. 112-13, 440).

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

meeting was "hostile" (id.).[4] In addition, the parents alleged that the June 2010 CSE failed to consider recommendations contained in an April 2010 neuropsychological evaluation and relied, instead, on a district psychological examination that included inaccurate information about the student's needs (id. at pp. 2-3, 4).

With respect to the June 2010 IEP, the parents alleged that it did not adequately describe the student's present levels of performance, which were generated "solely [based] on teacher reports and an [OT] evaluation," and failed to adequately describe the student's needs with respect to "working memory, self-monitoring, . . . visual tracking[,] . . . task avoidance, insecurity, impulsivity, and social difficulties" (Parent Ex. A at p. 4). The parents also averred that the annual goals in the June 2010 IEP's did not address the student's needs and were "vague and generic," "compound," and devoid of benchmarks and short-term objectives (id.). The parents asserted that a general education classroom with ICT services, as recommended on the June 2010 IEP, was contrary to the recommendations contained in the private neuropsychological evaluation and failed to offer "the level of individual support and attention" that the student required (id. at pp. 3-4). The parents additionally contended that the "accommodations" in the June 2010 IEP did not adequately address the student's attention needs or indicate his needs for "sensory breaks and a sensory diet" (id. at p. 4). In addition, the parents asserted that the recommendation in the June 2010 IEP that standard promotion criteria apply was contrary to the student's levels of performance (id.).

Next, the parents detailed their visit to the assigned public school site and indicated that the observed classroom was inappropriate for the student (Parent Ex. A at p. 4). Specifically, the parents alleged that the observed classroom was "very large" and busy and that the student "would not be able to maintain his focus" in such a classroom because of his "distractibility issues" (id.). This classroom was also inappropriate, argued the parents, because the student "would not receive the level of individual attention and support" that he required (id.). The parents also indicated that, after discussing the student's needs with the special education teacher of the observed classroom, the teacher stated that a 12:1+1 special class may be more appropriate for the student (id.).

With respect to the parents' unilateral placement, the parent alleged that MDS addressed the student's needs and enabled the student "to make adequate academic and social progress" (Parent Ex. A at p. 5). The parents further alleged that they were "active and cooperative" participants in the development of the student's June 2010 IEP and that no equitable factors justified a reduction in an award of tuition reimbursement (id.). Accordingly, the parents requested the costs of the student's tuition at MDS for the 2010-11 school year, as well as the provision of, or reimbursement for, the cost of "appropriate related services" and special education transportation (id. at p. 6).

B. Impartial Hearing Officer Decision

On June 29, 2011, an impartial hearing convened in this matter and concluded on February 21, 2012, after five days of proceedings (Tr. pp. 1-465). In a decision dated April 16, 2012, the IHO found that the district failed to offer the student a FAPE for the 2010-11 school year, that

[4] The parents also alleged that the district "targeted" the parents by making an unwarranted referral to a district public services agency (Parent Ex. A at p. 3).

MDS was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 13-24).

Initially, the IHO noted that it was "unclear" if the parents alleged that the district's failure to provide written notification of the May 2010 CSE meeting resulted in a denial of FAPE to the student (IHO Decision at p. 14, n.3). Nevertheless, the IHO found "credible" the school psychologist's testimony that the parents verbally agreed to waive their rights to written notice in order to schedule the CSE meeting "as soon as possible" (id.).

Regarding the parents' challenges to the development of the June 2010 IEP, the IHO found that the CSE properly assessed the student's needs and considered both the July 2009 district psychoeducational evaluation and the April 2010 private neuropsychological evaluation (IHO Decision at pp. 13-14). The IHO found that the July 2009 psychoeducational evaluation "remained timely" at the time of the June 2010 CSE meeting and further found "no reason to question the accuracy of the testing" (id. at p. 14). The IHO also found that the April 2010 private neuropsychological evaluation "was discussed" at the June 2010 CSE meeting and, further, that "its author . . . was in attendance at the meeting" (id.). Although the student's "academic achievement levels" in the April 2010 private neuropsychological evaluation differed from those contained in the July 2009 psychoeducational evaluation, the IHO found that "the variation in the[se] scores [wa]s not that disparate to invalidate the IEP" (id.). The IHO also noted that a formal classroom observation of the student was unnecessary, given the presence at the June 2010 CSE meeting of the student's teacher from the nonpublic school, who regularly observed the student, as well as the description of the psychologist's observation of the student during the April 2010 private neuropsychological evaluation (id. at p. 15).

The IHO next considered whether the district should have conducted a functional behavioral assessment (FBA) (IHO Decision at p. 15). The IHO found the June 2010 CSE "had sufficient information regarding [the student's] social/emotional function" from the April 2010 private neuropsychological evaluation, as well as information provided by the student's teacher during the CSE meeting, to address the student's attention needs (id.). Moreover, the IHO noted that it would have been "preferabl[e]" for the district to conduct an FBA in the student's environment during the upcoming 2010-11 school year (id.).

Turning to the June 2010 IEP, the IHO found that the present levels of performance described the student's primary areas of need; namely, his "attention issues and organizational difficulties" (IHO Decision at pp. 14-15). The IHO concluded that, based on the foregoing, the evaluations relied upon by the June 2010 CSE were "appropriate," the June 2010 IEP's present levels of performance were "adequate," and that the district afforded the parents the opportunity to meaningfully participate in the development of the IEP (id. at pp. 15-16).

