The University of the State of New York

The State Education Department
State Review Officer
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No. 12-194

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, Lisa R. Khandhar, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Jaime Chlupsa, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Child School for the 2011-12 school year. The parents cross-appeal from certain of the IHO's determinations that were adverse to them. 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 IEP, which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process

hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student and his family moved into the district from another state in August 2010 (Tr. p. 334). According to the student's mother, prior to moving into the district, the student was educated in a "classroom with about eight to ten students and three teachers" (id.). When the family moved into the district the student attended a district public school in a 6:1+1 special class for the 2010-11 school year as a comparable service to what he had received under his out-of-State IEP (Dist. Ex. 8 at pp. 1, 3). According to the parents, after two days in that program, they met with a district school psychologist and counselor who informed them that the student "did not fit

in" at that program and they determined to look for another program (Dist. Ex. 8 at p. 3; see Tr. pp. 351-52). The parents obtained a private psychoeducational evaluation of the student and placed the student at the Child School in October 2010 (Dist. Exs. 4; 8 at p. 3; see Tr. pp. 265, 352-53).[1]

The CSE convened on March 4, 2011 to develop an IEP for the student for the 2011-12 school year (Dist. Ex. 1 at p. 2). In attendance were a district special education teacher; a district school psychologist who also served as the district representative; a district regular education teacher; an additional parent member; the student's parents; the student's grandmother, and counsel for the parent's (Tr. pp. 22-23; Dist. Ex. 1 at p. 2).[2] In addition, the student's Child School classroom teacher, reading teacher, and speech teacher, as well as the head of the Child School, participated by telephone (Tr. pp 28, 63, 382, 385-87).[3] The hearing record indicates that the CSE reviewed the following documents related to the student at the IEP meeting: a psychoeducational evaluation dated October 2010, a social history dated January 2011, a classroom observation dated January 2011, a mid-year progress report from the Child School dated February 2011, a physical therapy (PT) evaluation dated February 2011, a speech and language evaluation dated February 2011, and samples of the student's work provided by the Child School (Tr. pp 25-28, 31, 105, 168, 376; Dist. Exs. 3-6; 8; 10; Parent Ex. F). Based on its review, the CSE found the student eligible to receive special education and related services as a student with a speech or language impairment (Dist. Ex. 1 at p. 1).[4]

The March 2011 CSE recommended that the student receive integrated co-teaching services (ICT) in a general education classroom and related services of physical therapy (PT) and speech-language therapy (Dist. Ex. 1 at pp. 1, 16, 18).[5] On April 27, 2011, after being provided with the results of a privately-obtained occupational therapy (OT) evaluation conducted in March 2011, the CSE reconvened to recommend that the student receive OT (Tr. 78-82; Dist. Exs. 2 at pp. 2, 20; 13).

By final notice of recommendation dated July 22, 2011, the district summarized the special education services recommended in the April 2011 IEP and identified the particular public school site to which the district assigned the student for the 2011-12 school year (Dist. Ex. 12). On August 1, 2011, the student's father and grandmother visited this public school site and, by letter dated August 4, 2011, the parents notified the district that they felt that the public school site was not

[1] It is unclear from the hearing record who paid for the costs of the student's tuition at the Child School for the 2010-11 school year (see Tr. pp. 136, 426-31; Dist. Exs. 4 at p. 2; 8 at pp. 1, 3).

[2] Also in attendance were two sign language interpreters to assist the district special education teacher (Tr. pp. 22-23; Dist. Ex. 1 at p. 2).

[3] The district school psychologist testified that it was an oversight on her part not to reflect the attendance of the Child School participants on the IEP (Tr. pp. 27-28, 62-63, 70-71).

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

[5] Although the terms "collaborative team teaching" or "CTT" are used interchangeably with ICT in the hearing record (see, e.g., Tr. pp. 10, 74, 180-81, 284), this decision refers to these services as ICT services for the sake of consistency with State regulations (see 8 NYCRR 200.6[g]).

appropriate for the student (see Parent Ex. C at pp. 1-2). In an August 24, 2011 letter, the parents notified the district of their concerns with the student's IEP and the assigned public school site and their intent to place the student at Child School for the 2011-12 school year at district expense if certain alleged defects were not corrected (Parent Ex. A at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated September 28, 2011, the parents alleged that the district "failed to offer [the student] a free and appropriate public education on procedural as well as substantive grounds" in the 2011-12 school year and requested an impartial hearing (Parent Ex. B at pp. 1-7). Initially, the parents alleged that the March 2011 CSE was improperly composed because it lacked a suitable regular education teacher (id. at p. 4).[6] The parents also alleged the CSE ignored input from the parents and the student's then current teachers, the annual goals were predetermined and prepared without parent input, and the IEP contained several references to another student's name (id. at pp. 3, 5). The parents also asserted that the CSE did not consider providing the student with adapted physical education and that the IEP did not contain any health and physical management needs despite the student's documented needs in that area (id. at pp. 5-6). Furthermore, the parents contended that the annual goals in the IEP did not reflect the student's needs, contained no baseline for measurement, and were generic and vague (id. at pp. 4-5). The parents also alleged that the recommendation for ICT services would not provide the student with sufficient support or individualized attention and that such a placement had proven to be inadequate to meet the student's needs in the past (id. at pp. 2-3).

Regarding the assigned public school site, the parents alleged that the proposed classroom would not be able to meet the student's needs (Parent Ex. B at p. 2). The parents also alleged that the recommended school and proposed classroom would both be too large, that the education methodology used in the classroom would not be appropriate for the student, and that the student would not be suitably grouped with similarly functioning students in the proposed class (id. at pp. 2-3). For relief, the parents requested that public funding for the cost of the student's placement at the Child School for the 2011-12 school year (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 8, 2012 and concluded on May 30, 2012, after four days of proceedings (Tr. pp. 1-512). By decision dated August 28, 2012, the IHO found that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year and awarded the parents reimbursement for the costs of the student's tuition at the

[6] The due process complaint notice mistakenly referenced an "April 4, 2011" CSE meeting and IEP, which was acknowledged to refer to the March 2011 CSE meeting and IEP at the impartial hearing (Tr. pp. 11-12; Parent Ex. C). Despite the subsequent April 2011 CSE meeting and IEP, the IHO and the parties often refer only to "the CSE" or "the IEP" when referencing events that pertain to the March 2011 CSE meeting and IEP, no claims are raised specific to the April 2011 CSE meeting and IEP, and neither party cites to the April 2011 IEP on appeal. However, the April 2011 IEP is the relevant IEP for determining whether the district offered the student a FAPE, and so citation for purposes of this decision is primarily to the April 2011 IEP.

Child School (IHO Decision at pp. 6-17).[7] Initially, the IHO found that the CSE was properly composed and that the parents were able to participate in the development of the student's IEP (id. at pp. 7-8).[8] Turning to what the IEP itself, the IHO found that the description of the student's present levels of educational performance and needs and abilities did not accurately reflect the evaluative information available to the CSE, or the description of the student contained in the hearing record, in that the IEP understated the degree of the student's deficits (id. at pp. 10-13). Accordingly, the IHO found that the recommendation for ICT services was not appropriate because a "full review of the record indicates the need for a much smaller educational environment" (id. at p. 11; see id. at pp. 10-13). The IHO next found that the unilateral placement of the student at the Child School was appropriate (id. at pp. 13-15). Lastly, the IHO found that equitable considerations supported the parents' request for relief and ordered the district to reimburse the parents for the cost of the student's attendance at the Child School during the 2011-12 school year (id. at pp. 15-17).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in his determinations that the district failed to offer the student a FAPE for the 2011-12 school year, that the Child School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief. Initially, the district asserts that the IHO properly determined that the CSE was properly composed, that the parents participated in the meeting, and that the inclusion of another student's name on the student's IEP did not deny the student a FAPE. The district also asserts that the SRO should not defer to the IHO's credibility findings inasmuch as they are contrary to the evidence in the hearing record.

In challenging the IHO's determination that the district failed to offer the student a FAPE, the district asserts that the IHO erred in finding that the CSE failed to consider appropriate evaluations and that the IEPs failed to accurately describe or address the student's present levels of academic performance or social/emotional and behavioral needs. The district next asserts that the goals and objectives on the IEPs were not predetermined. Regarding adapted physical education and the student's health and physical management needs, the district asserts that no one at the CSE meeting suggested the student needed adapted physical education, that the student's

[7] After the IHO issued the August 28, 2012 decision, the IHO issued a "Corrected Decision" on September 12, 2012 that contained additional sections not present in the August 28, 2012 decision (compare IHO Decision with IHO Corrected Decision). The additional information contained in the corrected decision, primarily relating to a recitation of the relevant facts and the parties' positions, is not necessary for review of the decision on appeal. Therefore, hereinafter citations to the IHO's decision shall refer only to the August 28, 2012 decision. The corrected decision adds ten pages of facts to the decision and, while it is not necessarily improper to correct a ministerial error in an issued decision, the explanation offered by the IHO in this instance—"Correction Made To Body of the Decision" (IHO Corrected Decision at p. 27)—is insufficient when both State and federal law require IHO decisions to be final and binding on the parties unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[8] The IHO also found that while the appearance of another student's name in the IEP did not deny the student a FAPE, it "demonstrated a lack of concern" on the part of the district and, for that reason among others, the IHO found it was "difficult to credit the entirety of [a district school psychologist's] testimony" (IHO Decision at pp. 8-9). The IHO also chose to credit certain testimony of the student's grandmother, who is also an educational consultant, over that of a district classroom teacher (id. at pp. 9-10).

health and physical management needs were addressed by the IEP, and that the recommended PT and OT related services were sufficient to address the student's needs in that area. The district also asserts that the recommended ICT services are appropriate and are the least restrictive environment (LRE) for the student, the IEP otherwise addressed the student's attention deficits, and the evaluative information available to the CSE indicated that the student would benefit from exposure to typically developing peers. Additionally, although the IHO made no findings regarding the appropriateness of the assigned public school site, the district asserts that the allegations raised in the due process complaint notice were both speculative and without merit. Next, the district asserts that the IHO erred in his determination that the Child School was an appropriate unilateral placement for the student. Specifically, the district argues that the Child School was not the student's LRE and that the school did not provide adequate PT. With respect to equitable considerations, the district asserts that the parents had no intention of enrolling the student in a public school placement, and requests an order reversing the IHO's decision in its entirety.

In an answer and cross-appeal, the parents respond to the district's petition by denying the material allegations raised and assert that the IHO correctly found that the district failed to offer the student a FAPE for the 2011-12 school year, that the Child School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for relief.[9] The parents assert that the IHO's credibility determinations are entitled to deference. The parents next assert that the IHO properly found that the descriptive information in the IEP relating to the student's present levels of academic achievement and functional performance was inaccurate. The parents further contend that the student's low tone and generalized weakness were discussed at the CSE meeting and that the CSE erred in not recommending adapted physical education. The parents also maintain that the IEP provided insufficient description of, and management needs to address, the student's health and physical needs. The parents also assert that the goals in the March and April 2011 IEPs were inappropriate. Regarding the recommended placement, the parents assert that the recommended placement was not the student's LRE because the student required more support than an ICT setting would provide.

The parents also cross-appeal two of the IHO's findings that were adverse to them. First, the parents contend that the IHO erred in finding that the CSE was properly composed because the district school psychologist who participated in the March 2011 CSE meeting could not adequately interpret the instructional implications of evaluation results as required by State regulations. Second, the parents contend that the IHO erred in finding that the parents were provided with an opportunity to participate in the development of the student's IEPs.

Regarding the particular school site assigned by the district, the parents contend that the school and the classroom were too large and too distracting, that the methodology employed by the school required more independence that the student possessed, and that their argument that the student would not be appropriately grouped at the assigned school was not speculative because the parents chose to unilaterally place the student after being told that the recommended class would not be appropriate for the student during their visit to the school. The parents contend that their

[9] The parents attached an affidavit to their answer and cross-appeal for consideration as additional evidence. The affidavit is executed by the student's father and concerns a CSE meeting to develop an IEP for the student for the 2012-13 school year.

unilateral placement at the Child School was in the student's LRE and that, contrary to the district's assertion, the student's PT needs were being addressed at the Child School through means including OT and adapted physical education. Lastly, the parents contend that the IHO correctly found that equitable considerations supported their claim for reimbursement.

In its answer to the parents' cross-appeal, the district asserts that the affidavit submitted by the parents with their answer and cross-appeal should be rejected because it concerns the student's IEP for the 2012-13 school year, which is not at issue here. The district also asserts that the SRO should not consider the parents' claim that the CSE was improperly composed due to the qualifications of the participating school psychologist because the claim was not raised in the parents' due process complaint notice, and that in any event the CSE was properly composed. The district also contends that the parents had an opportunity to participate in the development of the student's IEP.

V. Applicable Standards

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

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

Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters—Additional Evidence

Turning first to the parents' request to submit additional evidence, the district objects to my consideration of the additional evidence on the basis that, among other things, the evidence concerns the student's placement for the 2012-13 school year, which is not at issue and is therefore irrelevant. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, the additional evidence proffered by the parents, in the form of an affidavit executed by the student's father, relates to the placement recommended for the student for the 2012-13 school year. Although the additional evidence was not available at the time of the impartial hearing, it is not necessary in order to render a decision in this case. I therefore decline to accept the proffered evidence annexed to the parent's answer.

B. CSE Process

1. CSE Composition

In their due process complaint notice, the parents contended that the CSE lacked an appropriate regular education teacher because the district regular education teacher who attended the March 2011 CSE meeting had not taught in a classroom for an extended period of time and therefore could not be responsible for implementing the student's IEP (Parent Ex. B at p. 4). The IHO found that the composition of the CSE did not deny the student a FAPE (IHO Decision at pp. 7-8). In their answer and cross appeal, the parents now challenge the appropriateness of the district

school psychologist who participated in the March 2011 CSE meeting, rather than the regular education teacher. The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; ; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]). A review and plain reading of the parents' due process complaint notice demonstrates that the parents did not challenge the qualifications of the district school psychologist in their due process compliant notice. Moreover, there is no indication in the hearing record that the parents sought the district's agreement to expand the scope of the impartial hearing or seek to include the assertions in a further amended due process complaint notice. To the extent that the Second Circuit has held 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 (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]; see N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), a review of the hearing record does not reveal that the district raised this issue at the impartial hearing as a defense to a claim that was identified in the due process complaint notice, and the parents do not assert that the district did so. Accordingly, I decline to address this argument in this decision.[10]

2. Predetermination and Parental Participation

In their cross-appeal, the parents assert that they were denied a meaningful opportunity to participate in the development of the student's IEP. 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 Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7

[10] In any event, the parents point to no evidence that the district school psychologist was not duly certified as such and, while the parents correctly note that State regulations provide that the CSE must include "an individual who can interpret the instructional implications of evaluation results," this person is not required to be the school psychologist in attendance but may be any of a number of the members of the CSE (8 NYCRR 200.3[a][1][vi]). The parents do not assert that none of the members of the CSE satisfied this requirement.

[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]). Moreover, the IDEA does not require parental consent to an IEP, but rather "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the parents' right to participate in the development of an IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Initially, with regard to the March 2011 CSE's review of the evaluative material 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]). 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., 2013 WL 3975942, at *11; 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. 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]).

According to the testimony of the student's mother, she cooperated with the CSE's evaluation process prior to the March 2011 CSE meeting (Tr. pp. 369-70). The mother testified that she provided the CSE with a copy of the October 2010 private psychoeducational evaluation, and the hearing record reflects that information from the evaluation report was incorporated into the student's IEP (Tr. pp. 370-71; Dist. Ex. 4; see Dist. Ex. 2 at pp. 3, 6). The student's mother testified that she expected the March 2011 CSE meeting to take less than an hour to conduct, but that it was approximately three hours in length (Tr. pp. 372-74). She testified that the January 2011 classroom observation conducted by the district was discussed at the CSE meeting and that she expressed her disagreement with some of its conclusions (Tr. pp. 373-76; see Parent Ex. F). She further testified that, "there was a lot of input from myself and my mother" but that "anything I brought to the table was immediately disregarded" (Tr. pp. 378-79). The student's mother also indicated that she "took my opportunity in front of all these people to say who he is and what he needs, what's appropriate for him" but that she was very unhappy with the CSE's eventual recommendation and the resulting "outrageous, inappropriate [recommendation] for [ICT]"

services (Tr. p. 379). She testified extensively about the disagreement with the IEP recommendations voiced by herself, the student's grandmother, and the student's providers from the Child School who participated at the CSE meeting (Tr. pp. 380-90, 393-96). She also testified about statements made by the same people regarding what they believed would be a more appropriate setting for the student that that identified by the district members of the CSE (Tr. pp. 382-90, 393-96). The student's mother also testified that she agreed with the CSE's recommendation for OT, PT, and speech-language therapy related services, as well as the frequency and duration of those services (396-98).

As noted above, a parent's disagreement with a recommended IEP does not amount to a significant impediment to parental participation in the development of a student's IEP. In other words, "participation does not require deferral to parent choice" (Sch. for Language and Commc'n Dev., 2006 WL 2792754, at *7). Further, the IDEA's requirement that the district provides parents with the opportunity to participate in the development of their child's IEP does not equate to the right to dictate the provisions of the student's IEP (Doe v. East Lyme Bd. of Educ., 2012 WL 4344301, at * 4 [D. Conn. Sept. 21, 2012]; New Fairfield Bd. of Educ., 2011 WL 1322563, at *16 [D. Conn. Mar. 31, 2011]). I do not find that the district significantly impeded the parents' ability to participate in the decision-making process under the circumstances of this case. Based on the foregoing, the parents were able to participate in the development of the student's IEP and their dissatisfaction with the result does not constitute a denial of a FAPE.

Regarding participation in the creation of the IEP goals, the student's mother testified that she had an opportunity to discuss the goals at the CSE meeting and that she relied on her "educational consultants" for assistance in that regard (Tr. pp. 419). Based on the hearing record the student's Child School classroom teacher, reading teacher, and speech teacher, as well as the head of the Child School, participated by telephone (Tr. pp 28, 63, 382, 385-87).[11] The student's mother testified that the student's teacher at the Child School discussed the proposed goals at the CSE meeting and that, although her recall was not exact, the IEP's goals reflected the goals as discussed at the CSE meeting (Tr. pp. 419-20). The district school psychologist who attended the March 2011 CSE meeting testified that the IEP goals were created at the March CSE meeting with the input of the student's classroom teacher at the Child School and that the student's mother and grandmother did not object to any of the goals (Tr. pp. 59, 63-70).[12] The student's mother also testified that after the March 2011 CSE meeting she received a copy of the IEP and went over the goals in the IEP and had no objection to any of the academic, speech-language, or PT goals (Tr. pp. 422-23). The student's mother also testified that after the April 2011 CSE meeting, when the CSE added OT as a related service and annual goals and short-term objectives related to OT to the

[11] According to the district school psychologist, she neglected to record on the IEP the participation by telephone of the student's providers from the Child School (Tr. pp. 27-28, 62-63).

[12] Although the IHO stated that he "found it difficult to credit the entirety of [the district school psychologist's] testimony", that determination concerned the psychologist's failure to take complete meeting notes, flawed memory of a classroom observation she conducted, and error in including another student's name in portions of the IEP and the IHO did not specify that he did not credit any of the district school psychologist's testimony (IHO decision at pp. 8-9). Because the IHO found that the parents had a meaningful opportunity to participate in the development of the student's IEP, and because the district school psychologist's testimony regarding participation in the meeting and the creation of the IEP goals is consistent with the student's mother's recall of the meeting as presented in her testimony, I find that portion of the school psychologist's testimony to be reliable.

student's IEP, she had no objection to any of the OT goals in the IEP (Tr. pp. 423-25). As one district court has recently held, "meaningful and active" parental participation at a CSE meeting undermines claims of predetermination (B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *9-*10 [E.D.N.Y. Mar. 31, 2014]).

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 (IHO Decision at pp. 8-10).

C. Challenged IEPs

1. Present Levels of Performance

The district asserts that, in addition to input from the parents and Child School providers, the IEP accurately described and addressed the student's present levels of academic performance and social/emotional and behavioral needs. The parents assert that the IHO correctly determined that the IEP failed to accurately describe the student's needs because the IEP failed to identify and address certain needs and was crafted to eliminate the deficits that were reflected in the evaluations. Specifically, the parents assert that the IEPs did not describe the student's need for adult assistance for independent reading, difficulties with inferential comprehension, the need for reminders to pay attention to grammar in addition to spelling and word usage, the need for reminders, repetition and review, and "significant social-emotional concerns."

Among the 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]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 329-30 [S.D.N.Y. 2013]).

I find, as described in detail below, that the information found in the evaluative material that the CSE had before it is appropriately reflected in the IEP. The academic and learning characteristics present level of performance and individual needs contained in the April 2011 IEP reflected information obtained from the October 2010 private psychoeducational evaluation, the February 2011 progress report from the Child School, and a speech-language evaluation (Tr. pp

25-27, 79-81; Dist. Exs. 2 at pp. 3-8; 3; 4; 5; 10).[13] The IEP noted that the student's cognitive evaluation scores—obtained on the Wechsler Intelligence Scale for Children-IV (WISC-IV) during the October 2010 psychoeducational evaluation—reflected full scale scores in the average range but that variability was noted (Dist. Exs. 2 at p. 3; 4 at p. 4). The student obtained a verbal comprehension score in the average range, a perceptual reasoning score in the high average range, a working memory score in the average range and a processing speed in the low average range on the WISC-IV (Dist. Exs. 2 at p. 3; 4 at pp. 4, 13). The IEP indicated that the student performed within the average range in verbal functioning on the WISC-IV, when demonstrating his general fund of knowledge, orally defining increasingly complex vocabulary words, conceptualizing the underlying commonality between two seeming dissimilar words, and communicating social norms and behavior (Dist. Exs. 2 at p. 3; 4 at p. 4).[14] According to the IEP, as reported in the October 2010 psychoeducational evaluation the student's nonverbal abilities as assessed on tasks measuring visual perception and organization, visual-spatial problem solving, and visual–motor coordination was deemed to be well developed, while grapho-motor, dependent visual scanning, and discrimination skills fell in the overall low average range on set timed tasks that comprised the processing speed index (Dist. Exs. 2 at p .3; 4 at p. 5). Consistent with the evaluative information, the April IEP noted that the student's working memory and attentional skills were assessed on both cognitive and neuropsychological measures (Dist. Exs. 2 at p. 3; 4 at p. 6). As indicated on the IEP the working memory score placed the student's overall short-term auditory attention abilities within the average range (Dist. Exs. 2 at p. 3; 4 at p. 6). The IEP noted that the student performed best on simplex tasks of auditory sequential processing versus more complex tasks measuring auditory attention and internal manipulation (Dist. Ex. 2 at p. 3).

The IEP reflected that the student's scores on the Clinical Evaluation of Language Fundamentals-4 (CELF-4) speech-language evaluation fell within age level expectancy except for recalling sentences (Dist. Exs. 2 at p. 3; 5 at p. 2). Also as indicated on the IEP, performance on the word structure subtest, formulating sentence subtest and CELF-4 core language battery indicated age-level ability (Dist. Exs. 2 at p. 3; 5 at p. 2). The student presented with some difficulty on the recalling sentences subtest, however his score fell within the average range and it was noted that he became somewhat distracted during the subtest (Dist. Exs. 2 at p. 3; 5 at p. 2).

[13] As noted previously, the April 2011 IEP meeting amended the March 2011 IEP only to add OT services and goals for the student (see Dist. Ex. 2 at pp. 2, 16-17, 20; compare Dist. Ex. 1, with Dist. Ex. 2). Although not raised by the parents, it does not appear that the CSE updated the present levels of performance to reflect receipt of the March 2011 OT evaluation report (compare Dist. Ex. 1 at pp. 3-8, with Dist. Ex. 2 at pp. 3-8).

[14] The evaluation indicated that the student performed within the average range, however the IEP does not reflect information from the psychoeducational evaluation that the student struggled to efficiently organize and articulate his thoughts when presented with novel open-ended "wh" questions that involved more complex language expression, and that the student required queries to elicit and elaborate upon his answers, as well as scaffolding to organize his ideas (Dist. Ex. 4 at p. 4). Arguably, this is the sort of omission in the IEP about which the parents complain, however that level of detail is not necessary in an IEP's description of a student's needs and abilities, (see P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013] [noting that an IEP need not reflect every aspect of a student's presentation in the present levels of performance]). In any event, the student's need to improve his ability to organize and articulate his thoughts when presented with novel open-ended "wh" questions is reflected in one of the IEP goals, which calls for the student to increase his inferential comprehension and to "use a variety of techniques to answer inferential comprehension questions" (see Dist. Ex. 2 at p. 10).

Consistent with evaluative reports and as noted on the IEP, the student's pragmatic skills are significantly disordered (Dist. Exs. 2 at p. 3; 4 at pp. 3, 9, 5 at p. 4).

As indicated on the April IEP, the psychoeducational evaluation assessed the student's academic performance using the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Exs. 2 at p. 4; 4 at p. 6). The IEP indicated the results of the WIAT-III, and that the student performed within and above age expectancy levels on measures evaluating his ability to read sight words of increasing complexity and his facility with phonemic decoding of unfamiliar words and his comprehension skills (Dist. Exs. 2 at p. 3; 4 at p. 6). As reported on the IEP, mathematical achievement was assessed with one subtest on the psychoeducational evaluation, indicating facility with simple addition and subtraction and an increased difficulty with more complex operations, such as multiplication and division (Dist. Exs. 2 at p. 3; 4 at p. 7). In the area of math the student's teacher reported—and the IEP reflected—that the student was able to solve one and two digit addition and subtraction problems with regrouping, solve addition and subtraction word problems, when first provided with individual guided practice (Dist. Exs. 2 at p. 4; 3 at p. 6).

The IEP indicated that the student's written language skills were variable and highly dependent upon the task complexity (Dist. Exs. 2 at p. 3; 4 at p. 7). As stated on the IEP, the student's ability to spell mono- and multi-syllabic words, employ knowledge of grammar, punctuation and spelling to generate rule-based sentences and more complex written expression skills were assessed to be within grade expectancy levels (Dist. Ex. 2 at p. 3). Consistent with teacher report, the IEP indicated in the area of written language that the student was able to generate his own topics and thoughts for writing, was able with assistance to follow the steps of the writing process and produced a "published piece," and the student was working on improving his grammar and using elements of authors craft (Dist. Exs. 2 at p. 4; 3 at p. 4).

In the area of reading the student's teacher reported—and the IEP reflected—that the student was assessed using the Fountas and Pinnell benchmark assessment system, where he achieved fourth grade equivalents in reading comprehension, demonstrated good literal comprehension for books at his grade level, and understood narrative elements (characters, setting, problem and solution) and sequence of events (Dist. Exs. 2 at pp. 3-4; 3 at p. 2). According to the IEP the student understood and could state the main idea and supporting details of a non-fiction passage, was able to use headings, glossaries, table of contents and other features of expository text to enhance comprehension (Dist. Exs. 2 at p. 4; 3 at p. 2). Test scores obtained during the October 2010 psychoeducational evaluation and documented on the April 2011 IEP indicated average abilities in reading and writing on the WIAT-III, with the student's area of most difficulty in sentence composition, at mid to late third grade instructional level (Dist. Exs. 2 at p. 4; 4 at pp. 6-7). CELF-4 scores documented on the February 2011 speech-language assessment and recorded on the April 2011 IEP indicated average scores for language at the mid to late third grade level with recalling sentences the most difficult area for the student (Dist. Exs. 2 at p. 4; 5 at p. 2).[15] In light of the above, I am not persuaded by the parents' argument that the IEPs did not adequately describe the student's need for adult assistance in the classroom.

[15] The IEP appears to have recorded an incorrect date of testing for the CELF-4 scores.

The district school psychologist who participated in the March 2011 CSE meeting testified that the CSE team discussed program modifications and accommodations needed to address the student's management needs such as: chunking information, multi-step directions broken down into small tasks, redirection and prompts to sustain attention and engagement, preferential seating, teaching self-monitoring skills, structure and extended time, guided steps as a strategy to drive meaning/enhance comprehension, multisensory approaches such as modeling, role playing, demonstrations, simulations, cooperative learning groups, pictures and diagrams, graphic organizers, proof reading and encouragement (Tr. pp. 53-59). She testified that the student's teacher at the Child School had input regarding the academic management needs, and that they were created at the CSE meeting (Tr. p. 58).[16] These were placed on the IEP as academic management needs to improve the student's ability to attend, remain motivated, focus on presenter, have a structured environment to learn, extra time to complete work and directions repeated (Tr. pp. 53-59, Dist. 2 at pp. 4-5). In light of the above I am not persuaded by the parents' argument that the IEP failed to describe the student's need for reminders, repetition and review.

According to the April 2011 IEP, information regarding the student's social/emotional needs was obtained from the October 2010 psychoeducational evaluation and indicated that the student demonstrated the ability to initiate conversation, maintain age appropriate eye contact and remain socially and emotionally engaged throughout the evaluation (Dist. Exs. 2 at p. 6; 4 at p. 3). The Behavioral Assessment System for Children-Second Edition (BASC-2) self-report indicated that the student was not experiencing significant psychopathology, social withdrawal, or behavior issues, and that the student viewed himself as social and happy and enjoyed school and spending time with friends (Dist. Exs. 2 at p. 6; 4 at pp. 7-8). According to the parent report within the psychoeducational evaluation, and as indicated on the April 2011 IEP, the student demonstrated an interest in fostering interpersonal relationships, was able to relate appropriately to his peers, and engaged in age-appropriate recreational hobbies and activities (Dist. Exs. 2 at p. 6; 4 at p. 8). As stated on the IEP, the student's mother reported to the psychoeducational evaluator that the student could overreact to problems, and frequently required parental assistance when problem solving (id.). The parent report also indicated that the student was at risk of somatization (id.). The parent completed the Adaptive Behavior Assessment System-Second Edition (ABAS-II) as part of the psychoeducational evaluation, with results suggesting that the student's adaptive behavior fell in the borderline range of functioning (id.). As indicated on the April 2011 IEP, the parent reported that the student demonstrated a relative weakness in home living skills, which encompassed completing household chores in a timely and organized manner (id.). The IEP reflected that the student had a specific weakness in the area of self-direction, specifically his ability to initiate and independently engage in activities was variable and the student was easily frustrated when confronted with challenging tasks (Dist. Ex. 2 at p. 6). The IEP indicated that the student's behavior did not seriously interfere with instruction and could be addressed by the special

[16] As previously stated, although the IHO stated that he "found it difficult to credit the entirety of [the district school psychologist's] testimony," that determination concerned the psychologist's failure to take complete meeting notes, her flawed memory of a classroom observation she conducted, and the error in including another student's name in portions of the IEP (IHO decision at pp. 8-9). Because the IHO found that the parents had a meaningful opportunity to participate in the development of the student's IEPs, and because the district school psychologist's testimony regarding participation in the meeting and the creation of the academic management needs portion of the IEP not inconsistent with the student's mother's recall of the meeting in her testimony, I find that portion of the school psychologist's testimony to be reliable (see Tr. pp. 393-94).

education classroom teacher (id.). Although the April IEP indicated that the CSE recommended the student for counseling, the school psychologist testified that the recommendation was an oversight and the student did not require counseling (Tr. pp. 47-48; Dist. Ex. 2 at p. 6). The psychologist noted that the child was a happy student and was not receiving counseling at the Child School (Tr. pp. 47-48). The student's social/emotional management needs on the April 2011 IEP indicated that the student would benefit from a well-structured environment with limit setting (Dist. Ex. 2 at p. 7). In light of the above, I am not persuaded by the parent's argument that the IEP failed to describe or identify any "significant social-emotional concerns."

As reported in the social history report—and indicated on the April 2011 IEP in the present health status and physical development—the student was in good overall health, required orthotics in his shoes, was allergic to wheat products and a specific brand of peanut butter, that his hearing was within normal limits, and he wore corrective lenses (Dist. Exs. 2 at p. 8; 8 pp. 2-3). The IEP noted that the student received a physical therapy evaluation in February 2011 and was found to have low overall tone, with generalized weakness that was noticeable in his core (Dist. Exs. 2 at p. 8; 6 at p. 4). The student's range of motion was within normal limits and he did not present with sensory seeking behaviors that interfered with his ability to attempt skills being assessed during the evaluation (Dist. Exs. 2 at p. 8; 6 at p. 3). The April 2011 IEP reflected the recommendation of physical therapy to focus on postural control, motor planning and coordination of movement (Dist. Exs. 2 at pp. 8, 20; 6 at p. 4). The April IEP recommended, reflecting recommendations made in evaluative reports, related services including occupational therapy three times a week for 30 minutes, physical therapy three times a week for 30 minutes and speech and language therapy two times a week for 30 minutes, (Dist. Exs. 2 at p. 20; 6 at p. 4; 5 at p. 4; 13 at p. 5).

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]). Accordingly, I reverse that portion of the IHO's Decision that found that the student was denied a FAPE because the description of the student's present levels of educational performance and needs and abilities did not accurately reflect the evaluative information available to the CSE.

2. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Although the parents asserted that the goals were vague and generic, evidence in the hearing record fails to support this assertion. According to the school psychologist, and as discussed in detail above, the basis for the student's annual goals came "directly" from the student's speech therapist, physical therapist and the Child School teacher (Tr. pp. 59, 61-63, 72). The school psychologist testified that the goals were drafted and discussed during the March 2011 CSE meeting with no objections (Tr. pp. 59, 63, 72, 107-08). The parent testified that she did not disagree with the goals and that there was discussion about the goals in which she participated at the CSE meeting (Tr. pp 410, 419-20, 422).

An independent review of the April 2011 IEP shows that the CSE developed approximately 16 annual goals to improve the student's prosocial behavior, reading, writing, understanding of numerical concepts, ability to answer inferential comprehension questions, listening skills, understanding of conversational parameters, postural stability, overall endurance, motor planning, ball playing skills, and fine motor skills (Dist. Ex. 2 pp. 9-17).

The April 2011 IEP included annual goals targeting the student's speech-language needs including his ability to make meaningful responses as a listener in a conversation with a speaker; use appropriate loudness; facial expression and gestures, with a clinicians' prompting, in a small group (Dist. Exs. 2 at p. 13; 5 at p. 6). One goal called for the student to use the conversational parameters of honesty, relevancy, and clarity by making relevant remarks and to avoid superimposing his own views and interests on a conversation with minimal cuing in a small group setting (id.). The April 2011 IEP provided an annual goal to improve the student's ability to demonstrate cooperative, respectful, peaceful and prosocial behavior towards adults and peers; to continue to interact with adults and peers in a positive manner; to make an effort to improve his listening and following directions during transition times; to raise his hand to speak, refrain from calling out in class, and refrain from sulking when he becomes upset; and to adjust his behavior more quickly (Dist. Ex. 2 at p.10). In the area of gross motor skills, the IEP included annual goals designed to improve the student's ability to present with a more neutral alignment and postural stability, to increase overall endurance, to increase motor planning and movement coordination, and to increase ball playing skills, improve kicking and more age appropriate throwing skills (Dist. Exs. 2 at pp. 14-15; 6 at pp. 7-8). To improve the student's fine motor and visual motor skills, the IEP provided annual goals addressing the student's arm and hand control via a variety of activities including connecting dots, completing mazes, maintaining eye contact on a balloon during a game of balloon volleyball, copying and writing tasks, skipping and galloping and maintaining a functional seated posture while he is completing written work (Dist. Ex. 2 at pp. 16-17).

To the extent the parents allege that the IEP contained vague and generic goals, the hearing record does not support this conclusion. Rather, a review of the student's needs and the April 2011 IEP annual goals shows that the CSE developed goals in the student's deficit areas as identified in the information reviewed and considered by the March and April 2011 CSEs (compare Dist. Ex 2 at pp. 9-16, with Dist. Exs. 3-6, 13). As detailed above, the hearing record showed that based upon the information before the CSE, the April 2011 IEP adequately described the student's social/emotional needs, and provided annual goals designed to improve the student's communication with others (Dist. Ex. 2 at p. 13). The April 2011 IEP annual goals related to the student's behavior, gross motor and speech-language needs, were designed to improve his gross motor and communication skills and in turn, his social/emotional and peer interaction skills, and were appropriate to address the student's deficits in these areas (Dist. Ex. 2 at pp. 9, 13, 14).

Accordingly, the hearing record does not support a finding that the district failed to offer the student a FAPE on this basis (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

3. Adapted Physical Education

The parents asserted in their due process complaint notice that the CSE should have considered adapted physical education in light of the student's orthopedic needs, low tone and generalized weakness (Parent Ex. B at p. 5).

The district school psychologist testified that adapted physical education was not discussed at the CSE meeting, was not recommended in the PT progress report reviewed at the CSE meeting, and that no representative from the child school recommended the service for the student (Tr. pp. 109, 113-14, 141-42; Dist. Ex. 6). The PT evaluation report did not recommend adapted physical education, although it did recommend that the student participate in recreational activities that include bicycle riding and swimming to promote increased core strength, the ability to dissociate between his upper and lower body, as well as increase his overall level of endurance (Dist. Ex. 6 at p. 5). Furthermore, because the IEP indicated that the student did not require adapted physical education, it does not appear that the CSE failed entirely to consider whether the student required adapted physical education, (Dist. Ex. 2 at p. 8).[17] I agree with the district's assertion that the student's needs relating to his physical limitations were adequately addressed in the April 2011 IEP by the provision of PT and OT related services, and the inclusion of goals designed to address his PT and OT needs.

4. Health and Physical Management Needs

The parents assert that the April 2011 IEP was devoid of any meaningful physical management needs to address the significant issues in those domains that were identified by the March and April 2011 CSEs. In their due process complaint notice, the parents asserted that without identifying specific physical and health management needs, the student's need to improve his postural control, motor planning, and coordination of movement could not be addressed by the student's special education teacher and providers in the classroom by modifying instruction and restructuring the classroom environment (Parent Ex. B at pp. 5-6). However, the student's need to improve his postural control, motor planning and coordination of movement were identified in the April 2011 IEP and were adequately addressed by the provision of the related services of PT and OT and associated annual goals which focused directly upon those needs (see Dist Ex. 2 at pp. 8, 14-17). Although the health/physical management needs section of the April 2011 IEP did not specify any particular modifications or accommodations to address the student's needs in those areas, I find that the IEP, read as a whole, adequately addressed the student's health and physical management needs (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its

[17] The student has received adapted physical education at the Child School, where regular physical education is not available (Tr. p. 253).

deficiencies]; see also Bell v Bd. of Educ., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as a whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6 - *7 [D.N.H. Aug. 14, 2008] [noting that adequacy of an IEP is evaluated as a whole while taking into account the child's needs]).

5. ICT Services

Lastly with regard to the program developed for this student I address the parents' assertion that the recommended general education setting with ICT services and related services would not provide sufficient support for the student, who required a small class setting in a small school. To better understand the student's educational needs, as well as to assist in appropriate treatment planning, the parent requested a psychoeducational evaluation, a PT evaluation, an OT evaluation, and a speech-language evaluation (Tr. p. 72; Dist. Exs. 4 at p. 1; 5 at p. 1; 6 at p. 1; 13 at p. 1). The student's cognitive potential was found to be quite strong and his full-scale IQ fell in the average range (Dist. Ex. 4 at pp. 4, 9). The student demonstrated significant weaknesses with processing speed, mental efficiency, sustained attention, and sensory motor skills, and exhibited decreased strength and endurance of his postural muscles (Dist. Exs. 4 at 9; 6 at p. 4; 13 at p. 5). The student's core language scores were at age level, except for recalling sentences, while his pragmatic skills were disordered (Dist. Exs. 4 at p. 9; 5 at p. 4). The parent testified that the student presented with sensory issues, anxiety and rigidity, difficulty relating to peers, limited attention, and required constant redirection (Tr. pp. 339-45). The psychoeducational evaluation recommended that the student be placed in a small academic environment that afforded the opportunity to socialize with and learn from peers who could model typical social skills and age appropriate conversational interactions, without behavioral difficulties (Dist. Ex. 4 at p. 10).

During the 2011 CSE meetings, CSE members discussed possible placement options for the student and determined that the student required special education services to address his language delays and attentional difficulties (Dist. Ex 2 at p. 19; see Tr. pp. 73-74, 133-34). In addition, the CSE considered placing the student in a special class but determined that such a placements would be "too restrictive" for the student, who would benefit from contact with nondisabled peers (Tr. p. 78; Dist. Ex. 2 at p. 19).

The hearing record, viewed as a whole, supports the CSE's conclusion that the student's cognitive potential and overall grade level functioning, along with his variety of strengths and age appropriate skills, indicated that he would benefit from placement in a hybrid program, where he would have access to nondisabled peers (Tr. pp. 73-74; Dist. Ex. 2 at p. 19). State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students," including no more than 12 students with disabilities (8 NYCRR 200.6[g], [g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). The student's mother stated that she and the private psychologist expressed their opinion that the student required a more supportive setting; however, the district members of the CSE did not believe a placement providing more support than an ICT class was necessary (Tr. pp. 73-74, 78, 379, 382). The district school psychologist acknowledged the private psychologist's report recommending a smaller setting where the student could receive

increased support provided by a special education teacher during the day, which the school psychologist testified could be met in a classroom providing ICT services (Tr. pp. 99-100).

Here, the hearing record shows that the student had successfully participated in general education settings, with support, in the past. The social history report indicated that the student was successful in an integrated preschool, although the student preferred to be a loner (Dist. Ex. 8 at p. 3). The student remained in an integrated setting for kindergarten (20 students, one teacher and an assistant) (id.). For first and second grade, the student was in a self-contained 14:1+2 special, performing so well that he was mainstreamed, at first for "specials" and then for reading and social studies as well (id.). The parent report indicated that the student had made significant progress with regard to pragmatic language and social skills over the years, with no serious behavior difficulties, aggression, or acting out behavior reported (id.). Thus, in light of the student's recent success in a partially general education setting, and his recommended need for the opportunity to socialize with and learn from peers who could model typical social skills and age appropriate conversational interactions, it was reasonable for the CSE to recommend placing the student in general education setting with ICT services and additional supports to meet his special education needs (see Dist. Ex. 4 at p. 10).

In consideration of the student's needs as identified in the evaluative information available to the CSE, the April 2011 IEP recommended an ICT class and related services consisting of speech and language therapy twice per week for 30 minutes per session in a 1:1 setting, physical therapy three times per week for 30 minutes per session one time 1:2 and two times 1:1, occupational therapy three times per week for 30 minutes per session in a 1:1 session (Dist. Ex. 2 at pp. 1, 20). To further address the student's needs within the recommended ICT class setting, the April 2011 IEP offered accommodations and strategies specific to the student and his unique needs; including chunking information, multi-step directions broken down into small tasks, redirection and prompts to sustain attention and engagement, preferential seating, teaching self-monitoring skills, structure and extended time, guided steps as a strategy to drive meaning/enhance comprehension, multisensory approaches such as modeling, role playing, demonstrations, simulations, cooperative learning groups, pictures and diagrams, graphic organizers, proof reading and encouragement (Tr. pp. 53-59, Dist. 2 at pp. 4-5). The April 2011 IEP included accommodations for assessments such as; directions re-read, time extended (one and half times) and short breaks (Dist. Ex. 2 at p. 20). I find that these accommodations and program modifications appropriately addressed those areas of needs identified in the psychoeducational evaluation as necessitating the provision of a "small, structured learning environment" (Dist. Ex. 4 at p. 10).

Although the parents argue that the student required a smaller, more structured and supportive setting than the recommended ICT class, the information the CSE reviewed and used during the development of the student's 2011-12 IEP—which showed cognitive skills within the average to low average range of functioning and academic skills at grade level or higher—does not support this conclusion. Rather, the ICT services provided in the IEP, along with the support of a full-time special education teacher and a variety of modifications and accommodations, supports a finding that the program recommended in the April 2011 IEP was reasonably calculated to provide the student with educational benefits (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, 489 F.3d at 108; Walczak, 142 F.3d at 132; G.B., 751 F. Supp. 2d at 573-80; E.G., 606 F. Supp. 2d at 388; Patskin, 583 F. Supp. 2d at 428).

Because the ICT services recommendation is reasonable, 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. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2013]; 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 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"]).

Lastly, although there was a recommendation for a small academic setting in the psychoeducational evaluation, 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 small class size does not, in and of itself, constitute special education (Dist. Ex. 4 at p. 10; 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]). Without evidence in the hearing record regarding what unique needs of the student would be met by the provision of a smaller class than that recommended by the CSE, other than the type of benefits desired by any loving parent, I decline to rule on the issue of whether education in a class with ICT services constitutes a small class.

D. IEP Implementation—Assigned Public School Site

Finally, I next turn to the issues on appeal regarding the implementation of the student's IEP in the classroom at the particular school site to which the student was assigned. The parents argued in the due process complaint notice and continue to argue on appeal that the particular school's setting would be too large for the student, that the classroom would be too large for the student, that the methodology used in the assigned school proposed classroom would not be appropriate for the student, and that the student would not be suitably grouped for instruction in the proposed classroom (Parent Ex. B at pp. 2-3).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that

"[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [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., 746 F.3d at 79). 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]).[18] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the IEPs because a retrospective analysis of how the district would have

[18] 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 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

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 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 prior to the time the district became obligated to implement the IEP (see Parent Exs. C; D). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims that the student would not have been grouped appropriately in the recommended class in the assigned school, that the methodology employed in the recommended classroom was not appropriate to meet the student's needs, or that the school and proposed classroom would be too large and distracting for the student (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). I therefore agree with the district on appeal and find that the IHO correctly declined to make FAPE findings on the ability of the assigned school to implement the IEP. Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the student's IEP.[19]

[19] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

Nonetheless, I will briefly address the parents' implementation arguments and, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

Regarding the parents' claim that the assigned school would use an inappropriate methodology, I note that generally, while an IEP must provide for specialized instruction in a student's areas of need, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; accord M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]; R.B., 2013 WL 5438605, at * 11). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). Here, there is no evidence in the hearing record suggesting that there was a clear consensus that the student required a particular methodology and it does not appear that a particular methodology was contemplated by the March and April CSEs (see Dist Exs. 1; 2).

Regarding the parents' claim that the student would not be appropriately grouped for instruction in the proposed classroom, I note that State regulations provide that "[s]tudents with disabilities placed together for purposes of special education shall be grouped by similarity of individual needs" (8 NYCRR 200.6[a][3]; see D.B., 966 F. Supp. 2d at 337). Here, the hearing record shows that the student was functioning at approximately a third grade level in reading and math and that the students in the proposed classroom were reading at approximately from second to fifth grade levels and that in math the students were similar to those of the students in the Child School classroom that the student attended (Tr. pp. 182-83; Dist. Ex. 2 at p. 4; compare Tr. pp. 183 with Tr. p. 275). It would appear that had the district been required to implement the student's IEP, he could have been appropriately grouped in the proposed classroom.

Lastly, regarding the parents' contention that the recommended school and classroom would be too large and distracting for the student, on appeal the parents assert that their claim that the "placement is too large" for the student "refers back to the program recommendation as a

whole: a classroom of 20 or more students is far too large and unstructured" (Answer ¶ 48). Therefore, in light of the fact that I have already found that the student could be provided a FAPE in a general education setting with ICT services and related services, I would find the parents' argument here unconvincing for similar reasons.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at the Child School was appropriate or whether equitable considerations support the parent's request for tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

In addition, the parties' remaining contentions, including their arguments concerning the IHO's credibility determinations, need not be further addressed in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated August 28, 2012 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and ordered the district to reimburse the parents for the cost of the student's tuition at the Child School.

Dated: **Albany, New York**
July 30, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER