The University of the State of New York

The State Education Department
State Review Officer
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No. 12-126

Application of a STUDENT WITH A DISABILITY, by her parents, 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:
The Law Offices of Neal H. Rosenberg, attorneys for petitioners, Meredith B. Duchon, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Churchill School (Churchill) for the 2011-12 school year. The district cross-appeals from that portion of the IHO's decision which found that Churchill was an appropriate unilateral placement for the student. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

With regard to the student's educational history, the hearing record shows that the student began receiving early intervention services (EIS) at the age of two, consisting of speech-language

therapy and occupational therapy (OT) in the home (Tr. p. 110). Subsequently, the student received speech-language therapy, OT, and special education itinerant teacher (SEIT) services through the committee on preschool special education (CPSE) (id.). For kindergarten and first grade, the student attended a general education classroom with integrated co-teaching (ICT) services at a district public school (Tr. pp. 111-12).

The hearing record shows that, during a November 2010 parent-teacher conference, the district informed the parents that the student's promotion to the next grade was in doubt (Tr. p. 112). The parents testified that, during the 2010-2011 school year, the student struggled with homework and exhibited difficulty with social interaction due to her speech deficits (Tr. pp. 112-13). Subsequently, the parents obtained private tutoring for the student at home, as well as private speech-language therapy (Tr. p. 113). In addition, the parents obtained private evaluations of the student, including a December 2010 psychological evaluation, a January 2011 auditory processing evaluation, and February 2011 speech-language evaluation (see Tr. pp. 114-18; see generally Dist. Exs. 9-11).

On March 9, 2011, the parents signed an enrollment contract with Churchill for the student's attendance during the 2011-2012 school year (see Parent Ex. L at pp. 1-2).[1]

On April 6, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-2012 school year (see Dist. Ex. 8 at pp. 1, 12). Finding the student eligible for special education as a student with a learning disability, the April 2011 CSE recommended ICT services in a general education classroom for mathematics, English language arts (ELA), social studies, and science; as well as related services of OT and speech-language therapy (id. at pp. 1, 8-9). At the parents' request and as recommended in the private evaluations, the April 2011 CSE increased the student's speech-language therapy services by one individual session per week, relative to the student's speech-language therapy mandate during the 2010-11 school year (Tr. pp. 136-137; compare Dist. Ex. 10 at p. 7, with Parent Ex. O at p. 13).

By letter to the district, dated April 12, 2011, the parents stated that the student was not making appropriate progress in an ICT classroom and was overwhelmed by the class size (Parent Ex. C at p. 1). In addition, the parents stated that they provided the April 2011 CSE with private evaluations but that these reports were not adequately discussed at the meeting (id.). The parents also stated that the April 2011 CSE failed to make an appropriate recommendation for the student and did not consider other options for the student because the ICT class was the only type of special education program available at the student's then-current district public school (id.). Finally, the parents stated that the student had been accepted to a State-approved non-public school and requested that the CSE reconvene to discuss how the non-public school would be an appropriate setting for the student (id.; see also Parent Ex. B at p. 1).

[1] The Commissioner of Education has approved Churchill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

According to a letter from the parents to the district dated April 18, 2011, a district school psychologist informed the parents that in order for the CSE to consider "a different setting" for the student, the parents were required to requested that the district reevaluate the student (see Dist. Ex. 7). The parents consequently made a request to reevaluate the student and, as a result, the evidence in the hearing record demonstrates that, in June 2011, the district conducted a psychoeducational evaluation of the student (id.; see generally Dist. Ex. 6).

On June 21, 2011, the CSE re-convened at the parents' request (Tr. pp. 120-21; Dist. Ex. 4 at p. 8). Finding the student eligible for special education as a student with a speech or language impairment, the June 2011 CSE recommended ICT services in a general education classroom for mathematics, ELA, social studies, and sciences (Dist. Ex. 4 at pp. 1, 5, 8).[2] In addition, the June 2011 CSE recommended three 30-minute sessions of speech-language therapy per week, once in an individual setting and twice in a group of three, as well as two 30-minute sessions of OT per week in a group of two (id. at p. 5). The June 2011 CSE also recommended eight annual goals (id. at pp. 3-5).

By final notice of recommendation (FNR) dated June 21, 2011, the district summarized the ICT services and speech-language therapy and OT recommended in the June 2011 IEP and identified the particular public school site to which the district assigned the to attend for the 2011-12 school year (see Dist. Ex. 12).

In a letter to the district dated June 28, 2011, the parents reiterated their concerns, set forth in their letter dated April 12, 2011, that the recommended ICT services in a general education classroom were not appropriate for the student (see Dist. Ex. 3; see also Parent Ex. C at p. 1). The parents asserted that the June 2011 CSE failed to consider the evaluative information about the student because the reports "ma[d]e clear that [the student was] not making appropriate progress" in an ICT setting (Dist. Ex. 3). The parents stated that the student "require[d] a much more intensive special education program" (id.). Therefore, the parents rejected the June 2011 IEP and requested a new CSE meeting so that the student's needs could be "appropriately discussed" (id.). The parents also notified the district, if an appropriate recommendation was not made for the student, they intended to enroll the student at Churchill and seek tuition reimbursement (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated October 18, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at pp. 1-2). Initially, the parents set forth allegations relating to the

[2] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

April 2011 CSE and the resulting IEP (id. at p. 1).[3] With respect to the June 2011 CSE meeting, the parents asserted that the district failed to offer them an opportunity to meaningfully participate in the development of the student's IEP and predetermined the student's placement (id. at p. 2). The parents also asserted that the June 2011 CSE failed to accurately identify or describe the student's needs on the IEP based on the private evaluations, including the student's diagnoses (id.). In comparison to the April 2011 IEP, the parents alleged that the June 2011 IEP removed priority seating as a management need (id.). In addition, the parents alleged that, notwithstanding information in a district evaluation that the student performed in the borderline range for mathematical calculations, the June 2011 IEP included "only one broad math goal" (id.). Moreover, the parents asserted that, notwithstanding the recommendation for related services in the June 2011 IEP, the CSE failed to develop speech-language therapy and OT related services annual goals (id.). The parents also argued that the June 2011 IEP omitted annual goals that had been included in the April 2011 IEP, without explanation and without discussion as to whether the student had mastered such goals (id.). Also, with respect to the annual goals included in the June 2011 IEP, the parents noted that, without the addition of supports, the June 2011 IEP stated the expectation that the student would make yearly gains towards the annual goals, as opposed to the April 2011 IEP, which identified that the student would progress a half a year behind grade level (id.). Finally, the parents asserted that the recommendation for ICT services for the student was not appropriate, given the student's lack of progress in such a placement during the prior school year (id.). The parents argued that, although the June 2011 IEP identified the student's "difficulty focusing on novel tasks and following multi-step directions," the CSE "inappropriately continued to recommend a large classroom that would follow grade-level curriculum" (id.).

In addition, the parents alleged that the student's unilateral placement at Churchill was appropriate (Parent Ex. A at p. 2). As relief, the parents requested that the IHO order the district to pay for the costs of the student's tuition at Churchill for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on February 6, 2012 and concluded on April 19, 2012 after three days of proceedings (see Tr. pp. 1-312). In a decision dated May 9, 2012, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 13-14). While noting that it was not necessary to reach such issues, the IHO also found that Churchill School was an appropriate unilateral placement for the student but that equitable considerations did not weigh in favor of the parents' request for relief (id. at pp. 14-15).

In determining that the district offered the student a FAPE for the 2011-12 school year, the IHO found that the June 2011 IEP "was developed in accordance with all rules and regulations and

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[3] For the purpose of clarity, the April 2011 IEP was superseded as a result of the June 2011 CSE meeting and the resulting June 2011 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-level review (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215; see generally Dist. Exs. 4; 8). Consequently, this decision will address the April 2011 CSE and resulting IEP only to the extent necessary to conduct an analysis of the June 2011 IEP.

that the parent[s] w[ere] provided with a meaningful opportunity to participate in making educational decisions for [the student]" (IHO Decision at p. 13). The IHO also found that the lack of an addition parent member at the CSE meeting, while a procedural violation, did not rise to the level of a denial of FAPE, noting that the composition of the June 2011 CSE included the student's then-current special education and general education teachers, as well as the district school psychologist who evaluated the student (id.). The IHO also found that the June 2011 CSE team members considered the new district evaluation and the private evaluations provided by the parents (id. at pp. 13-14). In this regard, the IHO noted that it was clear that the CSE considered the private evaluations because, in response, the June 2011 CSE recommended a change in the student's eligibility classification and in the recommended speech-language therapy mandate (id. at pp. 13, 14). The IHO also determined that the annual goals included in the June 2011 IEP were appropriate, noting that Churchill used the IEP as a guide and addressed the IEP annual goals at the unilateral placement (id. at p. 14). With respect to the ICT services recommended in the June 2011 IEP, the IHO found that "[i]t was clear from all of the evidence presented that [the student] had been making satisfactory progress in the [ICT] class during first grade" (id.). The IHO noted that, while the private evaluations recommended that the student be placed in a smaller setting, "it [wa]s reasonable [for the CSE] to give more weight to the information and experiences of the two teachers who worked with [the student] during the entire school year than to an examiner who never observed [the student] in class and who reached her conclusions by testing [the student] in isolation" (id.).

With respect to the assigned public school site, the IHO found that the district would have been able to implement the IEP, noting that the student would have been placed in the only ICT classroom at the school, that the special education students in that classroom had similar needs, and that the school would have been able to provide all of the student's related services (IHO Decision at p. 14). While the IHO noted that the hearing record lacked specificity as to the similarity of needs of the other special education students in the proposed classroom, she surmised that the student would presumably have been placed in the same grouping as she had been during the previous school year and that the parent had not alleged that such grouping was problematic (id.).

The IHO also determined that the parents satisfied their burden to establish that Churchill was an appropriate unilateral placement for the 2011-12 school year, finding that Churchill offered a program with instruction and services designed to meet the student's needs and that the student was benefiting from that instruction (IHO Decision at pp. 14-15). With respect to her decision that equitable considerations did not weigh in favor of the parents' request for relief, the IHO found that the parents could not reconcile their testimony that they were notified in a November 2010 parent-teacher conference that the student was at risk of not being promoted, with an October 2010 progress report that evidenced that the student was expected to meet her annual goals (IHO Decision at p. 15). The IHO also noted that the parents conceded that, after the November 2010 parent-teacher conference, they did not bring their concerns to the district's attention or seek additional services or evaluations to address this issue, but instead obtained private evaluations, applied to a nonpublic school, signed an enrollment contract, and made a "very substantial" payment to Churchill (id.). The IHO also noted that the parents requested that the April 2011 CSE

recommended a nonpublic school placement for the student and that, when that option was not "forthcoming," they requested a new evaluation and still made another "substantial" payment to Churchill prior to the June 2011 CSE meeting (id.). As such, the IHO found that it was disingenuous for the parents to assert that that they acted with the district in good faith to find a public school placement for the student (id.).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determinations that the district offered the student a FAPE for the 2011-12 school year and that equitable considerations did not weigh in favor of the parents' request for relief. The parents assert that, contrary to the IHO's determinations, when taken together, the procedural inadequacies relative to the April and June 2011 CSE meetings, as well as the district's actions in the period between the CSE meetings rose to the level of a denial of a FAPE. The crux of the parents' first assertion is that a broader issue exists which the IHO failed to address; that is, that the CSE's recommendations were predetermined and the parents' were therefore denied a meaningful opportunity to participate in the development of the student's IEP because: (a) the April 2011 CSE meeting was "admittedly invalid"; (b) no one present at the April 2011 meeting could interpret the private evaluations; (c) the CSE reconvened in June only after the parents requested a new meeting in response to the invalidity of the April 2011 CSE meeting; (d) the June 2011 CSE lacked an additional parent member; and (e) an IEP was developed prior to the June 2011 CSE meeting. The parents further allege that the CSE did not consider or discuss placing the student in a nonpublic school placement at any point during the process. The parents also assert that the IHO erred in her determination that the CSE considered the private evaluations provided by the parents and incorrectly discounted the weight of the private neuropsychological evaluation.

The parents also assert the June 2011 IEP did not identify the student's levels in mathematics, reading, and writing, and failed to set forth diagnoses. Further, the parents argue that, given these omissions, the district failed to demonstrate how the student would be assessed at the start of the school year to determine her needs. With regard to the parent's allegation that the CSE failed to consider the private evaluations, the parents also note that the June 2011 IEP contained only a single, unexplained reference to the results of such evaluations. The parents also assert that the June 2011 IEP failed to identify the student's management needs or promotional criteria and that that the IHO erred in failing to address these omissions.

Next, the parents assert the IHO erred by failing to address the fact that the June 2011 IEP contained no annual goals targeted to address the student's speech-language needs. The parents further assert that, despite an auditory processing evaluation report, which stated that the three speech-language annual goals on the student's IEP from the previous school year were not sufficient, the June 2011 CSE did not add any speech-language goals and, in fact, failed to carry over such goals from the IEP from the 2010-11 school year. The parents also assert that, contrary to the IHO's finding, the Churchill teacher testified that she followed only two of the annual goals included in the student's IEP, one of which was an OT goal, and that the Churchill staff created their own goals for the student. The parents also argue that the IHO erred in her failure to address

the insufficiency of the sole mathematics annual goal included in the June 2011 IEP. The parents also note that annual goals included in the April 2011 IEP were omitted from the June 2011 IEP with no discussion and that the district's two witnesses who testified about the annual goals did not attend the April 2011 CSE meeting and/or did not testify about the process of drafting the annual goals. The parents also assert that the IEP failed to provide any goals or supports relating to the student's attention difficulties. The parents further assert that, with respect to the appropriateness of the annual goals, the IHO improperly placed the burden of persuasion on the parents, as demonstrated by the IHO's decision, wherein she noted that the parents failed to raise concerns about the annual goals during the June 2011 CSE meeting.

With respect to the IHO's determination that the recommended ICT services were appropriate, the parents assert that, contrary to the IHO's findings, the evidence did not demonstrate that the student made progress in an ICT setting during the 2010-11 school year and that the IHO failed to provide any citations to this "baseless" conclusion. The parents assert that the testimony by district staff regarding the student's progress during the 2010-11 school year was insufficient. The parents also assert that, even if the student progressed during the 2010-11 school year, the evidence did not demonstrate that the student would continue to progress during the 2011-12 school year. The parents also assert that the IHO erred in her conclusion that it was reasonable to give more weight to the information and recommendations of the teachers who worked with the student, notwithstanding that none of the teachers testified at the impartial hearing and notwithstanding that all of the private evaluations demonstrated that the student should be placed in a "smaller setting." The parents also claim that, since the evaluations and the student's report card demonstrated that she was performing below grade level and, given her delays, providing the student with grade level instruction in a general education classroom with ICT services would have been inappropriate. The parents further argue that the IHO erred in determining that a general education class placement with ICT services was appropriate because the evidence showed that the student: was observed to be distractible even in a 1:1 or small group setting; had difficulty grasping concepts; got "lost in the shuffle" in the ICT setting because she appeared to be following along when she was not; and had a difficult time requesting help when unable to independently complete a task. Further, the parents assert that the IHO again misplaced the burden of persuasion by taking issue with the parents' inability to explain how the student could have been at risk of retention in November 2010, when the October 2010 progress report indicated that it was anticipated that the student would meet her annual goals. The parents also argue the IHO erred in making the correlation between the student's progress towards annual goals and her progress towards promotion criteria.

With respect to the appropriateness of the assigned public school site, the parents assert that the hearing record is devoid of evidence that the June 2011 IEP could be properly implemented. The parents argue that the district witness who testified regarding the assigned public school site did not establish that the student's needs would have been met.[4] The parents

[4] The parents assert that, because the district had identified the "proposed" teacher and did not call her to testify, instead relying on the testimony of an administrative staff member, that a negative inference should be drawn that the district could not demonstrate the appropriateness of the proposed classroom and assigned public school site.

note that, while the teachers of the proposed classroom were identified by name during the impartial hearing, no evidence was offered as to their qualifications or experience. The parents also assert that the district failed to demonstrate the size of the proposed classroom or whether the other students in the classroom had similar needs to the student. The parents allege that the IHO erred in making a presumption as to whether the student would have been assigned to a classroom with the same students from her ICT class during the 2010-11 school year.

With respect to equitable considerations, the parents assert that the IHO improperly punished them for obtaining private evaluations instead of requesting district evaluations. The parents also assert that the IHO improperly found that they had not timely alerted the district to their concerns; rather, they argue that they shared their concerns as soon as the evaluations were completed. They also assert that, regardless of when they shared their concerns, it was a district teacher who expressed concern to them first, which prompted the private evaluations. With regard to the IHO's consideration of the fact that the parents signed an enrollment contract and tendered deposits and payments to Churchill, as well as the timing of the foregoing, they assert that they were not prohibited from this course of action, which was reasonable under the circumstances. They further assert that they were forthcoming and cooperative with the district at all times.

In an answer and cross-appeal, the district responds to the parents' petition by admitting or denying the allegations raised and asserting that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year and that equitable considerations did not weigh favor of the parents' request for relief. The district interposes a cross-appeal, asserting that the IHO erred in finding that Churchill was an appropriate unilateral placement for the student.

As an initial matter, the district asserts the parents' contentions concerning (a) the lack of a parent member at the June 2011 CSE meeting; (b) any deficiency in the amount and duration of speech-language therapy; (c) and the appropriateness of the assigned public school site and proposed classroom, were not raised in their due process complaint notice, and as such, the SRO lacks the jurisdiction to adjudicate them. In the alternative, the district asserts that the hearing record demonstrates that these issues lack merit and, in particular, that the parents' claims regarding the assigned public school site were speculative as the student did not attend the district school.

With respect to the unilateral placement, the district asserts that the IHO's finding was a "bare bones" determination, which was unsupported by reference to the record and inadequate as a matter of law. The district also asserts that Churchill, which exclusively serves students with disabilities, did not constitute the student's least restrictive environment (LRE), particularly in light of the IHO's finding that an ICT setting was appropriate for the student. Finally, the district asserts that the student would only receive approximately 50 percent of the OT sessions recommended on the June 2011 IEP at Churchill during the 2011-12 school year.

In an answer to the district's cross-appeal, the parents assert that the district could not raise the issue of the sufficiency of OT at Churchill, since the district did not assert such an argument during the impartial hearing. In the alternative, the parents assert that the district's claim is without merit. In a reply to the parents answer to the cross-appeal, the district asserts that it did not waive the argument regarding the sufficiency of OT at Churchill, since only the party initiating a due

process hearing is required to raise an issue in the due process complaint, while the responding party bears no such obligation.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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

B. June 2011 CSE Process

1. CSE Composition

Initially, the district argues that the parents failed to include in the due process complaint notice a claim that the June 2011 CSE was improperly composed. The parents included a clear assertion in the due process complaint notice with regard to the composition of the April IEP 2011 CSE but failed to make a comparable assertion relative to the June 2011 CSE (see Parent Ex. A at pp. 1-2). Therefore, the due process complaint notice was not sufficient to put the district on notice that the parents objected to the composition of the June 2011 CSE (see Parent Ex. A at pp. 1-2; see also 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d at 188-89 & n.4). Furthermore, a review of the hearing record shows that the only testimony elicited on this subject was by the parents' counsel and the relevance of such testimony was understood to relate to the parents' claim that the June 2011 CSE predetermined the student's placement (see Tr. pp. 65-67; see also Tr. p. 251). The parents admit as much in their petition, framing the CSE composition claim in the context of their allegation that the CSE predetermined the student's placement, in that the district school psychologist testified that an additional parent member was invited to a meeting only on those occasions when a more restrictive setting was warranted for the student (see Pet. ¶ 17). Therefore, it cannot be said that the district opened the door to such an issue (see B.M. v New York City Dep't of Educ., 2014 WL 2748756, at *2 [2d Cir. 2014]; M.H., 685 F.3d at 250-51 [holding that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice]).

2. Parental Participation

Turning to the parents claims regarding their opportunity to participate in the June 2011 CSE and the district's predetermination of the student's placement, 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 & Communc'n Dev. 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]).

In this case, attendees at the June 2011 CSE meeting included the district school psychologist (who also served as the district representative), the student's then-current special education and general education teachers, the parent, as well as the student's occupational therapist and speech-language therapist (Tr. pp. 19, 122; Dist. Ex. 4 at p. 10; 5 at p. 1). The minutes of the June 2011 CSE meeting show, among other things, that the parents expressed concerns about the student's "language expression" and word retrieval, to the point that the student becomes frustrated, which in turn affected her socially (Dist. Ex. 5 at p. 1). The minutes also reflect that the CSE discussed the student's success within the ICT setting (id. at p. 2). The hearing record demonstrates that the members of the CSE team participated in the review and were present during the entire length of the meeting (Tr. p. 20).

The parents contend that the IHO erred in her determination that the CSE considered the independent evaluations, and equated both a change in the student's classification [from the April to the June IEP] as well as the addition of a pull-out speech-language therapy session as proof of the CSE's consideration of the private evaluations.[5] 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. Board of Educ. of the Town of Ridgefield, 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]). While a CSE must consider parents' suggestions or input offered from privately retained experts, a CSE is not required to merely adopt such recommendations for different programming (see, e.g., J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; T.G. v. New York City Dep't of Educ., 973 F.Supp.2d 320, 340 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013], aff'd, 2014 WL 519641 [2d Cir. Feb. 11, 2014]; T.B. v. Haverstraw-Stony Point Cent.

[5] Although the district argues that the frequency of the recommended speech-language therapy was an issue outside the scope of the impartial hearing, review of the parents' due process complaint notice and the petition reveals that the frequency is raised only to the extent that the IHO cited the increase in the speech-language therapy mandate as evidence that the April or June 2011 CSE considered the parents' private evaluations (see IHO Decision at p. 14).

Sch. Dist., 933 F.Supp.2d 554, 571 [S.D.N.Y. 2013]; Dirocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd, 487 Fed. App'x 619, 2012 WL 2615366 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]).

The district school psychologist testified that the June 2011 CSE considered the February 2011 private speech-language evaluation and the January 2011 private auditory processing evaluation, as well as the speech-language therapist's progress report (Tr. pp. 21-23). The parent also testified that CSE members stated that they had read the private evaluation reports, and that she did not initiate a discussion regarding the reports at the CSE meeting (Tr. pp. 134-35). The hearing record demonstrates information in the student's June 2011 IEP, such as the student's present levels of performance, discussed below, as well as changes in the student's eligibility classification and speech-language therapy mandate, consistent with the conclusion that the CSE reviewed the private evaluation reports (compare District Ex. 4 at pp. 1-2, 5 with District Exs. 9; 10; 11). For example, the hearing record indicates that the increase in the frequency of speech-language therapy sessions, relative to the student's IEP for the 2010-11 school year, was due to the parents' request and the recommendations included in the private evaluations (Tr. pp. 34, 135-37; Dist. Exs. 4 at p. 5; 10 at p. 7; see Parent Ex. O at p. 13). The hearing record also demonstrates that the CSE changed the student's eligibility classification from a learning disability to a speech-language impairment based on the private evaluations and the parents' focus on the impact of the student's language deficits (see Tr. p. 73).

Related to the parental participation claim is the parents' allegation that the district predetermined the student's placement. The consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp.2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco, 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506). Districts may also

"'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

Initially, the parents note that a draft IEP was developed prior to the June 2011 CSE meeting without parental participation (see Tr. p. 123). The district school psychologist testified that the CSE discussed the IEP at the June 2011 CSE meeting, that everyone seemed to be in agreement, and that the IEP presented during the meeting was a draft, rather than a finalized document (Tr. at p. 28). The district school psychologist further testified that although the annual goals on the June 2011 IEP were drafted prior to the meeting, nothing was finalized until after the meeting, and that she believed it would be unprofessional to come to a meeting unprepared (Tr. at pp. 74-75).[6] In addition, she stated that parents were consulted at the meeting regarding changes or additional information which should be included on the final IEP (Tr. p. 75). As noted above, such preparation is permissible (see, e.g., Nack, 454 F.3d at 610).

The parents assert that the district did not intend to consider any other placement for the student other than a general education classroom placement with ICT services. As noted above, the parents cite the lack of an additional parent member at the June 2011 CSE meeting as evidence of such predetermination, since the district school psychologist testified that an additional parent member was only invited to a meeting when the CSE intended to consider a more restrictive setting for the student (see Tr. p. 65).[7] However, contrary to the parents' argument that the CSE should have considered the student's placement at the nonpublic school, because the ICT services recommendation was reasonable for the student, as discussed below, it would not have been appropriate for the CSE to recommend placement of the student in a nonpublic school (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *9 [E.D.N.Y. Mar. 31, 2014] ["once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; T.G., 973 F. Supp. 2d at 341-42; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the

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[6] The IDEA also has no requirement that annual goals be typed up at the CSE meeting itself, that parents and teachers have the opportunity to draft the goals themselves, or that the goals be seen on paper by any of the CSE members at the meeting (S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at *11 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F.Supp.2d 387, 394 [S.D.N.Y. Jan. 29, 2010]). Furthermore, it has been found that when a parent is provided a meaningful opportunity to participate in the IEP development process, the lack of goal discussion, while not the most desirable practice, does not rise to the level of a denial of FAPE (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794 at *7-*8 [S.D.N.Y. Sep. 29, 2012]).

[7] At the time of the June 2011 CSE meeting, relevant State law and regulations in effect required the presence of "an additional parent member of a student with a disability" at a CSE meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]). However, State law further provided that a CSE subcommittee was not required to include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c]). Under applicable State law and regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with the exception of instances in which a student is considered for initial placement in (1) a special class; (2) a special class outside of the student's school of attendance; or (3) a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8NYCRR 200.3[c][4]).

law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

Moreover, the district school psychologist testified that the CSE remained open to discussing other recommendations but that the district participants did not feel that a special class was warranted for the student (Tr. at pp. 66-67). The student's June 2011 IEP identifies other placements considered and rejected by the CSE (Dist. Ex. 4 at p. 9). Specifically, the June 2011 IEP states that the CSE rejected a general education class placement with special education teacher support services (SETSS) because the student's difficulties warranted more support) (id.). In addition, the IEP reflects the CSE's determination that a special class as too restrictive for the student at that time (id.).

In light of the above, I concur with the IHO's determination that the parents were not significantly impeded in their opportunity to participate in the creation of the student's IEPs and that the student was not denied a FAPE in that regard.

C. June 2011 IEP

1. Present Levels of Performance

With respect to the student's present levels of performance, the parents assert that the June 2011 IEP did not identify the student's levels in mathematics, reading, and writing, and failed to set forth diagnoses.

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]).

Initially, contrary to the parents' claim, federal and State regulations do not require the district to set forth the student's diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist.

v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because, the goals were adequately designed to address the student's learning challenges, related to the particular diagnosis and otherwise]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]).

Review of hearing record shows that the information found in the evaluative material that the June 2011 CSE had before it was appropriately reflected in the IEP. The district school psychologist testified that the June 2011 CSE reviewed the private evaluations (including the January 2011 auditory processing evaluation, and the February 2011 speech-language evaluation) and the June 2011 district psychoeducational evaluation, as well as a progress report from the student's speech-language therapist and input from the student's teachers, providers, and parents, who attended the CSE meeting (Tr. pp. 19, 21; see generally Dist. Exs. 6; 9-11). Further, the June 2011 IEP rejects much of the information included the June 2011 psychoeducational evaluation report (compare Dist. Ex. 4 at pp. 1-2, with Dist. Ex. 6).

The academic present levels of performance contained in the June 2011 IEP reflected that administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) to the student revealed that her overall cognitive functioning fell within the average range, as reported in the December 2010 private psychological evaluation report (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 11 at p. 2). The parents' main objection to the present levels of performances lies with their concern that the June 2011 IEP did not specify the particular levels at which the student functioned in mathematics, reading, and writing. However, the June 2011 IEP included results of the administration of the Woodcock-Johnson Tests of Achievement (WJ-III), as reported in the June 2011 psychoeducational evaluation, which indicated that the student's reading and writing skills fell within the average range and that her mathematics skills ranged from average to low average (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6 at pp. 2-3).

More specifically, the IEP described the student's needs and abilities in these areas, which could have informed a teacher responsible for implementing the IEP on what the level the student functioned. For example, in the area of reading, the June 2011 IEP and the June 2011 psychoeducational evaluation reflected that the student's "just right reading level" had progressed from a level B to a level H, which has a level two equivalency (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6 at p. 1).[8] The IEP and the June 2011 psychoeducational evaluation further stated that the student had made gains in fluency, sight word recognition, and phonics (id.). However, as reflected in the private evaluations, the June 2011 IEP also noted that the student had difficulty with decoding (Dist. Ex. 4 at p. 1; see Dist. Exs. 10 at p. 4; 11 at pp. 5, 7). Further, as noted in the private evaluations, the June 2011 indicated that the student exhibited difficulties with word retrieval (Dist. Ex. 4 at p. 1; see Dist. Exs. 9 at pp. 7, 8; 10 at p. 3; 11 at p. 7). In the area of mathematics, as reported in the June 2011 psychoeducational evaluation, the June 2011 IEP

[8] According to the district school psychologist, this progress meant that the student was approaching grade level in her reading skills (Tr. p. 31).

specified that the student was able to: write numbers up to 100; count by ones, twos, fives and tens; add using manipulatives; and count dimes, nickels and pennies (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 6 at p. 1). In writing, the June 2011 IEP noted that the student could write on a variety of topics but, at times, left out details that rendered her writing unclear (Dist. Ex. 4 at p. 1; see Dist. Exs. 6 at p. 1; 9 at p. 5). As described in the June 2011 psychoeducational evaluation, the June 2011 IEP stated that the student was "a sweet and friendly young girl" and that "[h]er teachers described her as being respectful, well-liked, and eager to please," and "noted that she [got] along well with her peers" (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 6 at p. 3). Thus, while taking information from the July 2011 psychoeducational evaluation, as well as information provided at the June 2011 CSE meeting, the June 2011 IEP also included information consistent with the private evaluations, including a description of the student's difficulties with self-expression, decoding, retrieving information from memory, and following multistep directions, her problems with attention and auditory processing, including comprehending auditory information of increasing length and complexity, as well as the student needs for preferential seating, repetition, scaffolding, "visuals," longer response times, and minimal distractions (compare Dist. Ex. 4 at pp. 1-2, with Dist. Exs. 9 at pp. 1, 8; 10 at pp. 1, 3, 5, 7; 11 at pp. 4, 6).

In sum, I find that the IEPs contained an accurate statement of a student's academic achievement and functional performance (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]). As the CSE adequately described the student's needs and developed a program designed to address them, the failure to state each and every one of the student's abilities and deficits did not constitute a denial of a FAPE under the facts of this case (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

2. Annual Goals

The parents assert that the June 2011 IEP did not contain any annual goals directed to the student's speech-language needs and, further, that the annual goals did not adequately address the student's needs in the area of mathematics calculation. An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 C.F.R. § 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 C.F.R. § 300.320[a][3]).

The district school psychologist testified that all of the annual goals for the June 2011 IEP were drafted by herself and the student's speech-language and occupational therapists (Tr. pp. 35, 75-76). The hearing record shows that the June 2011 IEP contains eight annual goals to address the student's needs in the areas of reading comprehension, decoding, writing, mathematics, and

OT (Dist. Ex. 4 at pp. 3-5; see Tr. pp. 28-30). A review of the student's needs and the June 2011 IEP annual goals shows that the CSE developed goals in many of the student's deficit areas as identified in the information reviewed and considered by the June 2011 CSE (compare Dist. Ex. 4 at pp. 3-5, with Dist. Exs. 6; 9-11). While the June 2011 IEP did not specify that any particular annual goal is intended to be achieved through the student's speech-language therapy sessions, certain annual goals specified that either a provider or a teacher/provider would measure the student's progress (see Dist. Ex. 4 at p. 3). Moreover, the annual goals appear to address certain areas of need identified in the private speech-language and auditory processing evaluations. For example, whereas the February 2011 private speech-language evaluation indicated that the student's auditory processing delay affected "her ability to process, encode, organize auditory information, and verbally formulated her ideas," one annual goal addressed such abilities, providing that the student would "use oral literacy skills as she retells stories in temporal sequential order which include story grammar elements of character, setting, main idea, problem and resolution, utilizing visual cues to help her organize her ideas" (see Dist Exs. 4 at p. 3; 9 at p. 8).

With regard to the parents' assertion concerning the sole mathematics goal, the hearing record shows that the student had met her mathematics goal during the 2010-11 school year (Parent Ex. P at p. 1). The school psychologist stated that the student's only mathematics goal as a "targeted goal," that the IEP comprised a "snapshot of the curriculum" (Tr. pp. 29-30). The mathematics annual goal included on the IEP provided that the student would solve word problems that required computation (Dist. Ex. 4 at p. 5). This particular skill was targeted to the one of the specific areas that the December 2010 private psychological evaluation identified as a skill with which the student struggled—solving mathematics word problems (id.; see Dist. Ex. 11 at p. 5). Furthermore, the June 2011 identified that, in order to understand complex multi-step math tasks, the student required scaffolding and repetition (Dist. Ex. 4 at p. 1).

The failure to address every one of a student's needs by way of an annual goal will not ordinarily constitute a denial of a FAPE (J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), and it does not do so in this instance. Based on the foregoing, the evidence in the hearing record shows that the June 2011 IEP included sufficient annual goals in the student's deficit areas and does not indicate that the district denied the student a FAPE on this basis.

3. ICT Services

The parents assert that the recommended general education classroom placement with ICT services was not appropriate for the student. The parents assert that, contrary to the IHO's findings, the evidence did not demonstrate that the student made progress in an ICT class during the 2010-11 school year.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality

Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S., 2011 WL 3919040, at *12; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Here, since the student's April 2010 IEP, implemented during the 2010-11 school year, also recommended a general education classroom placement with ICT services, along with related services consisting of speech-language therapy and OT, review of the student's progress under such program is an appropriate consideration in reviewing the appropriateness of the placement included in the student's June 2011 IEP, although differences in the programs do exist, including the increase in the student's speech-language therapy mandate (Dist. Exs. 4 at p. 5; Parent Ex. O at pp. 1, 11, 13).

The hearing record shows that the student made progress in the ICT classroom during the 2010-11 school year, as demonstrated by the June 2011 psychoeducational evaluation, wherein the student demonstrated higher level skills as compared to the results of evaluations summarized on the student's April 2010 IEP (compare Parent Ex. O at p. 3, with Dist. Ex. 6 at pp. 1-2). Specifically, the April 2010 IEP stated that, at the time, the student was able to identify almost all letters of the alphabet, say the sound of most letters, write with a mixture of unevenly sized capital and lower case letters, and count objects to ten, but had difficulty answering basic questions about a story, had a weak vocabulary, and could not follow a two-step direction (Parent Ex. O at p. 2). In addition, the April 2010 IEP reported that, while the student's attention span had improved, this still impacted her work and focus on the lesson (id. at p. 3). According to the June 2011 district psychoeducational evaluation, the student's teachers reported that she improved in all areas (Dist. Ex. 6 at p. 1). In the area of reading, the evaluation reported that she progressed from a level B to a level H and made gains specifically in the area of fluency, sight word recognition, and phonics skills (id.). The student's teachers reported that, in mathematics, the student could: count by ones, twos, fives, and tens; write numbers one to 100; add single and double digit numbers; and count coins (id.). On the basis of an observation conducted as part of the June 2011 neuropsychological evaluation, the evaluator reported that the student worked independently on a writing assignment, listened attentively during a mathematics lesson, attempted all presented test items, and was easily redirected during testing (id. at pp. 1-2). Finally, the evaluation reported that the student responded to all presented questions and freely engaged in spontaneous conversation as well (id. at p. 2).

The student's annual goals progress report for the 2010-2011 school year reported the student's progress toward achieving the annual goals included in the April 2010 IEP as of June 2010, November 2010, February 2011, and June 2011 (Parent Ex. P at pp. 1-4). According to the progress report, the student had met six out of her thirteen annual goals as of June 2011 and was anticipated to achieve the remainder (id.). Specifically, as of June 2011, the student was able to: identify and use at least 30 sight words; write at least initial and final letters in words based on the sounds she knows; demonstrate comprehension by retelling, summarizing or discussing stories; and demonstrate improved counting and numeral identification skills (id. at p. 1). She was expected to achieve her other goals related to attending, writing, fine motor, reading comprehension, following directions, and vocabulary skills (id. at pp. 2-4). While the student did not achieve every annual goal included on the April 2010 IEP, focus should be placed on the extent to which the student progressed toward achieving the annual goals, rather than on the number of IEP goals the student "achieved" (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]).

The student's report card also demonstrates that the student made progress in the ICT setting during the 2010-2011 school year (Dist. Ex. 2). By June 2011, the student: met the basic standards in reading and writing; met the proficiency standards in science, social studies, and specials; and met or exceeded a proficiency standard in personal and social growth (id. at p. 2). The teachers commented that they were proud of the progress the student had made that year and noted that the student should continue to practice all the reading, writing, and mathematics skills she had acquired (id. at p. 1). Finally, according to the meeting minutes of the June 2011 CSE meeting, the parents reported to the CSE that the student had exhibited progress in many areas; however, the parent later testified that the student exhibited inconsistent progress in reading (Tr. p. 113; Dist. Ex. 5 at p. 1).

Based on the foregoing, the evidence supports a finding that the student exhibited overall meaningful progress in school during the 2010-11 school year, which, as noted above, is relevant to the examination of the similar program recommended during the 2011-12 school year.

Turning to the June 2011 CSE's determination to recommend the ICT services, along with related services, during the 2011-12 school year, State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities who receive ICT services within a class may not exceed 12 students, and an ICT classroom must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][1]-[2]). As discussed above in the context of the parents' predetermination claim, the June 2011 CSE did consider other placement options for the student. The district representative indicated that the April 2012 CSE recommended the general education placement with ICT services because, in addition to the student's progress during the 2010-11 school year, the student would continue to benefit from access to general education peers (Tr. pp. 25, 36).

The parents also point to recommendations in the private evaluations for a smaller setting for the student. The December 2010 private psychological evaluation recommended that the student "require[d] a more structured and intensive academic program than her current placement" and the January 2011 private auditory processing evaluation recommended a "[s]mall sized, quiet, language enriched classroom with a favorable student-to-teacher ratio where [the student] c[ould] receive the individualized services she needs" (Dist. Ex. 11 at p. 8). In this regard, although there were recommendations for a small academic setting in the private evaluations, and the parents assert that the student required a smaller class than the recommended ICT setting, what constitutes a "small class" is not defined in the hearing record, and it is questionable whether or not small class size, in and of itself, constitutes special education (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]). Further, to the extent that the parents correctly characterize the IHO's decision as affording more weight to the information and recommendations of the teachers who worked with the student, to the detriment to the recommendations set forth in the private evaluations, such a finding was not in error (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that the underlying judgment of those having primary responsibility for formulating a student's IEP is given considerable weight]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641, [7th Cir. 2010]; E.S., 742 F.Supp.2d at 436 ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] . . . deference to the district and its trained educators"]; Z.D., 2009 WL 1748794, at *6 [explaining that deference is frequently given to the school district over the opinion of outside experts]; see also Rowley, 458 U.S. at 207; Watson, 325 F.Supp.2d at 145).

The parents also cite, in part, to evidence of the student's attentional difficulties as the basis for their position that the student would not receive educational benefit in an ICT setting. However, the June 2011 IEP describes supports to address the student's attentional difficulties, including verbal prompts to help maintain focus and preferential seating, and includes annual goals targeted to address such needs (see Dist. Ex. 4 at pp. 1, 3). Further, although the student exhibited distractibility, she was also motivated to learn and presented with overall average cognitive abilities (see Tr. p. 23; Dist. Ex. 6 at p. 3). The June 2011 IEP also recommended related services of OT and speech-language therapy, as well as other supports to address the student's management needs identified in the June 2011 IEP including: use of visuals and scaffolding; repetition in order to complete complex multi-step tasks; and directions repeated, rephrased, and/or broken down, as needed (Dist. Ex. 4 at pp. 1-2, 5).

Given the student's academic and cognitive strengths and the fact that the student progressed in the ICT setting during the 2010-11 school year, the evidence leads to the conclusion that the student's relative weaknesses could be adequately addressed by the ICT services provided by a full time special education teacher in a general education setting, in conjunction with the other supports included in the June 2011 IEP. 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. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]). In this instance, it was appropriate for the district to continue the student's educational programming in the lesser restrictive ICT setting prior to

segregating the student from nondisabled peers. Based on the foregoing, I find that the April 2011 CSE's recommended general education class with 12:1 ICT services was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

D. Challenges to the Assigned Public School Site

The parent argues that there was no evidence in the hearing record demonstrating that the assigned public school site could have implemented the student's June 2011 IEP. The district argues that it was not required to establish that the assigned public school site could implement the student's IEP because any such claims advanced by the parents were speculative and pre-mature because the student was not educated under the IEP and did not attend the assigned public school site. In addition, the district asserts that the parents failed to raise any claims relating to the assigned public school site in their due process complaint notice. Review of the parents' due process complaint notice confirms the district's argument that the assigned public school site claims were outside the scope of the impartial hearing (see Parent Ex. A at pp. 1-2; see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]; R.E., 694 F.3d at 188-89 & n.4). However, given that the district presented a witness at the impartial hearing from the assigned public school site who testified that the school could implement the student's June 2011 IEP, it is arguable that the district opened the door to the issue (see Tr. pp. 96-102; see also M.H., 685 F.3d at 250-51).

In any event, challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d

at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[9]

When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the June 2011 IEP because a retrospective analysis of how the district would have implemented the student's IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273).

Here, it is undisputed that the student did not attend the district's assigned public school site. Therefore, the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87).

[9] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2011 IEP or that the student would not have been functionally grouped in the proposed classroom.[10]

[10] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13 [S.D.N.Y. July 24, 2014]; B.K, 2014 WL 1330891, at *20-*22; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013]; A.D., 2013 WL 1155570, at *13; J.L., 2013 WL 625064, at *10; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to consider the appropriateness of unilateral placement at Churchill or whether the equitable considerations 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., 2011 WL 3919040, at *13).

THE APPEAL IS DISMISSED

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 5, 2014

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JUSTYN P. BATES
STATE REVIEW OFFICER