The University of the State of New York

The State Education Department
State Review Officer
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No. 13-022

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, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, Tracy Siligmueller, Esq., of counsel

Law Offices of H. Jeffrey Marcus, P.C., attorneys for respondents, H. Jeffrey Marcus, 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 which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for costs of the student's tuition at the Rebecca School for the 2010-11 school year. The appeal must be sustained.

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

At the time of the impartial hearing, the student was attending an ungraded class at the Rebecca School (Parent Exs. O, U, V, W). The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (Tr. p. 519; see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The student entered the Rebecca School when he was five years old in September 2008 and has remained at the school since that time (Tr. pp. 235, 466-67). For the 2009-10 school year at the Rebecca School, the student attended a class composed of 8 students ranging in age from 5 to 9 years old (Dist. Ex. 3 at p. 3; Parent Ex. N at p. 1). The student received speech-language

therapy, occupational therapy (OT), physical therapy (PT), art and music therapy and adapted physical education (APE) as part of his weekly program (Parent Ex. N).

On February 5, 2010, the CSE convened to conduct an annual review of the student's IEP (Dist. Exs. 2, 3), and in the resultant IEP the CSE recommended, among other things, that the student receive a public placement consisting of 12-month services in a 6:1+1 special class in a specialized school and related services. In a "Notice of Recommended Deferred Placement" dated February 5, 2010, the district suggested that the parents consider deferring the student's placement in the recommended program until June 30, 2010, as the February 2010 IEP was developed for the 2010-11 school year (Dist. Ex. 4). The CSE recommended that the student receive the program for a 12-month school year, beginning July 1, 2010 (Dist. Exs. 3, 4).

In a February 18, 2010 letter to the district, the parents acknowledged receipt of the Notice of Recommended Deferred Placement, but stated that they could not agree with its recommendations for the student, other than the recommendation for a twelve-month school year, until they received more information to make a decision, through observing the program, identifying the other children with whom the student would be placed, and identifying the teaching techniques, methodologies and qualifications of the public school staff (Parent Ex. H).

By letter to the district dated June 16, 2010, the parents indicated that they believed the district had denied the student a FAPE for the 2010-11 school year and that they would be enrolling the student in the Rebecca School and seeking funding or reimbursement (Parent Ex. G).

On June 18, 2010, the parents signed a contract enrolling the student in the Rebecca School for the 2010-11 school year, to begin in July 2010 (Parent Ex. Q).

By letter to the district dated June 22, 2010, the student's father acknowledged receipt of the district's final notice of recommendation (FNR) that provided the name and address of the public school site to which the student had been assigned for the 2010-11 school year (Parent Ex. F). The parents requested additional information concerning the size and physical layout of the building and classroom, the profiles and characteristics of the other children in the classroom, and the credentials and experience of the staff, and requested to visit the assigned school (see id.).

On July 9, 2010, the parents visited the assigned school (Parent Exs. E, K). On July 20, 2010, the student's father advised that he did not deem the assigned school appropriate to address the student's educational needs (Parent Ex. E).

The parents thereafter served a due process complaint notice and an impartial hearing was held, resulting in a decision by an impartial hearing officer on August 16, 2011. That decision was appealed to the SRO by the district, and on November 25, 2011, I issued a decision in the administrative appeal in this matter which sustained the appeal and found that the district had offered the student a FAPE for the 2010-11 school year (Application of the Dep't of Educ., Appeal No. 11-118). The decision held that the district had considered sufficient evaluative information, and had not denied the student a FAPE by failure to conduct a functional behavioral assessment (FBA) or by failure to include parent counseling and training on the student's IEP (id.).

The parents sought judicial review of the November 25, 2011 administrative decision, and on February 14, 2013, the United States District Court, Southern District of New York issued an Opinion and Order, remanding the case back to the SRO (F.B. v. New York City Dep't of Educ.,

923 F. Supp. 2d 570, 589 (S.D.N.Y. 2013). The Court granted summary judgment in favor of the district on the sufficiency of the evaluative information before the CSE, the lack of an FBA or BIP, and the lack of parent counseling and training on the IEP (id. at pp. 578-86, 590). Specifically, the court held that those issues raised by the parents in the due process complaint, but not addressed by the impartial hearing officer or cross-appealed to the SRO had not been addressed by the SRO in the prior decision, and, although noting a lack of uniformity in case law on the issue of whether such claims must be raised as cross-appeals, the Court held that the parents were not required to cross-appeal them and therefore remanded the matter to the SRO (id. at p. 589). The Court listed the claims that must be considered on remand, and further noted that "[w]ithout limiting the scope of the SRO's determination, the Court observes that the parents' claims that the IEP was substantively inadequate, and that the DOE's recommended placement was not equal to the task of satisfactorily educating [the student], merit close and thoughtful attention" (id.).

The parties' familiarity with the prior SRO decision is presumed and, therefore, certain facts and procedural and educational history are not repeated in detail herein (Application of the Dep't of Educ., Appeal No. 11-118).

A. Due Process Complaint Notice

By due process complaint notice dated October 21, 2010, the parents commenced an impartial hearing, arguing that the district denied the student a FAPE for the following reasons: (1) the district improperly refused to consider a more restrictive placement for the student; (2) the February 2010 CSE was improperly constituted because the district representative and special education teacher were unqualified to fulfill their roles on the CSE; (3) the district denied the student's classroom teacher the right to meaningfully participate in the CSE and did not provide her with access to all of the materials being reviewed and considered by the CSE; (4) the CSE's recommendations were predetermined; (5) February 2010 IEP did not contain an adequate and updated statement of the student's present levels of educational performance; (6) the February 2010 IEP did not contain a listing of the evaluative data upon which the CSE relied in forming its recommendations; (7) the goals were insufficient, inappropriate, and would not allow the student to make meaningful progress across all domains; (8) the annual goals were not individually tailored to address the student's significant educational deficits; (9) the goals lacked adequately objective criteria to measure the student's progress; (10) a number of the goals could not have been implemented in the recommended program; (11) the February 2010 IEP should have included transitional support services to allow the student to move from the Rebecca School to the district program; (12) the district failed to conduct an FBA and develop a behavioral intervention plan (BIP); (13) the assigned school was inappropriate; (14) the February 2010 IEP did not provide for individualized parent counseling and training; and (15) the parents were denied meaningful parent participation (Parent Ex. A at pp. 3-10). The parents further alleged that the Rebecca School was an appropriate placement and that equitable considerations favored their request for relief (id. at pp. 10-11). As relief, among other things, the parents requested an order directing the district reimburse them for the monies submitted toward the student's tuition at the Rebecca School for the 2010-11 school year in addition to direct funding of the balance of the student's tuition to the Rebecca School (id. at pp. 11-12).

On October 27, 2010, the district responded to the parents' due process complaint notice (Parent Ex. B).

B. Impartial Hearing Officer Decision

On March 11, 2011, the parties proceeded to an impartial hearing that concluded after four days of testimony (Tr. pp. 1-512). On August 16, 2011, the impartial hearing officer rendered his decision in which he ordered that the district reimburse the parents for the student's tuition at the Rebecca School for the 2010-11 school year (IHO Decision at pp. 9-10). Initially, the impartial hearing officer rejected the district's claim that the parents' case must be dismissed because they failed to exhaust their administrative remedies (id. at p. 4). The impartial hearing officer then found that the district denied the student a FAPE for the following reasons: (1) the CSE failed to have sufficient data upon which to base the February 2010 IEP, nor did the IEP set forth what documentation upon which the CSE relied in making its determinations; (2) the February 2010 CSE should have developed an FBA and a BIP; and (3) the February 2010 IEP failed to provide for parent counseling and training (id. at pp. 5-6).

The impartial hearing officer further found that the Rebecca School was appropriate to meet the student's unique needs (IHO Decision at pp. 8-9). Specifically, the impartial hearing officer concluded that the Rebecca School constituted a therapeutic environment designed to address the student's sensory and social deficits (id. at p. 8). Additionally, the impartial hearing officer determined that the student had made progress with respect to decreasing the frequency of his dysregulation as well as his interfering behaviors at school (id. at p. 9). He also found that the student has made progress in the speech-language and social skills domains (id.). Lastly, the impartial hearing officer noted an increase in the student's sight word vocabulary during his enrollment in the Rebecca School (id.). Regarding equitable considerations, the impartial hearing officer found that they weighed in favor of the parents' request for relief, because the hearing record reflected the parents' cooperation with the district and that they would have considered a district school (id.).

IV. Appeal for State-Level Review

The district appeals and maintains that it offered the student a FAPE during the 2010-11 school year. Specific to this claim, the district raises the following points: (1) the district had sufficient evaluative data and information regarding the student's functioning levels on which to develop the February 2010 IEP; (2) the absence of an FBA and a BIP did not result in the denial of a FAPE; and (3) although the February 2010 IEP did not contain a provision for parent counseling and training, this did not rise to the level of a denial of a FAPE. The district also addressed the remaining issues in the due process complaint notice that the impartial hearing officer did not reach in making his conclusion that the student did not receive a FAPE and maintains that they are without merit. For example, the district asserts that the February 2010 CST was properly composed and everyone to attend the meeting, including the parents, had an opportunity to participate. Moreover, the district contends that its program recommendation for the student was not predetermined. The district also claims that the goals contained in the February 2010 IEP addressed the student's educational needs and were designed to provide him with an educational benefit. Lastly, the district maintains that it was not legally obligated to incorporate transitional support services on the student's IEP.

Regarding the parents' claims that pertain to the assigned public school site, the district initially notes that they are speculative because the parents rejected the district's program. Regardless, the district asserts that the student would have been functionally grouped with other

students at the assigned school and the student would have received his related services mandate. Next, the district argues that the Rebecca School was not appropriate because in part, the hearing record is unclear regarding the amount of related services that he received at the Rebecca School. Moreover, the district submits that the student has not progressed at the Rebecca School. Additionally, given that the student does not have access to typically developing peers at the Rebecca School, the district alleges that it does not constitute the student's least restrictive environment (LRE). Lastly, the district argues that equitable considerations bar the parents' request for relief because they never seriously intended to send the student to public school.

The parents submitted an answer and requested that the petition be dismissed in its entirety. As a threshold claim, the parents allege that in its response to the due process complaint notice, the district failed to raise any challenges regarding the appropriateness of the Rebecca School and whether equitable concerns support the parents' request for relief; therefore, it is precluded from asserting such allegations on appeal. The parents maintain that the student was denied a FAPE for the following reasons, which include, among other things: (1) the February 2010 IEP was not based on current evaluations; (2) the February 2010 CSE did not conduct an FBA and develop a BIP; (3) the present levels of performance contained in the February 2010 IEP were not based upon current evaluative data; (4) the goals in the February 2010 IEP were not measurable and cannot be implemented; (5) the February 2010 IEP did not provide for parent counseling and training; (6) the student would not have received his related services mandate at the assigned school; (7) the February 2010 IEP did not address the student's sensory needs; (8) the February 2010 IEP did not provide the student with transitional support services; and (9) the district did not provide the student with a classroom placement in the assigned school.

Next, the parents argue that the Rebecca School was appropriate because it constituted a therapeutic environment that addressed the student's sensory and social deficits. The parents further submit that the student has made progress while at the Rebecca School. Finally, the parents argue that the equities support their request for relief, because, in part, they properly and promptly notify the district of their concerns regarding the February 2010 IEP and assigned school, and their intention to place the student at the Rebecca School and seek reimbursement. Furthermore, they maintain that they cooperated with the district at all times.

The district submitted a reply, and asserted that its response to the due process complaint notice was appropriate. Furthermore, as the responding party below, the district maintains that its response is not required to include claims that it planned to assert on appeal.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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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

As detailed in the District Court's order, the remaining challenges to the IEP to be considered include the following claims of the parents: 1) the district's refusal to consider a more restrictive program for the student; 2) the February 2010 CSE meeting was improperly constituted; 3) the CSE recommendations were predetermined; 4) the IEP goals were insufficient and

inappropriate; 5) the proposed IEP goals were not capable of implementation in the recommended program; 6) transitional support services were required to be included on the IEP; 7) the assigned school was inappropriate; 8) the CSE failed to consider sufficient related services; and 9) the parents were denied meaningful parent participation (F.B., 923 F. Supp. 2d at 589). I will first address the claims related to the procedures under which the CSE meeting was conducted before proceeding to claims resulting from the written IEP.

A. February 2010 CSE Process

On February 5, 2010, the CSE convened for an annual review to develop the student's IEP for the 2010-11 school year (Tr. p. 17; Dist. Exs. 2, 3). Meeting attendees included the parents, the district school psychologist, a district special education teacher, who also served as district representative, and an additional parent member (Tr. pp. 17, 19-20; Dist. Exs. 2; 3 at p. 2). The student's classroom teacher from the Rebecca School also participated in the February 2010 CSE meeting by telephone (Tr. p. 19; Dist. Exs. 2; 3 at p. 2).

According to the resultant IEP, the February 2010 CSE recommended placement of the student in a 6:1+1 special class in a specialized school with APE and related services consisting of 1:1 speech-language therapy five times per week, twice-weekly 1:1 counseling, 1:1 OT five times per week, and twice-weekly 1:1 PT (Tr. pp. 27-28; Dist. Exs. 2 at p. 2; 3 at pp. 1, 15; 4). The February 2010 CSE also determined that the student was eligible for a 12-month program in order to prevent significant regression of skills (Tr. p. 28; Dist. Exs. 2 at p. 2; 3 at pp. 2, 16). Annual goals and short-term objectives were developed with respect to reading; math; receptive, expressive and pragmatic language; shared attention and engagement; sensory processing and regulation; fine and gross motor development (motor planning, sequencing, visual-spatial skills, strength, coordination and postural control); and oral motor skills (Dist. Ex. 3 at pp. 7-14). The February 2010 CSE also considered placing the student in a 12:1:1 special class and an 8:1:1 special class; however, the CSE deemed both placements insufficient to meet the student's needs (Tr. p. 44; Dist. Ex. 3 at p. 16).

1. CSE Composition

The parents contend, upon information and belief, that the CSE was not properly constituted because the district representative did not have appropriate knowledge of the available programs, and the special education teacher was not properly qualified (Parent Ex. A at pp. 4-5). The parents also argue that the student's special education teacher from the Rebecca School was denied the ability to effectively participate because she was not provided with the materials considered by the CSE (Parent Ex. A at p. 5).

Review of the hearing record evidences that the CSE was at least facially comprised of all legally mandated members as required by federal and State regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). As noted above, attendees for the February 5, 2010 CSE meeting included the parents, the district school psychologist, a district special education teacher, who also served as district representative, an additional parent member, and the student's classroom teacher from the Rebecca School (Tr. pp. 17-19; Dist. Exs. 2; 3 at p. 2). The evidence does not support the conclusion that the special education teacher/district representative at the CSE meeting was unqualified to serve in either of those positions.

The district representative was licensed as a special education teacher, and was therefore qualified to provide or supervise special education (Dist. Ex. 3 at p. 2; Tr. p. 82) and assuming, for the sake of argument, that the special education teacher from the district was not a teacher "of the student," and therefore amounted to a violation of the IDEA, the facts in this case do not support that such a technical violation resulted in a denial of a FAPE (see A.M. v. New York City Dep't of Educ., 2013 WL 4056216 at *6 [S.D.N.Y. Aug. 9, 2013]). It is undisputed that the student was not being considered for a general education curriculum (Dist. Ex. 3). In addition, the student's special education teacher familiar with the student from the Rebecca School participated in the CSE meeting (Dist. Ex. 3 at p. 2). While the parents argue that documentation from the CSE was not shared with the Rebecca School teacher in advance, there was no complaint noted at the CSE meeting in this regard (Dist. Ex. 2). Further, one of the items raised by the parents as not being provided is a district-obtained classroom observation that was an observation in the Rebecca School's teacher's classroom (Dist. Ex. 7). However, the evidence shows that the Rebecca School teacher was able to share information about the student and his unique needs (Tr. pp. 28-30). The school psychologist notes that she read the entirety of the IEP at the meeting, allowing everyone in attendance to comment and participate in its development (Tr. pp. 40-41, 103-04). Additionally, the absence of a related service provider at the CSE meeting, in addition to the allegation of the absence of a special education teacher, was not raised in the parents' due process complaint notice (Parent Ex. A). The evidence shows that IEP goals for the student's related services were written by the related service providers, were incorporated into the draft IEP and agreed to by the parents (Tr. pp. 49-53, 95).

Based upon the foregoing, the hearing record establishes that there was no denial of FAPE due to inadequate membership in the February 5, 2010 CSE annual review meeting for the student.

2. Predetermination and Parent Participation

The parents contend that the CSE determinations were predetermined and they were denied the ability to meaningfully participate in the February 5, 2010 CSE meeting because neither the parents nor the student's special education teacher from the Rebecca School had access to all the documents considered by the CSE (Parent Ex. A at pp. 5, 10).

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

The consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see

T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 2013 WL 3868594 [2d Cir. July 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6 - *7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

The hearing record reflects meaningful and active participation by the parents and the Rebecca School special education teacher in the development of the student's 2010-11 IEP. The school psychologist testified that she attended the February 5, 2010 CSE meeting and that all attendees at the meeting participated for the entirety of the meeting and that there were no disagreements with the team's recommendations (Tr. pp. 17, 19, 22, 28). The student's special education teacher at the Rebecca School provided the team with estimates of his academic levels and reviewed his progress from the prior IEP (Tr. pp. 28-30). The school psychologist testified that not only did the parents and Rebecca School teacher have the opportunity to participate, but they did in fact participate during the CSE meeting (Tr. pp. 45-46). The student's father testified that the parents had received the notice of the IEP meeting in advance and were aware they could bring whoever had knowledge or expertise of the student and they chose to invite only the student's special education teacher at the Rebecca School (Tr. p. 509).

In addition, regarding the parents' claim that the Rebecca School teacher was not able to meaningfully participate due to not having been provided all documents reviewed by the CSE at the time of the meeting, the hearing record does not establish that the teacher's ability to participate in the development of the student's IEP was compromised (Tr. pp. 40-41, 103-04; Dist. Exs. 2, 3). There is no evidence that the failure to provide the Rebecca School teacher with her own copies of the evaluative data impeded the student's right to a FAPE, significantly impeded the parents' meaningful participation in the CSE process, or caused deprivation of educational benefits in this case, and the available evidence supports the opposite conclusion.[1] Based upon my review of the hearing record, I find that the student's parents and special education teacher from the Rebecca School were afforded a meaningful opportunity to participate in the development of the student's

[1] While it would be ideal to provide all CSE participants with their own individual copies of all materials in a student's file under all circumstances, it does not follow that any deviation from such an ideal automatically constitutes a denial of a FAPE. As a practical matter, it would also be appropriate for a professional such as the student's Rebecca School teacher to simply ask for copies of materials during a CSE meeting if copies were not provided at the outset and they were important issues of concern to the teacher. If the district then refused without a valid reason (i.e. lack of parental consent), the likelihood of finding substantive harm would increase.

IEP at the February 5, 2010 CSE meeting (see 20 U.S.C. §1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

3. Consideration of More Restrictive Options

The parents argue that the district failed to consider more restrictive programs for the student, noting that the district had previously recommended a State-approved non-public school for the student (Parent Ex. A at p. 3). LRE is a mandate under the IDEA and its principles address the extent to which a student should have access to the general education environment or the level of access his or her nondisabled peers (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). There is no reverse corollary under the IDEA mandating a "more restrictive environment." However, in this case it appears that the "more restrictive" claim asserted by the parents actually appears to challenge the level of support the recommended special class setting as insufficient, that is that the CSE failed to consider other options for supporting the student, and the parents does not appear to suggest that the student's access to nondisabled peers should be minimized.

The hearing record reflects that all participants at the CSE meeting discussed different options for the student's programming and educational placement on the continuum. The district school psychologist testified that everyone in attendance discussed and agreed that the student needed a twelve-month program (Tr. p. 43), and that he needed a special class in a specialized school (Tr. pp. 43-44). The team discussed the special class setting options of 12:1+1 and 8:1+1 and determined that they were not appropriate for the student based upon the teacher-student ratio (Tr. p. 44). The team determined that a 6:1+1 program was appropriate for the student (Tr. p. 44). The school psychologist testified that both she and the district's special education teacher, both of whom had visited the Rebecca School, did not believe that continued placement at the Rebecca School was appropriate for the student in light of the lack of structure (Tr. pp. 56-59). The school psychologist was aware of 6:1+1 special class settings and felt that the student would progress in that type of program (Tr. pp. 63-64). The evidence in the hearing record establishes that the CSE properly considered a program for the student that would offer his educational benefit in the least restrictive environment (LRE), as the CSE was required to do (8 NYCRR §200.1[cc]; 200.6[a][1]).

B. Adequacy of February 2010 IEP

1. IEP Goals and Short-Term Objectives

The parents contend that the IEP goals were insufficient and inappropriate because they fail to address the student's educational needs, the goals are overly broad, and the short-term objectives lack objectively measurable criteria (Parent Ex. A at pp. 6-7).

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]).

As noted above, annual goals and short-term objectives were developed for the student with respect to reading; math; receptive, expressive and pragmatic language; shared attention and engagement; sensory processing and regulation; fine and gross motor development (motor planning, sequencing, visual-spatial skills, strength, coordination and postural control); and oral motor skills (Dist. Ex. 3 at pp. 7-14).

The goals related to academics were developed with input from the student's Rebecca School special education teacher (Tr. p. 36). The goals of the Rebecca School were incorporated since they knew the student, and other goals were incorporated in addition (Tr. p. 35). The district school psychologist noted that the student had not appeared to make as much progress as could be expected in the prior school year at the Rebecca School and that the team added goals that were appropriate to the student's functional grade level and related to curriculum standards (Tr. p. 35). The school psychologist noted that the goals sought to remedy deficits considering the student's functional level of mid-kindergarten (Tr. p. 35). The school psychologist testified that every goal was reviewed by the team and with input from the Rebecca School teacher (Tr. pp. 35-36, 46-47). The team crossed out goals on the draft IEP that the student had already met, as indicated by the Rebecca School teacher (Tr. p. 36). Goals for related services were written by the related service providers, incorporated into the draft IEP and agreed to by the parents (Tr. pp. 49-53, 95). Although draft goals were typed into a draft IEP prior to the CSE meeting, the CSE made clear that the goals were in draft form and could be changed, and were in fact revised during the meeting (Tr. pp. 53-55).

I have considered the parents' allegations that the goals and objectives were broad and otherwise insufficient and inappropriate. The program director for the Rebecca School testified to her belief that the goals were lacking because there was not a baseline of the student's present abilities in the goals (Tr. pp. 286-87). Notably, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." Upon reviewing the IEP, I note that the student's present levels of performance are adequately developed, noting his instructional level of K.5 to K.8 for sight word vocabulary and further noting that he recognizes 20 to 30 sight words (Dist. Ex. 3 at p. 3). The student's instructional level for math computation was estimated to be K.6 to K.7 (Dist. Ex. 3 at p. 3). The student's present levels of performance as identified in the February 5, 2010 IEP appropriately describe instructionally relevant information for the student and provide appropriate direction for provision of educational services to the student in accordance with the annual goals (Dist. Ex. 3).

A review of the goals and objectives establish that they were designed to address the student's identified needs, including additional goals beyond those being worked on by the Rebecca School to comply with curriculum standards and to address the student's deficits (Dist. Ex. 3, at pp. 7-14). The notes of the IEP meeting reflect that the goals were reviewed and certain goals were discarded due to the student having met the goals already based upon the Rebecca

School teacher's input, and the remaining goals were agreed upon with the Rebecca School teacher's and parents' input (Dist. Ex. 2). The majority of the annual goals themselves are not measurable, however the corresponding short-term objectives provide appropriate measurable evaluative criteria (id.). The short term objectives contain measurable criteria of a percentage or a specific number by which attainment of the objective will be measured (id.). The IEP also notes that there will be three progress reports over the course of the year (id.). I find that the related short-term objectives "contained sufficiently detailed information regarding 'the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress'" and remedied any deficiencies in the annual goals (R.B., 2013 WL 5438605, at *13; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *19 [E.D.N.Y. Aug. 19, 2013]; Tarlowe, 2008 WL 2736027, at *9; see M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-113; Application of a Student with a Disability, Appeal No. 11-073).

Based upon the evidence above, I find that the annual goals and short-term objectives in the February 5, 2010 IEP appropriately targeted the student's areas of need, contain sufficient specificity by which to direct instruction and intervention, and contain sufficient specificity by which to evaluate the student's progress. Any deficiencies in the goals and short-term objectives did not rise to the level of a denial of a FAPE.

2. Transitional Support Services

The parents argue that the IEP failed to include transitional support services, to help the student transition from the more restrictive placement at the Rebecca School, to the less restrictive placement at the proposed placement in the IEP (Parent Ex. A at p. 8).

Transitional support services are "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).

I note that the district's proposed program for the student for the 2010-11 twelve-month school year, a 6:1+1 program, was highly structured (Dist. Ex. 3). The IEP made specific accommodations for the student's sensory needs (id.). The record reflects that the CSE relied upon the detailed progress report from the Rebecca School and the input from the Rebecca School teacher at the CSE meeting to understand the depth of the student's needs and abilities and to draft appropriate goals and set forth appropriate supports and services (id.).

While it would not have been inappropriate for transitional support services to be included on the IEP as a supportive service if the CSE believed it was needed, the IEP was nevertheless designed with services addressed to the student's sensory needs. Moreover, the parties point to no authority suggesting that the purpose of transitional support services is support special education certified personnel while transitioning a student from a special class setting in a private school selected by the parents to a special class setting in a public school, and I have found none. In light of the services and accommodations provided for the student on the IEP, the IEP as a whole was reasonably calculated to enable the student to receive educational benefits and I do not find that any failure to list transitional support services under the circumstances rises to the level of denial

of a FAPE to the student (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 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]; 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 deficiencies]). Accordingly, I do not find that the student was denied a FAPE on this basis.

3. Related Services

Regarding related services, the parents contend that parent training was required to be included on the student's IEP and its absence resulted in a denial of a FAPE (Parent Ex. A at p. 10). As noted previously, the issue of parent training was considered in the prior decision at pages 17 through 19. (Application of the Dep't of Educ., Appeal No. 11-118).

C. Assigned School and Annual Goal Implementation Claims

Regarding the IEP's goals, the parents argue that the goals are insufficient and inappropriate as set forth above, and also argue in the alternative, that the goals are not able to be implemented in the recommended program (Parent Ex. A at pp. 7-8). The parents argue that the goals are drafted with the wording of the methodology used at the Rebecca School, but not at the district's assigned school, and therefore the goals would be unable to be implemented (id.).

A determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/ publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

Regarding the proposed placement, the parents argue that the assigned school would not be able to meet the student's unique needs and would not contain adequate support for the student (id. at pp. 9-10).

I note that a meaningful analysis of the parents' claims with regard to the assigned school and its appropriateness and ability to implement the student's IEP goals, would require me to determine what might have happened had the district been required to implement the student's IEP.

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). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000].

Challenges to an assigned school 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., 2012 WL 4891748, at *14 - *16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, *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 missed placed], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement the school district may not rely on evidence that a child would have had a specific teacher or specific aid to support otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; 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]).

While several district courts have, since R.E. was decided, continue 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 D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11 - *16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in a school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since 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 place 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., 2013 WL 2158587, at *4 [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., 2013 WL 3814669, at *6 [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]).[2] 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 parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

As explained more recently, "[t]he Second Circuit has been clear, however, 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., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [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']). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public

[2] The Second Circuit has also made clear that just because the 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 T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [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.

education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3). In view of the foregoing, the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, the parents rejected the IEP and enrolled the student at the Rebecca School prior to the time that the district became obligated to implement the student's IEP (Tr. p. 506). The district was not required to establish that the assigned school would have been appropriate upon the implementation of his IEP. The issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed student's IEP at the assigned public school site is not an appropriate inquiry (see K.L., 2013 WL 3814669 at *6).

Even assuming for the sake of argument that these allegations were not speculative and that the student had attended the district's recommended school and class, the available evidence in the hearing record nevertheless supports the conclusion that the special class at the assigned public district school would have been able to implement the goals on the student's February 5, 2010 IEP and otherwise met the student's unique needs to enable him to receive educational benefit. The special education teacher of the proposed classroom testified to how the student would have been functionally grouped in the classroom, how she would have worked on the goals on his IEP, how she would have inquired of the Rebecca School if more information on the student was needed or if she had questions, how the student would receive his related services, and how she would meet the student's needs as listed on his IEP (Tr. pp. 112-61).

VII. Conclusion

I note that I have considered the entirety of the claims set forth by the parents, addressed in the prior decision and in this decision, and I find that the deficiencies identified do not themselves amount to a denial of a FAPE, and also do not cumulatively result in the denial of a FAPE (see F.B. v New York City Dep't of Educ., 923 F. Supp.2d 570, 589 n.7 [S.D.N.Y. 2013]).

Based upon all the considerations in the prior decision as set forth in Appeal No. 11-118, and the present decision, and having determined that the district did not fail to offer the student a FAPE for the 2010-11 school year, it is not necessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 16, 2011 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and ordered the district to provide tuition reimbursement for the student's attendance at the Rebecca School.

Dated: **Albany, New York**
February 4, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER