The University of the State of New York

The State Education Department
State Review Officer
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No. 13-002

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, Ilana A. Eck, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Abbie Smith, 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 assigned public school site and classroom to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Bay Ridge Preparatory School (Bay Ridge) for the 2011-12 school year. The parents cross-appeal from the IHO's determination that the district offered an appropriate educational program. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The hearing record shows that the student attended a nonpublic school from kindergarten through fourth grade (Tr. p. 203; see Dist. Ex. 2 at pp. 1-2). In December 2009 and January 2010, during the student's third grade, he underwent a comprehensive private psychoeducational evaluation (see generally Dist. Ex. 5). In a letter dated June 7, 2010, the parents notified the district that the student was having difficulties with reading and writing and requested information on

services for which the student might be eligible, including occupational therapy (OT) and tutoring (Parent Ex. C). The parents also noted that there was "prerequisite testing involved" and wanted to get the process started as soon possible (id.).

The district arranged for an initial evaluation of the student on July 29, 2010, which was rescheduled and completed on August 10, 2010 and August 13, 2010 (Tr. pp. 213-14; Parent Ex. H). As a result, a social history, a district psychoeducational evaluation, and an OT evaluation were completed (see generally Dist. Exs. 2-4). In fall 2010 the student continued at his nonpublic school in a fourth grade general education class (Tr. pp. 203, 216; Dist. Ex. 4 at p. 1). According to hearing record, on February 3, 2011 the CSE convened to conduct the student's initial review but adjourned and rescheduled so that the the CSE members could review additional documents and the district could conduct an observation of the student (Tr. pp. 217-21).

On March 15, 2011 the parents signed an enrollment contract with Bay Ridge for the student's attendance during the 2011-12 school year (Parent Ex. E at p. 1).[1]

On April 5, 2011 the CSE reconvened to conduct the student's initial review and to develop an IEP for the 2011-12 school year (Dist. Ex. 1 at pp. 1-2). Finding the student eligible for special education as a student with a learning disability, the April 2011 CSE recommended that the student receive 12:1 integrated co-teaching (ICT) services in a general education classroom (id. at pp. 1, 7).[2, 3] The April 2011 CSE also developed three annual goals for the student and recommended testing accommodations, consisting of extended time (time and a half) and a separate location in a small group (no more than eight students) (id. at pp. 6, 9).

By final notice of recommendation (FNR) dated July 21, 2011, the district summarized the ICT services recommended in the April 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 9).

In a letter to the district, dated August 24, 2011, the parents detailed their attempts to contact the assigned public school site to schedule a visit, as well as their concerns regarding the recommended ICT services, stressing their position that the student required "a specialized school for students with similar needs" (Parent Ex. J). The parents further requested a meeting to discuss the assigned public school site, or if a meeting could not be arranged, a written description of the school and the proposed classroom (id.). In a separate letter, also dated August 24, 2011, the parents provided the district with notice of their intent to unilaterally place the student at Bay Ridge for the 2011-12 school year if the district did not "cure the procedural and substantive errors in the development of" the April 2011 IEP and "offer [the student] an appropriate program" (Parent Ex.

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

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

[3] The terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (see, e.g., Tr. pp. 65, 121, 133; Dist. Exs. 1 at pp. 1, 7; 9). For consistency in this decision, the term ICT will be used.

A at p. 1). The hearing record shows that the parents subsequently visited the assigned public school site on November 1, 2011 (see Tr. pp. 227, 229).

A. Due Process Complaint Notice

In a due process complaint notice dated May 15, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year on both procedural and substantive grounds (see generally Parent Ex. B). Leading up to the April 2011 CSE meeting, the parents asserted, among other things, that the district took 10 months to evaluate the student and convene a CSE meeting after it received the parents' written request for evaluation and services and failed to fully evaluate the student prior to the February 2011 CSE meeting (id. at p. 2). With respect to the April 2011 CSE, the parents alleged that the CSE did not complete sufficient evaluative information and failed to thoroughly review the private psychoeducational evaluation report (id. at p. 4). In addition, the parents asserted that the district denied them meaningful participation in the IEP creation process, in that the CSE disregarded the parents input and failed to discuss all of the student's needs, and predetermined the student's recommended program and placement (id. at pp. 2-3, 5).

With respect to the April 2011 IEP, the parents asserted that the IEP failed to accurately or adequately describe the student's present levels of performance, with respect to his academic, physical, or social/emotional needs, including the student's weaknesses in decoding, phonological processing, executive functioning, coping skills (anxiety), and graphomotor functioning, and failed to set forth any academic management needs (Parent Ex. B at pp. 4-5). In addition, the parents alleged that the annual goals included in the April 2011 were inadequate, inappropriate, and failed to address all of the student's areas of need (id. at p. 5). In addition, the parents also alleged that the recommendation for a general education classroom placement with ICT services was inappropriate because it would not provide the student with a sufficient level of support (id. at p. 3).

With respect to the assigned public school site, the parents asserted that: (1) the school was too large; (2) the school would not have been "able to offer the individualized, small group support [the student] require[d]"; (3) the student would not have been functionally grouped with the other students in the proposed classroom; and (4) the school had a documented record of poor student performance, which, given the student's academic potential, was troubling (Parent Ex. B at pp. 2-4).

In addition, the parents alleged that the student's unilateral placement at Bay Ridge was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. B at p. 6). As relief, the parents requested that the IHO order the district to reimburse them for the costs of the student's tuition at Bay Ridge for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on July 10, 2012 and concluded on September 10, 2012, after three days of proceedings, (Tr. pp. 1-260).[4] In a decision dated November 30, 2012, the IHO

[4] The first two days of the impartial hearing addressed only administrative and evidentiary issues (Tr. pp. 1-41).

determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Bay Ridge was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of tuition reimbursement (IHO Decision at pp. 9-11, 12, 13).

Initially, the IHO found that overall, "no procedural errors occurred during the [CSE] meeting that w[ere] tantamount to denial of FAPE" (IHO Decision at p. 9). Specifically, the IHO found that the elapse of 10 months between the parents' referral of the student for special education and the actual development of an IEP was not "preferable"; however, the IHO noted that, once the process started, the district was in continuous contact with the parents, and, therefore, the delay did not result in a denial of a FAPE.

With respect to the April 2011 IEP, the IHO found that: the "lack of recommendations [on the April 2011 IEP] to address the student's academic management needs, social[/]emotional management needs, or health and physical development needs" did not rise to the level of a denial of FAPE (IHO Decision at p. 9). In this regard, the IHO noted that (1) there was no evidence that the student needed OT; (2) there was no evidence that the student required any other type of physical or health supports; (3) the student did not require counseling for social/emotional issues, as the student's anxiety was directly related to his "academic struggles," which the IHO opined would "diminish" if the student were placed in an appropriate program; and (4) there was no evidence before the CSE that the student had received a diagnosis of dyslexia (id. at pp. 9-10). The IHO also held that the annual goals included on the April 2011 IEP, which targeted the student's needs in reading spelling and vocabulary, "specifically targeted the student's needs as identified in the initial social history and private psycho[educational] evaluation" (id. at p. 10). The IHO noted that, because "evidence establishe[d] that the student's anxiety was related to his academic struggles, . . . success with his academic-based goals addressed his anxiety related needs" (id.). Next, the IHO determined that, "given the evaluations and other reports" before the April 2011 CSE, the recommended general education classroom placement with ICT services was appropriate for the student and constituted the least restrictive environment (LRE) (id. at pp. 10-11).

With respect to the assigned public school site, the IHO found that the district failed to demonstrate that the student would have been suitably grouped in the proposed classroom with other students with similar special education needs (IHO Decision at p. 11). Further, the IHO noted a lack of evidence regarding how the classroom teachers at the assigned public school site would have varied their instruction based on the students' needs (id.).

The IHO also determined that the parents satisfied their burden to establish that Bay Ridge was an appropriate unilateral placement for the student for the 2011-12 school year, finding that Bay Ridge "met the student's education needs" in a general education class, along with participation in the "Achieve Program," a "specialized language arts class," Orton Gillingham reading instruction, and speech-language therapy (IHO Decision at p. 12). The IHO also noted that "the children in this smaller setting had similar profiles and needs to the student" (id.). In addition, the IHO found that the student made academic and social/emotional progress at Bay Ridge (id.).

With respect to equitable considerations, the IHO found that the parents cooperated with the district, acted reasonably, provided the CSE with the results of the privately obtained evaluations, attended all of the CSE meetings, and were amenable to a public school placement (IHO Decision at p. 13). Consequently, the IHO ordered the district to pay the costs of the student's tuition at Bay Ridge for the 2011-12 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year, on the basis that it did not demonstrate that the assigned public school site was appropriate, and that equitable considerations favored the parents' request for tuition reimbursement.[5]

With respect to the assigned public school site, the district asserts that the IHO's determination was contrary to case law and that the parents' claims in this regard were speculative since the student never attended the assigned public school site. With respect to equitable considerations, the district asserts that the hearing record, when taken as a whole, demonstrates that the parents had no intention of placing the student in a public school, as demonstrated by: (1) evidence that the student never attended a public school; (2) the parents execution of an enrollment contract with Bay Ridge for the student's attendance during the 2011-12 school year prior to the April 2011 CSE meeting; and (3) the parents' testimony concerning their intentions with regard to the student's education after their visit to the assigned public school site.

In an answer and cross-appeal, the parents respond to the district's petition by admitting or denying the allegations raised therein and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year, based on the district's failure to demonstrate the ability of the assigned public school site to implement the student's IEP, and that equitable considerations weighed in favor of the parents' request for relief. In their cross-appeal, the parents assert that the IHO erred in her determinations regarding the conduct of the April 2011 CSE meeting and appropriateness of the resultant IEP. Specifically, the parents assert that the cumulative effect of the procedural and substantive deficiencies amounted to a denial of a FAPE. In support thereof, the parents allege that the April 20112 IEP: failed to describe the student's academic, social/emotional, and physical present levels of performance; did not indicate the student's dyslexia or how to address it; lacked information regarding the student's writing or executive functioning; and failed to identify the student's management needs. The parents also assert that the recommended general education placement with ICT services in a 12:1 ratio was inappropriate and that the student required small group reading and writing support.

In an answer to the parents' cross-appeal, the district asserts that any deficiencies with the April 2011 IEP did not rise to the level of a denial of FAPE and that the recommended general education class placement with ICT services was appropriate and offered sufficient support in the LRE. The district asserts that the April 2011 CSE discussed the student's present levels of

[5] The district has not appealed the IHO's determinations that Bay Ridge was an appropriate unilateral placement. Accordingly, this determination has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

performance and that the parents did not object to the recommendation for ICT services during the CSE meeting.

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. April 2011 IEP

1. Present Levels of Performance

The parents assert that the April 2011 IEP failed to accurately reflect the student's present levels of performance or identify the student's management needs. Under the IDEA and State regulations, among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parent 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]).

In the present case, a review of the evidence in the hearing record demonstrates that the April 2011 IEP accurately described the student's present levels of academic achievement, social development, and physical development and that the description of the student's needs was consistent with the evaluative information before the CSE at the time of the April 2011 meeting (see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see also P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 512 [S.D.N.Y. 2013] [holding that an IEP need not specify in detail every deficit arising from a student's disability so long as the CSE develops a program that is "designed to address precisely those issues"]).

The hearing record shows that the April 2011 CSE had available the January 2010 private psychoeducational evaluation, the August 2010 district psychoeducational evaluation, the August 2010 OT evaluation, the August 2010 social history, the January 2011 teacher-student evaluation (teacher report), and the February 2011 classroom observation (Tr. pp. 62-65; see Dist. Exs. 2-7; 8 at p. 1).[6]

A review of the April 2011 IEP demonstrates that the present levels of academic performance reflected test scores from the August 2010 district psychoeducational evaluation that indicated the student's performance in reading, writing and mathematics were considered to be average (Dist. Ex. 1 at p. 3; see Dist. Ex. 3 at p. 2). According to the April 2011 IEP the only academic area considered below average measured the student's ability to "write basic math facts"

[6] Although the January 2010 private psychoeducational evaluation was available to the April 2011 CSE, it is unclear from the hearing record whether or not the CSE considered this document (see Tr. pp. 64-66, 68-69, 214-16, 220-21).

in a timely manner (Dist. Ex. 1 at p. 3). Consistent with the August 2010 district psychoeducational evaluation, the April 2011 IEP indicated that the student was performing at a 4.1 instructional level in broad reading and broad math, and that his performance in writing fluency and academic skills was at a 3.6 instructional level (compare Dist. Ex. 1 at p. 3, with Dist. Ex. 3 at p. 4).

In the area of social/emotional performance, the April 2011 IEP reflected information from the August 2010 district psychoeducational evaluation report that, during testing, the student exhibited age appropriate behaviors and was respectful, compliant, and very open and forthcoming in his responses (Dist. Ex. 1 at p. 4; see Dist. Ex. 3 at p. 2). Further the April 2011 IEP stated that, during the August 2010 psychoeducational evaluation, the student presented with an appropriate mood and affect, and engaged in appropriate conversation with the examiner (id.).

In the health and physical development present levels of performance, the April 2011 IEP reflected reports that the student was in good health and did not require environmental modifications at that time (Dist. Ex. 1 at p. 5). The April 2011 IEP further reflected reports that the student exhibited difficulty grasping and manipulating the pencil correctly (id. at p. 4).

The parents assert that the April 2011 IEP failed "to describe [the student's] noted issues with writing or executive functioning" described in the January 2010 private psychoeducational evaluation report. With respect to writing, the January 2010 private psychoeducational evaluation report indicated that the student achieved a score in the 44th percentile (average range) on a writing fluency subtest, a score in the 45th percentile (average range) on a spelling subtest, and scores in the average range on two of the three subtests of the Test of Written Language-3, with one subtest score in the low average range (Dist. Ex. 5 at pp. 21-22). The examiner indicated that the student's "relative struggles" with spelling and graphomotor skills contributed to making writing a "demanding process" for him (id. at p. 9). Furthermore, academic test results from the August 2010 district psychoeducational evaluation describe the student's performance in writing as "average," as he achieved a spelling subtest standard score of 90 and a writing fluency standard score of 100 (Dist. Ex. 3 at p. 3). The student's performance on cognitive subtests that measured his ability to scan/write information in a timely manner was in the average to high average range (id. at pp. 1-2). According to the August 2010 OT evaluation report, the student achieved scores in the above average range on tests of his visual motor integration, motor coordination, and visual perceptual skills, and that his writing difficulty stemmed from the demands of spelling words (Dist. Ex. 4 at p. 4). The April 2011 IEP reflected the student's relative weakness in writing by indicating that his writing fluency skills upon entering the fourth grade were at the 3.6 instructional level and that he exhibited difficulty grasping and manipulating the pencil correctly during drawing activities (Dist. Ex. 1 at pp. 3-4). In addition, as discussed further below the April 2011 IEP addressed this identified need with an annual goal in writing which targeted spelling patterns and rules (id. at p. 6).

Regarding the student's executive functioning, information available to the April 2011 CSE indicated that the student's cognitive functioning was in the average to very superior range, and his overall academic performance was average (Dist. Exs. 3 at pp. 1-4; 6 at p. 1; see Dist. Ex. 5 at pp. 4-9, 21). Similarly, the January 2010 evaluation report indicated that the student functioned in the average range on the majority of subtests measuring attention and executive ability, with the exception of one subtest score in the superior range and four subtest scores in the low average or borderline range (Dist. Ex. 5 at p. 22). The examiner noted the variability in the student's executive

functioning skills and identified areas of need once again as "relative struggles" related to his ability to quickly process sequences, direct himself in less than automatic ways, multi-task, and retain more and more information (id. at p. 14). The examiner further noted that the student did a good job of slowing himself down in order to compensate for these issues, although he was sensitive to the extra time he needed (id.). Furthermore, the August 2010 district psychoeducational evaluation report indicated that the student attended to all information and instructions presented to him in the testing situation, although he appeared to become "flustered" by one unfamiliar task that affected his concentration (Dist. Ex. 3 at p. 1). During the August 2010 OT evaluation, although writing tasks were "clearly difficult" for him, the student sustained his attention on tasks presented, was cooperative, and worked diligently on all tasks (id. at p. 2). The January 2011 teacher report described the student's ability to keep pace with instruction and the quality of his classwork as poor to fair, and his ability to work independently as poor (Dist. Ex. 6 at pp. 1-2). In the February 2011 classroom observation report, the social worker noted that the student benefited from organizational strategies employed by the teacher (Dist. Ex. 7 at p. 2). Her report also reflected that the student displayed a good attention span, responded to teacher attempts to refocus, followed the lesson plan, completed the assigned work, arrived prepared for class and appeared to be a very hard worker (id. at pp. 2-3). Although the student may have achieved scores in the low average or borderline range on specific tests of executive functioning, his cognitive and academic performance overall was average to above average (Dist. Exs. 3 at pp. 1-4; 5 at p. 22; 6 at p. 1). Given the extent to which the student's handwriting issues were driven by his difficulties with spelling rather than the mechanics of handwriting, and that the April 2011 IEP provided additional time to the student to accommodate for his handwriting, I find that the lack of a description of the student's writing and executive functioning difficulties in the April 2011 IEP does not rise to the level of a denial of a FAPE in this instance.

In regard to the parents' claim the April 2011 IEP fails to note the student's "dyslexia" or discuss needs relating to it, once a student has been determined to be eligible for special education services, it is not a particular diagnosis or "the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [emphasis in original]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [holding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial" and noting that an IEP is not necessarily invalid "for failing to include a specific disability diagnosis" so long as it is tailored to the student's needs]). Additionally, both the January 2010 private and the August 2010 district psychoeducational evaluation reports show that the student performed within the average range or above on the majority of reading subtests administered, with the exception of letter reversals, which was identified in the low average range (Dist. Exs. 3 at p. 4; 5 at p. 21). Specifically, the August 2010 district psychoeducational evaluation report indicated and the April 2011 IEP reflected that the student appeared to have "acquired grade appropriate decoding skills," that he read grade appropriate items with fluency, that his reading comprehension skills were adequate, and that he was capable of finding specific

vocabulary to respond accurately to test items (Dist. Exs. 1 at p. 3; 3 at p. 2).[7] Moreover, the hearing record shows that the April 2011 CSE discussed information from the student's teacher that "the student's 'dyslexia' [was] still a problem" and took it into consideration when recommending the general education class placement with ICT services (Tr. p. 72; Dist. Ex. 8 at p. 1). As such, the hearing record does not support a finding that the failure to include such a diagnosis in the April 2011 IEP denied the student of a FAPE, and, as discussed further below, the student's reading needs were addressed by the ICT services, as well as by the annual goals.

Based on the foregoing, a review the April 2011 IEP reflects present levels of academic achievement and functional performance that are consistent with the evaluative information available to the CSE (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]).

2. Management Needs

The parents also claim that the IHO erred in finding that, although the April 2011 IEP failed to identify the student's academic management needs, this did not amount to a denial of a FAPE. State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). According to State guidance "[e]ach [CSE] must decide on a case-by-case basis the level of specificity needed to identify a student's management needs. . . . At this point in the IEP development process, the [CSE] is identifying needs, (e.g., limited audio/visual distractions, scheduled rest periods, consistency in routine, assistive technology to assist communication, assistance with transitions), not specific recommendations to address those needs" ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," Office of Special Educ. [April 2011], at 12, available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at 20, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [providing examples of environmental modifications (e.g., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (e.g., assistance in locating classes, following schedules, and note taking), and material resources (e.g., instructional materials in alternative formats)]). A student's management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social development, and physical development, as reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]).

[7] The January 2010 private psychoeducational evaluation report reflects that the student received the diagnosis of a reading disorder (Dist. Ex. 5 at p. 20). As stated previously, the hearing record is unclear as to whether the April 2011 CSE reviewed this report (Tr. pp. 64-66, 68-69, 214-16, 220-21). Although the examiner who conducted the January 2010 private psychoeducational evaluation reported that, in comparison to the student's "outstanding reasoning capacity" and vocabulary skills, aspects of his reading and spelling abilities were considered to be "relative weaknesses," she also reported that the student was making "good progress in reading," and that his decoding and spelling skills spanned the average range (Dist. Ex. 5 at pp. 6-9, 16, 21).

Here, in the area of academics, the parents enumerated a list of "modifications" the student required; needs which they contend the district failed to show could be met in an ICT setting. The Bay Ridge consultant teacher testified that the student required these modifications—work being rewritten, breaking down questions and chunking and writing down key words—yet she did not participate in the April 2011 CSE meeting was and there is no indication in the hearing record that this information was available to the April 2011 CSE (Tr. pp. 164-65, 167; Dist. Ex. 1 at p. 2).[8] As noted above, while the IEP does not list "management needs," the student's deficits were such that he did not require environmental modifications in order to enable the student to benefit from instruction; rather the student's areas of weakness placed him in the low average to predominately average range of functioning (see generally Dist. Exs. 2-7).[9] Further, as described below, the April 2011 IEP, as a whole, addressed the student's needs (see Dist. Ex. 1 at pp. 1, 6-7, 9).

Moreover, in the area of social/emotional development, as described above, by all assessments and reports the student was a respectful and compliant student who exhibited age appropriate behaviors, and maintained relationships with peers and adults (Dist. Exs. 2 at p. 2; 3 at p. 2; 6 at p. 2; 7 at pp. 1-2).[10] Regarding the student's physical development, the April 2011 IEP noted the student's difficulty grasping and manipulating the pencil while drawing (Dist. Ex. 1 at p. 4). As discussed above, the August 2010 OT evaluation concluded that the student did not require OT services (Dist. Ex. 4 at p. 4). Therefore, the hearing record does not support a finding that the lack of management needs in the April 2011 IEP rose to the level of a denial of a FAPE.

Accordingly, the evidence in the hearing record indicates, that although the April 2011 IEP did not identify any management needs for the student as desired by the parents, the student's needs were overall adequately described within the present levels of performance section of the IEP and

[8] The remaining "required modification," highlighting key information, which the parents claim the student required, appeared in an exhaustive list of recommendations for the student found in the January 2010 private psychoeducational evaluation report (Dist. Ex. 5 at pp. 18-20). Specifically, the January 2010 private psychoeducational evaluation called for highlighting in the editing process of writing and in mathematics (id. at pp. 18-19). The January 2010 private psychoeducational evaluation and the rest of the hearing record reveal that the student was performing in the average range in writing and mathematics (Dist. Exs. 3 at pp. 2, 4; 5 at pp. 9, 21-22). As such, and because no other evidence in the hearing record indicates that the student specifically needed such a strategy in order to receive educational benefit, there is no reason to conclude that the failure of the CSE to ensure that highlighting was included in the April 2011 IEP as a management need resulted in a denial of a FAPE to the student, either on its own or in combination with any other alleged procedural violation (Dist. Ex. 5 at pp. 18-19).

[9] Many modifications listed in the January 2010 private psychoeducational evaluation, targeted areas of learning in which testing indicated the student was functioning in the average range or above (compare Dist. Ex. 5 at pp. 18-20, with Dist. Ex. 5 at pp. 21-23). Further, many of the recommendations, such as using outlines or visual webs and continuing to read to nurture the student's love of books, could be considered strategies used in general education classrooms that would benefit any student going into the fifth grade (see Dist. Ex. 5 at p. 18).

[10] Anxiety was a noted concern of the parents and the student's then current teacher in a few specific situations, such as homework, writing, and public speaking (reading out loud and a play performance); yet the parent does not specifically raise this issue on appeal and the evidence in the hearing record does not reveal that this need required additional support beyond that provided by ICT services (see Dist. Exs. 4 at p. 1; 5 at pp. 1, 8-9, 16; 7 at p. 3). Indeed, though the examiner noted in the January 2010 private psychoeducational evaluation that the student had always exhibited some anxiety in areas of greater weakness, the examiner reported that the student had always been able to recover from these moments (Dist. Ex. 5 at p. 16).

those needs did not indicate that the student required specific support in addition that provided, by the IEP as a whole, in order to enable him to benefit from instruction. Thus, any deficiency in the management needs component of the IEP, in this instance, did not rise to the level of a denial of a FAPE to the student.

3. 12:1 Integrated Co-Teaching Services

The parents contend that the recommended general education class placement with ICT services, with no additional related services or supports, was inadequate for the student. Contrary to the parents' assertions, a review of the evidence in the hearing record supports the IHO's determination that the recommended program was appropriate for the student (see IHO Decision at p. 10).

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[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]).

According to the April 2011 IEP, the CSE recommended that the student receive 12:1 ICT services in all areas of instruction for 35 periods per week (Dist. Ex. 1 at p. 7). The IEP also provided for collaboration between the general education teacher and the special education teacher (id.). To address academic needs, the IEP provided annual goals designed to improve the student's ability to check the accuracy of his reading using context to monitor and self-correct, use spelling patterns and rules to accurately spell words on a third grade level, and to demonstrate an increase in sight word vocabulary (id. at p. 6). Testing accommodations included extended time, and tests administered in a separate location in a small group of no more than eight students (id. at p. 9).

The parents argue that ICT services were inadequate because the April 2011 CSE was aware that the student required small group reading and writing support and cite to the January 2010 private psychoeducational evaluation report for that proposition (see Dist. Ex. 5 at p. 18). However, the evaluative information available to the April 2011 CSE does not offer any specific recommendations regarding small group reading and writing support (see generally Dist. Exs. 2; 3; 4; 6; 7). The January 2010 private psychoeducational evaluation report states "[i]n addition to receiving any small group reading and writing support in his school setting, [the student's] family should continue to have him work with his learning specialist" (Dist. Ex. 5 at p. 18). It appears this recommendation is for continued tutoring, with the recognition that the student received small group support at his nonpublic school. Although ICT services in a 12:1 ratio may not be the level of individualized support the student received at the private school, or what the parent desires, the ICT services were reasonably calculated to address the student's needs and enable the student to receive educational benefits in the LRE. The IDEA requires that the district address the student's needs, not that it explain how every service provided by a nonpublic school will be replicated in a district placement (see Grim, 346 F.3d at 379 [districts need not provide "every special service necessary to maximize each handicapped child's potential"], quoting Rowley, 458 U.S. at 199; Walczak, 142 F.3d at 132; Tucker, 873 F.2d at 567; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *1 [S.D.N.Y. Mar. 19 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp.

2d 141, 144-45 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005] [the district need not provide a student with "the best educational services" possible or follow the recommendations of private evaluators]).

The April 2011 IEP indicated that the CSE considered a general education placement without services, which was rejected due to the student's need for "additional academic supports" (Dist. Ex. 1 at p. 8). The provision of a general education setting with special education teacher support services (SETSS) in an 8:1 ratio was also considered; however, the CSE concluded those services "would not address [the student's] current delays" (id.). The April 2011 CSE also rejected a 12:1 special class placement in a community school as being "too restrictive" for the student (id.).

Given the student's academic strengths and the fact that, even in the nonpublic school the student attended a general education classroom, the hearing record supports a finding that the student's relative weaknesses could be adequately addressed by 12:1 ICT services provided by a full time special education teacher in a general education setting, in conjunction with the annual goals and testing accommodations provided in the April 2011 IEP (Dist. Ex. 1 at pp. 6,-7, 9). The CSE is required to properly balance the IDEA's requirement of placing the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143 [2d Cir. 2013]). In this instance, it was appropriate for the district to attempt a program that provided special education supports in a less restrictive setting prior to segregating the student from nondisabled peers.

Based on the foregoing, I find that the April 2011 CSE's recommended general education class with 12:1 ICT services was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

B. Assigned Public School Site

The district asserts that the IHO erred in finding a denial of a FAPE because the district failed to demonstrate that the student's IEP would have been properly implemented at the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 552 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. . New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v.

New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012], rev'd on other gounds, 2014 WL 3685943 [2d Cir. July 25, 2014]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *3-*4 [E.D.N.Y. June 10, 2014] [finding that the parents were denied the "right to evaluate" the assigned public school site]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [same]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]).

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

denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[11]

As recently explained, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 552 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on the claims that the district would have failed to implement the May 2013 IEP at the assigned public school site because a retrospective analysis of how the district would have executed 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 (see Parent Ex. A at p. 1). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative.

Furthermore, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013

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

WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273).

VII. Conclusion

Having found that the district offered the student a FAPE for the 2011-12 school year, I need not reach the issue of whether the IHO erred in her determination that equitable considerations favored an award of tuition reimbursement, and the inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that that the IHO's decision dated November 30, 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 which ordered that the district reimburse the parents for the costs of the student's tuition at Bay Ridge.

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

JUSTYN P. BATES
STATE REVIEW OFFICER