However, as to the placement recommendation, the IHO found that the evaluative material before the June 2010 CSE did not support the recommendation for a general education classroom with ICT services (IHO Decision at 16-18). Specifically, given the student's "distractibility and behavior issues," the IHO found that the student would not obtain "any benefit" in a general education classroom with ICT services (id. at p. 16). The IHO concluded that the student functioned "very poorly" in a general education classroom, as evidenced by his "remov[al] from the general education setting he attended at [his then-current nonpublic school] for a significant portion of the day" (id. at p. 17). Therefore, the IHO found that the recommendation was not

supported by the information considered by the June 2010 CSE and, further, that the CSE "should have . . . adopted" the recommendation in the April 2010 private neuropsychological evaluation that the student attend "a structured, small class program with intellectually similar peers" (id.). The IHO further characterized the testimony of the teacher from the proposed classroom at the assigned public school site as "ex post facto," in that she did not attend the June 2010 CSE meeting (id. at p. 18). However, the IHO indicated that the teacher's description of an ICT setting, including the strategies utilized (positive reinforcement and reward system) and the expectation that students engage in independent work, further supported the conclusion that the placement would not provide sufficient support to address the student's needs (id.).

Regarding the appropriateness of the unilateral placement, the IHO found that MDS offered the student specially designed instruction to meet his needs during the 2010-11 school year (IHO Decision at pp. 18-20). At the outset, the IHO observed that the student's program at MDS, which consisted of a special class, closely hewed to the recommendations contained in the "evaluations and reports that were available" to the June 2010 CSE (id. at pp. 18-19). Additionally, the IHO held that MDS met the student's needs because it provided the student with a small, structured class, 1:1 attention, multi-sensory instruction, and the breaking down and repetition of materials (id. at pp. 19-20). The IHO also determined that the program at MDS met the student's social/emotional and attentional needs by offering social skills lessons, peer activities, 1:1 assistance, and supports that would "improv[e] [the student's] self-confidence and motivation" (id. at p. 20). The IHO further found that the student made progress toward goals established by MDS, gained the ability to effectively manage his academic work, and showed improvement in his attention (id.). The IHO also indicated that MDS met the "LRE requirements for a [unilateral] placement" (id. at p. 19). Therefore, the IHO found that MDS "was an appropriate, if not ideal placement" for the student (id. at p. 20).

The IHO also found that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 20-21). The IHO found that the parents provided the district with the April 2010 private neuropsychological evaluation, attended and participated in the June 2010 CSE meeting, visited the assigned public school site, and provided timely notice to the district regarding their disagreement with the recommendations in the June 2010 IEP (id. at p. 21). Although the IHO noted that the "circumstances under which the parents cancelled the May 2010 CSE meeting after waiving timely notice and the fact that they surreptitiously taped the June[] 2010 CSE meeting constitute[d] questionable conduct," they did not justify a reduction in the amount of tuition sought by the parents (id.).

The IHO proceeded to award the parents the costs of the student's tuition reduced by 27 percent, which percentage, according to the IHO, represented the portion of time at MDS devoted to religious instruction (IHO Decision at pp. 22-23). The IHO further granted the parents' request for "direct funding" because the district "d[id] not appear to object" to relief in this form (id. at p. 23 n.5). Additionally, the IHO denied reimbursement for "building and dinner fees" at MDS which were, according to the IHO, unrelated to the student's educational needs (id. at 22). The IHO also denied the parents' request for special education transportation reimbursement because the evidence in the hearing record was "inadequate" to grant such relief (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2010-11 school year, that MDS was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief.

The district argues that the IHO erred in finding that the district should have adopted the recommendation in the April 2010 private neuropsychological evaluation that the student attend a special class. The district argues that the June 2010 IEP contained strategies for addressing and managing the student's behavior and, further, that the ICT services were appropriate given the student's high academic abilities. The district further argues that, although such considerations were speculative as a matter of law, the IHO erred in determining that the positive reinforcement and reward systems employed at the assigned public school site would not have effectively managed the student's behaviors. On the contrary, the district asserts that the assigned public school site could have implemented the student's IEP.

The district also contends that the IHO erred in determining that MDS was an appropriate unilateral placement for the student because the parents did not show how MDS cold meet the student's OT mandates as set forth in the June 2010 IEP and the student failed to master any of the goals set by MDS for the 2010-11 school year. The district additionally appeals the IHO's determination that equitable considerations weighed in favor of the parents' request for relief, arguing that the parents unreasonably cancelled the May 2010 CSE meeting and surreptitiously recorded the June 2010 CSE meeting. Finally, the district objects to the IHO's order that the district directly fund the student's placement at MDS because the parents did not introduce any evidence indicating that they were unable to pay the cost of the student's tuition.

In an answer and cross-appeal, the parents deny the district's material assertions and argue that the IHO correctly determined that the district failed to offer the student a FAPE for the 2010-11 school year, that MDS was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of their request for relief. The parents also interpose a cross-appeal arguing that the IHO erred in making certain findings or in failing to address certain claims contained in the parents' amended due process complaint notice. Specifically, the parents assert that the IHO should have found that: (1) the June 2010 CSE was improperly composed; (2) the district failed to afford the parents and attendees from the student's nonpublic school an opportunity to meaningfully participate in the June 2010 CSE meeting and predetermined the student's placement recommendation; (3) the June 2010 CSE failed to adequately consider the April 2010 private neuropsychological evaluation; (4) the July 2009 psychoeducational evaluation was untimely and inaccurate; (5) the June 2010 CSE improperly relied on teacher estimates in the developing the student's present levels of performance and failed to adequately describe the student's needs in the IEP; and (6) the June 2010 IEP did not contain annual goals that targeted the student's attention and organizational issues. The parents also assert that the IHO erred in failing to reach their claims that the assigned public school site would not have appropriately grouped the student with similarly functioning students or provided the student with sufficient academic instruction and individual attention. With respect to equitable considerations, the parents assert that the IHO erred in finding that the parents engaged in "questionable" conduct surrounding the June 2010 CSE meeting. Turning to the relief granted, the parents argue that the IHO erred in reducing the parents' tuition award by 27 percent. Finally, the parents argue that direct funding is

an appropriate remedy because the parents introduced evidence at the impartial hearing demonstrating their inability to pay the costs of the student's tuition at MDS.

In an answer to the parents' cross-appeal, the district denies the parents' material assertions. Initially, the district asserts that the parents raise issues in their answer and cross-appeal for the first time on appeal, including claims regarding the accuracy of the July 2009 psychoeducational evaluation and the functional grouping at the assigned public school site. With respect to the parents' challenge to functional grouping at the assigned public school site, the district further argues that this argument is speculative as a matter of law but that, in the alternative, the student would have been properly grouped by functional and academic level.

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, 180-83, 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. June 2010 CSE Composition and Parental Participation

The parents argue that the district failed to establish that a special education teacher of the student attended the April 2012 CSE meeting and that the IHO erred in failing to consider this claim. The parents also assert that the district failed to afford the parents and CSE attendees from the student's nonpublic school an opportunity to meaningfully participate in the development of the student's June 2010 IEP.[5] The district denies these allegations in its answer to the parents' cross-appeal.

At the time of the June 2010 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person . . . certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).[6]

In this case, the hearing record indicates that the following individuals attended the June 2010 CSE meeting: a district school psychologist (who also served as the district representative), a district social worker, a district special education teacher, an additional parent member, the parents, and the private psychologist who conducted the April 2010 private neuropsychological evaluation (see Dist. Exs. 5 at p. 2; 6 at p. 1; see also Tr. pp. 53, 428; Parent Ex. L at p. 14). Additionally, for a portion of the meeting, the student's regular education teacher and the principal

[5] The parents also allege for the first time on appeal that the CSE predetermined the student's program recommendation. As the parents did not raise this assertion in their due process complaint notice, it will not be addressed (see R.E., 694 F.3d at 187 n.4).

[6] The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

from the student's nonpublic school participated by telephone (see Dist. Exs. 5 at p. 2; Dist. Ex. 6 at p. 1; see also Tr. pp. 53, 57, 103-04, 118-19). The district school psychologist testified that the special education teacher, who attended the June 2010 CSE meeting, was a district employee who, at the time of the June 2010 CSE meeting, delivered special education services to students with disabilities enrolled in nonpublic schools (Tr. pp. 119-21). Thus, the hearing record reveals that the June 2010 CSE lacked a special education teacher who would have been responsible for implementing the student's IEP had the student attended the district's proposed program.

However, to the extent that this constitutes a procedural violation of the IDEA, the hearing record does not provide any basis upon which to conclude that any such 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 (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 14-15, 2011 WL 2164009 [2d Cir. 2011]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, *5-*6 [S.D.N.Y. Mar. 26, 2014] [finding that the CSE's reliance, in part, upon progress reports created by the student's teacher "significantly mitigated" the absence of a special education teacher at the CSE meeting who was not the student's "own special education teacher"]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011] [finding no denial of a FAPE where the "parents . . . identified no harm that they or their son suffered due to the absence of a special education teacher or provider at the IEP meeting"]).

This is particularly so in light of the fact that, in addition to the parents, the private psychologist and the student's regular education teacher and the principal from the student's nonpublic school attended the June 2010 CSE meeting (see Dist. Exs. 5 at p. 2; 6 at p. 1).[7] As the teacher and principal from the nonpublic school—who were directly acquainted with this student's particular needs—were able to participate in the June 2010 CSE meeting, the failure to include a special education teacher "of the student" was of little consequence in this instance and did not rise to the level of a denial of a FAPE (see Tr. pp. 57, 72-73, 105-06; A.H., 394 Fed. App'x at 720; see also S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student's] educational and therapeutic needs"]). The evidence in the hearing record also demonstrates that the June 2010

[7] With respect to the CSE attendees who participated telephonically, the parent also notes that the CSE failed to ensure that members from the nonpublic school had copies of the documents considered by the CSE. I note that State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]). Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129). In determining whether there has been a denial of a FAPE due to a procedural violation, every member of a body such as a CSE need not read a document in order for the body to collectively consider the document (T.S. v. Board of Educ., 10 F.3d 87, 89 [2d Cir. 1993]); however, I remind the district that it should ensure that all members of the CSE have access to the documents discussed at a CSE meeting.

CSE relied upon information provided by the student's teacher and principal to develop the June 2010 IEP, including a letter written by the teacher, and that the private psychologist and the parent had the opportunity to participate in the development of the June 2010 IEP by, for example, expressing opinions about the program and placement recommendations (see Tr. pp. 105-06, 428-30; Dist. Exs. 5 at pp. 3-4; 6 at pp. 2-3; see also Parent Ex. E). Moreover, as discussed in further detail below, the June 2010 CSE considered the April 2010 private neuropsychological evaluation (Tr. pp. 299-302, 305-08, 328-39).

The foregoing also supports a finding that the parents' parental participation claim must fail. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Therefore, the hearing record supports the IHO's determination that the district afforded the parents a meaningful opportunity to participate in the June 2010 IEP.

B. June 2010 IEP

1. Evaluative Information and Present Levels of Performance

The parents assert that the June 2010 CSE relied solely on teacher estimates and failed to adequately consider the April 2010 private neuropsychological evaluation and, further, that the June 2010 IEP did not fully and accurately reflect the student's current levels of performance, and failed to incorporate test scores and deficits specific to the student. Contrary to the parents' assertions, a review of the hearing record supports the IHO's finding that the student's needs were adequately addressed in the IEP.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't

of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F., 2011 WL 5419847, at *10 [indicating that based upon 20 U.S.C. § 1414(c)(1)(A), a CSE is required in part to "'review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"']).

In preparation for the June 2010 CSE meeting, the district school psychologist spoke with the student's occupational therapist, who indicated that he had sent the parents an OT progress note and proposed goals (Tr. pp. 50, 53, 113-14). The hearing record shows that during the June 2010 meeting, the CSE reviewed information about the student including selected scores from a July 2009 district psychoeducational evaluation report, an April 2010 private neuropsychological evaluation report, a May 2010 OT progress report, and an undated description of the student prepared by his regular education fourth grade teacher at the nonpublic school (Tr. pp. 102, 105-06; Dist. Exs. 6 at p. 1; 7; 8; Parent Exs. E; L).

Initially, the parents argue that the June 2010 CSE failed to appropriately review the April 2010 neuropsychological evaluation provided by the parents. A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. Sept. 16, 2013]).

The evidence in the hearing record demonstrates that the CSE considered the April 2010 neuropsychological evaluation. The private psychologist testified that she attended the May 2010 CSE meeting and reviewed the results of the student's private neuropsychological evaluation with the CSE (Tr. pp. 299-302). According to the private psychologist, the May 2010 CSE asked her about the placement recommendations, and she provided her opinion that the student required the additional support of a small, structured, self-contained special education class (Tr. p. 302). During the June 2010 CSE meeting, the CSE again discussed the private neuropsychological evaluation report and the psychologist's views about the CSE's placement recommendations (Tr. pp. 305-08). The evaluator testified at the impartial that her report was "accepted," "reviewed," and "discussed" by the CSE (Tr. pp. 308, 328-39). Based upon the foregoing, the evidence in the hearing record shows that the June 2010 CSE considered the April 2010 private neuropsychological evaluation.

To the extent that the parents assert on appeal that the IHO failed to consider the "inaccuracy" of the July 2009 district psychoeducational evaluation report of the student's reading

skills, I note that while the June 2010 CSE may have discussed "some" scores from the 2009 evaluation report, the hearing record shows that the CSE fully reviewed the more recent April 2010 private neuropsychological evaluation report discussed above (see, e.g., Tr. pp. 51, 62-63, 66-68, 102). The June 2010 CSE benefitted from discussing the April 2010 private neuropsychological evaluation with its author, who participated in the meeting (Tr. pp. 305-06). Also, the CSE discussed the student's in-class academic performance with his current nonpublic school teacher (Tr. pp. 57, 66-67, 102-06; Dist. Exs. 5 at pp. 3-4; 6 at pp. 1-2; Parent Ex. E). Therefore, the June 2010 CSE's consideration of scores from the 2009 psychoeducational report—which, as the IHO observed, remained timely—was not improper (see IHO Decision at p. 14).

As to the description of the student included in the June 2010 IEP, the present levels of performance reflected information from a teacher report indicating that the student was functioning within a third grade range in reading decoding, reading comprehension, and mathematics computation and problem solving (Dist. Ex. 5 at p. 3; see Parent Ex. E). Also consistent with the teacher report, the IEP indicated that the student did not read fluently, but his performance improved when information was read to him in that he answered questions and was able to retell the story (Dist. Ex. 5 at p. 3, see Parent Ex. E). In written language, the IEP reflected information from the teacher report that the student exhibited difficulty organizing his thoughts and putting them into writing and that his sentence structure and punctuation skills were weak (compare Dist. Ex. 5 at p. 3, with Parent Ex. E). Also as noted in the teacher report, the IEP also indicated that the student did not yet know his multiplication and division tables and that he made computation errors (compare Dist. Ex. 5 at p. 3, with Parent Ex. E). The teacher estimated the student's listening comprehension skills to be at grade level; however, the occupational therapist indicated that the student's auditory processing delays manifested in the classroom (Dist. Ex. 5 at pp. 3, 7; see Dist. Ex. 8).

The June 2010 IEP further stated that the student had received a diagnosis of an ADHD (Dist. Ex. 5 at p. 5; see Parent Ex. L at p. 12). Teacher and occupational therapy reports reflected in the June 2010 IEP indicated that the student exhibited a decreased attention span, at times became overly excited, had difficulty maintaining focus and sitting still, and that, due to inattentive behaviors, he did not always complete class work (compare Dist. Ex. 5 at pp. 4, 6-7, with Dist. Ex. F, and Parent Ex. E). The IEP also reflected the occupational therapist's report that the student was "consistently out of his seat and required sensory breaks throughout the school day," noting also that a sensory diet was implemented with the student and that the student's attention improved following sensory input (compare Dist. Ex. 5 at p. 7, with Dist. Ex. 8). The IEP indicated that the student's behavior did not interfere with instruction and could be addressed by the regular and/or special education classroom teacher (Dist. Ex. 5 at p. 4).

Socially, the IEP stated that the student made inconsistent eye contact, was "well liked," and got along well with both peers and adults (Dist. Ex. 5 at pp. 4, 6). The IEP reflected information from the May 2010 OT progress report that described the student's difficulty maintaining proper grasp during graphomotor tasks, which caused his hand to fatigue while writing, resulting in poor letter formation and line regard after a few sentences (compare Dist. Ex. 5 at p. 6, with Dist. Ex. 8). According to the IEP, the student's writing skills had improved but lacked consistency (Dist. Ex. 5 at p. 6; see Dist. Ex. 8). The occupational therapist's report reflected in the IEP indicated that the student exhibited difficulty processing multistep directions and deciphering the most important aspects of a task (Dist. Ex. 5 at pp. 6-7; see Dist. Ex. 8).

Based on the foregoing, review of the June 2010 IEP reveals that the CSE relied significantly on the teacher report and the OT progress report. On appeal, the parents argue that the June 2010 CSE improperly derived the student's present levels of performance from these sources. However, as noted above, use of teacher estimates is an appropriate source of information for the purpose of developing the student's present levels of performance and reliance on such sources does not amount to a violation of the IDEA or federal and State regulations (see S.F., 2011 WL 5419847, at *10).

The parents additionally argue that the student's grade level estimates in the June 2010 IEP were inaccurate. A review of the hearing record reflects that the grade level estimates provided by the student's current teacher closely approximated the results of recently conducted formal testing. The most recent standardized assessment of the student's academic skills occurred in March and April 2010, and the resultant report contains grade equivalents based upon the student's performance during administration of the Wechsler Individual Achievement Test, Second Edition (WIAT-II) (Parent Ex. L at p. 16). The WIAT-II was administered to the student in a 1:1 environment and resulted in reading, math, and written language subtest grade equivalents within a 2.6-4.6 grade range, not that unlike the private school teacher's estimate that the student's academic skills in the classroom fell within a third grade level (Tr. p. 72; Dist. Ex. 5 at p. 3; Parent Ex. L at p. 16).[8] I therefore agree with the IHO that the variation between the teacher estimates of the student's academic performance in the classroom and the grade equivalents achieved in a 1:1 testing environment were "not that disparate to invalidate the IEP" (IHO Decision at p. 14).

Finally, the parents argue that the June 2010 IEP's present levels of performance failed to mention the student's difficulties in areas such as working memory, self-monitoring, and visual tracking, and did not describe his task avoidance, insecurity, impulsivity, and social difficulties. While the IEP may not have listed each of the student's discrete areas of difficulty, I agree with the IHO that the IEP identified the student's significant areas of need; namely, his difficulties with attention, reading, mathematics, written language, and graphomotor skills (IHO Decision at pp. 14-15; Dist. Ex. 5 at pp. 3-7; Parent Ex. L at pp. 12-13).

Thus, upon review of the information considered by the June 2010 CSE and discussed at the CSE meeting, the June 2010 CSE sufficiently considered information relative to the student's present levels of academic achievement and functional performance—including the teacher estimates of the student's current skills levels—to develop an IEP that reflected the student's special education needs with sufficient accuracy to formulate a program designed to confer educational benefit (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

2. Annual Goals

Next, the parents allege that the June 2010 IEP's annual goals were inappropriate because they did not address his areas of need and were not sufficiently measurable. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed

[8] Additionally, the author of the April 2010 neuropsychological evaluation testified that, although the report contained standard scores, percentiles, and "some" grade equivalents, "grade equivalents on tests like these are notoriously inconsistent because one answer can totally shift a grade equivalent" (Tr. pp. 274-75, 315).

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]).

As noted above, the student's occupational therapist indicated that he had sent the parents an OT progress note and proposed goals prior to the June 2010 CSE meeting (Tr. pp. 50, 53, 113-14; compare Dist. Ex. 5 at pp. 11-12, with Dist. Ex. 8). The hearing record shows that the June 2010 CSE discussed the annual goals during the meeting and that the resultant IEP includes annual goals to improve the student's reading comprehension, reading fluency, decoding, written language, math problem solving, math computation, graphomotor, attention, hand strength, and transition skills (Tr. pp. 76-86, 312-13; Dist. Ex. 5 at pp. 8-12).[9]

To improve the student's reading comprehension skills, the June 2010 IEP included annual goals to promote the student's use of graphic organizers, context clues, and specific reading strategies in order to improve his ability to identify the main idea and supporting details, distinguish between fact and opinion, and draw conclusions based on information presented in text (Dist. Ex. 5 at p. 8). To improve reading fluency, an annual goal addressed the student's need to read paragraphs aloud using adequate audibility and appropriate reading rate, punctuation to guide pauses/stops, grade level word recognition, and intonation appropriate to the content (id.). Reading decoding needs were addressed by an annual goal requiring the student to use specific, identified word-reading strategies to increase word reading skills by 5-10 new words per week (id. at p. 9).

An annual goal addressed the student's written language needs by improving his ability to use graphic organizers and write a variety of sentence types of specified lengths; using grade level vocabulary, and accurate spelling, grammar and punctuation (Dist. Ex. 5 at pp. 8-9). The June 2010 IEP also included an annual goal addressing the student's need to become proficient with multiplication and division facts, and to improve his ability to add and subtract two digit numbers, multiply two digit numbers by one digit numbers with regrouping, and divide two digit numbers by a one digit divisor with a remainder (id. at p. 10). Another annual goal was designed to improve the student's need to accurately use addition, subtraction, multiplication and division facts to solve math word problems, which also required that the student identify key math terms to solve problems and explain the solution (id.). The June 2010 IEP further provided annual goals addressing the student's graphomotor skill needs, including a goal to improve the student's ability to copy sentences from the blackboard with proper letter formation, and demonstrate improved hand strength to locate pegs within resistive theraputty in a specified length of time (id. at pp. 11-12).

[9] The parents also assert that the June 2010 IEP was defective in part due to the lack of short-term objectives; however, short-term objectives are only required for a student who takes New York State alternate assessments and the IEP indicates that the student would participate in State and local assessments (Dist. Ex. 5 at p. 15; see 8 NYCRR 200.4[d][2][iv]). The parents have not argued at any stage of this proceeding that the student should have been found eligible for New York State alternative assessments.

To improve the student's ability to attend and complete class work, an annual goal required that, with verbal cues provided by both the occupational therapist and the teacher, the student attend to table top tasks for five minutes (Dist. Ex. 5 at p. 11). Another annual goal was designed to improve the student's ability to transition from activities such as recess or administration of the sensory diet, to classroom learning activities with no more than one classroom "disturbance" (id. at p. 12).[10]

Therefore, contrary to the parents' assertion that the annual goals failed to address all of the needs arising from the student's disability—in particular, his needs related to his ability to attend—a review of the June 2010 IEP reveals that it contained annual goals addressing the student's academic, attention/transition, and graphomotor difficulties identified in the evaluative information before the CSE (Dist. Exs. 5 at pp. 8-12; 8; Parent Ex. L at pp. 12-13). Similarly, the parents' argument that the annual goals were not sufficiently measurable is not supported by the hearing record. A review of the June 2010 IEP reveals that the annual goals all specify the evaluative criteria (e.g., 90 percent, 4/5 trials or days, 2/3 times), the evaluation procedures (e.g., work samples, weekly tests/quizzes, teacher conferences), and the evaluation schedule (e.g., weekly, every two weeks, every two months) for determining whether the goal had been achieved by the student (Dist. Ex. 5 at pp. 8-12). Many goals go further and identify the particular supports that the teacher or provider should utilize in order to help the student achieve the particular goal (e.g., visualizing, rereading, picture clues, drawing a picture, finding the math pattern, verbal cues) (id. at pp. 8-11).

Therefore, I find that overall the annual goals contained on the student's June 2010 IEP targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (see S.H., 2011 WL 6108523, at *8; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146, 147 [S.D.N.Y. 2006]).

3. Integrated Co-Teaching Services

The parents next argue that the ICT services recommended on the June 2010 IEP were insufficient to support the student's needs and not supported by the information before the CSE. After careful consideration of the evidence in the hearing record, I find that the recommended ICT services, in conjunction with the other supports and services included on the June 2010 IEP, were reasonably calculated to enable the student to receive educational benefits in the LRE.

Initially, with regard to the student's educational history prior to the June 2010 CSE meeting, the hearing record shows that the student attended a nonpublic parochial school in a general education setting (Tr. p. 439). The parents testified that, during first and second grade, the student began to "fall behind" and failed to master expected skills (Tr. p. 422). According to the

[10] The hearing record reflects that both the occupational therapist and the student's teacher were responsible for observing and charting the student's progress toward these annual goals (Dist. Ex. 5 at p. 11). Further, the student's OT services would have been provided in a separate location (id. at p. 15). Therefore, the June 2010 IEP provided the student with opportunities to improve his attention skills across settings such as in the classroom and OT room, as well as with adults such as the regular and special education teachers and the occupational therapist (id. at pp. 5, 15).

April 2010 private neuropsychological evaluation, from first through third grade, the parents indicated to the psychologist that the student received "extra help" in certain subjects in a resource room at the nonpublic school (Parent Ex. L at p. 3). The hearing record also shows that, during third grade, the parents referred the student to the district, which recommended that he continue in a general education setting with the related service of OT (Tr. pp. 422-23; Parent Ex. G). While it appears that the student received two weekly OT sessions during the 2009-10 school year (fourth grade), the parents discontinued resource room services provided by the nonpublic school due to their belief that removing the student from the classroom exacerbated the student's learning disability (Dist. Ex. 8; Parent Ex. L at p. 3).

The evidence in the hearing record shows that, during fourth grade, the student's nonpublic school teachers reported that his academic skills were below grade level, he could not keep up with the work, and he appeared to be missing foundational skills (Parent Exs. E; L at p. 3). The teachers also reported that the student was unable to "control his behavior" in that he exhibited difficulty sitting in the classroom, sought other means of stimulation, and "entertained" his classmates by making silly comments (id.). When the student's behavior interfered with classroom instruction, the student's teachers sent him to the principal's office (Parent Ex. L at pp. 3, 11). By spring 2010, this often occurred several times per day (id.).

According to the April 2010 neuropsychological evaluation, the student did not view his removal from the class as a "punishment" as he "like[d] to visit with the principal and find[] other boys with whom to play" (Parent Ex. L at p. 3). The psychologist reported that the student did not mind being regularly sent out of class because he had "cultivated a wonderful relationship with his principal and he far prefer[red] [the principal's] company over class work" (id. at p. 11). The psychologist further reported that, at times, the student "actually trie[d] to get kicked out of class since he kn[e]w[] that he [was] unable to complete the in-class assignments" (id.). Based upon the student's responses to a personality measure, the psychologist concluded that the student used humor in part "as a defensive maneuver to deflect attention from his shortcomings," and that he was "upfront" that he "desperately" wished he did not have to attend school (id.).

The psychologist concluded that, while in school, the student's behaviors associated with a diagnosis of an ADHD "acted like a smoke screen, masking his concurrent learning disabilities as school staff ha[d] unsuccessfully responded to [his] behavior" (Parent Ex. L at p. 12). She further reported that the student was engaged in a cycle of feeling insecure about his academic abilities, occasionally feeling unable to curb his impulses, acting up, getting removed from class, missing more work, falling farther behind, and finding support, relief, and entertainment outside of the classroom (id. at pp. 12-13). The student continued to engage in this cycle to avoid class work he felt incapable of completing (id. at p. 13).

During the psychologist's classroom observation of the student in a classroom in spring 2010, she observed that the instructor either ignored the student's inappropriate behavior or asked the student to "calm down, stop negative behavior or act appropriately" (Parent Ex. L at p. 4). Both the psychologist's classroom observation and the student's nonpublic school teacher's description of the student's classroom performance revealed a dearth of services, supports, or strategies used to address the student's academic or behavioral needs (Parent Exs. E; L at p. 4).

Turning to the appropriateness of the ICT services recommended in the June 2010 IEP, I note that both the private psychologist and the parents testified that, following a review of the

student's information, the May 2010 CSE considered recommending special education teacher support services (SETSS), to which the psychologist disagreed because "simply pull[ing] [the student] out of class to provide remediation would not meet his attention and his learning needs in the classroom . . . ." (Tr. pp. 302; see Tr. pp. 91, 303, 424, 427).[11] The district school psychologist testified that at the June 2010 CSE meeting she was aware that the student had been attending a nonpublic general education school (Tr. p. 89). Following additional discussion about the student at the June 2010 CSE meeting, the CSE determined that a general education classroom placement with SETSS would not offer enough support for the student's attention needs (Tr. p. 91; Dist. Exs. 5 at p. 14; 6).[12]

Ultimately, the June 2010 CSE recommended a general education class placement with ICT services and the related service of OT (Dist. Ex. 5 at p. 1). According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines 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 district school psychologist, the ICT class would provide the student with support "other than a general education class," structure, and the support of both a special education teacher and a regular education teacher in the classroom all day (Tr. pp. 74, 91). She further indicated that, for students who have difficulty staying on task or with class work, the second teacher would be available to refocus and provide assistance (Tr. pp. 91-92).[13]

The district school psychologist testified that the June 2010 CSE aimed to ensure that the student received needed support in an academic situations where he could "strive and strengthen [his] abilities" and not be placed where he would function "below [his] level" (Tr. pp. 90-91). During the June 2010 CSE meeting, both the parents and the private psychologist objected to the ICT placement and requested a "small class" setting for the student (Tr. pp. 87-93, 305, 307-08, 428-29; Dist. Ex. 6 at p. 3). According to the district school psychologist, the district's "small class

[11] It should be noted that neither federal nor State statutes or regulations contain a definition of SETSS and neither party fully described SETSS in the hearing record other than to suggest that this remedial service would have been provided as a "resource room" type pull-out service from a regular education classroom (see, e.g., Tr. pp. 33, 92; Dist. Ex. 5 at p. 14; see B.W. v. New York City Dep't of Educ., 716 F. Supp. 2d 336, 340 [S.D.N.Y. 2010]).

[12] According to the evidence in the hearing record, the June 2010 CSE also considered and rejected a 12:1+1 special class placement in a community school because it would be "too restrictive" and, further, the district members of the CSE did not believe the student needed the level of structure provided in a special class (Dist. Ex. 5 at p. 14; see Tr. pp. 92-93).

[13] In addition, according to a district special education teacher who taught in an ICT classroom during the 2010-11 school year, instruction in an ICT class was provided to students in a variety of ways (Tr. pp. 177, 179-80). The regular and special education teachers at times taught the same lesson simultaneously, or one of the teachers provided the primary instruction while the other teacher assisted, observed, and/or collected data on the students (Tr. pp. 180, 237). At times the teachers engage in "parallel teaching" where they provided the same information to divided groups of students, which allowed for smaller, more individualized study (Tr. pp. 180-81, 238). The teacher testified that group sizes in ICT classes varied and that there were also opportunities for the special education teacher to work one on one with students (Tr. pp. 209-10, 238, 245).

environment" was for students who were cognitively and academically lower functioning than the student, who was cognitively "very high functioning" and on grade level in some academic areas (Tr. pp. 88, 90). She further testified that, although the student's abilities varied and he exhibited some deficits, he also possessed some strengths and "wouldn't fit into a small class placement within [the district]" (Tr. p. 88). The record also reflects that the student was socially adept and had many friends in his then-current, general education environment (Dist. Ex. 5 at p. 4; Parent Ex. L at p. 11). Thus, the hearing record reveals the student would benefit from continued access to non-disabled peers in a general education classroom with ICT services (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143-45 [2d Cir. 2013]; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428).

This is particularly so in light of the additional supports and services set forth in the June 2010 IEP, including the two 30-minute individual sessions per week of OT in a separate location intended to facilitate the student's progress towards his annual goals addressing his visual, graphomotor, attention, hand strength, and transition skills (Dist. Ex. 5 at pp. 11-12, 15). In addition, the June 2010 IEP included strategies to address the student's management needs, including refocusing and redirection as needed, preferential seating in close proximity to the teacher, and positive reinforcement (id. at pp. 3-4). The June 2010 IEP additionally noted that the student may benefit from a multisensory approach to learning (id.). These management needs were similar to some of the recommendations the private psychologist included in her report (compare Dist. Ex. 5 at pp. 3-4, with Parent Ex. L at p. 14). Additionally, the IEP provided the following testing accommodations: separate location, extended time, directions read and reread, and questions read except on tests of comprehension (Dist. Ex. 5 at p. 15; see Parent Ex. L at p. 14).[14]

Although the student exhibited attention difficulties as well as academic and graphomotor deficits, the hearing record as a whole does not support the IHO's conclusion that the student could not receive educational benefit in a general education classroom with ICT services. Rather, in consideration of the student's prior educational history and his academic and social/emotional strengths, I find that the June 2010 CSE's recommendation of a general education class placement with ICT services, including the support of a full time special education teacher, OT services, and support for management needs was reasonably calculated to enable the student to receive educational benefit. The CSE is required to properly balance the IDEA's requirement of placing the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see M.W., 725 F.3d at 143). In this instance, it was appropriate for

[14] Additional behavioral support for the student within the general education classroom with ICT services may have been obtained as a result of an FBA that the district intended to conduct in the fall of 2010 (Tr. pp. 95-96; see Dist. Ex. 6 at p. 3). The hearing record indicates that the June 2010 CSE postponed conducting an FBA until the fall of 2010 as there was insufficient time left in the school year to conduct the FBA and because evidence presented to the CSE indicated that the student had not attended class in his then-current nonpublic school since March 2010 (Tr. pp. 94-96; see Dist. Ex. 6 at p. 3; see also Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x. 519, 522, 2006 WL 3102463 [2d Cir. 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by observing that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]).

the district to attempt a program that provided special education supports in a less restrictive setting prior to segregating the student from nondisabled peers.

C. Challenges to the Assigned Public School Site

The parents cross-appeal the IHO's decision to the extent that he failed to consider their claims that the assigned public school site would not have provided the student with an appropriate peer group based on functional levels or provided the student with a sufficient level of individual attention. In a letter dated August 18, 2010, the parents rejected the June 2010 IEP and informed the district that the student would attend MDS (Parent Ex. C at p. 1).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 552 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. . New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *3-*4 [E.D.N.Y. June 10, 2014] [finding that the parents were denied the "right to evaluate" the assigned public school site]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [same]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ.,

2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]).

I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[15]

As recently explained, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. 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] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge

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

to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 552 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on the claims that the district would have failed to implement the June 2010 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 2010 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing (see Dist. Ex. 5; Parent Ex. C). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative.

Furthermore, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the district correctly argues that the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2010 IEP, including that the student would not have been appropriately grouped with the other student in the proposed classroom or that the student would not have received a sufficient degree of individual attention and support at the assigned public school site.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of MDS or consider whether equitable factors weighed in favor of the parents' request for relief (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd sub nom., 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 16, 2012 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2010-11 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated April 16, 2012 is modified by vacating that portion which ordered the district to pay for the costs of the student's tuition at MDS for the 2010-11 school year.

Dated: **Albany, New York**
July 23, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER