The University of the State of New York

The State Education Department

State Review Officer

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No. 13-052

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Susan Luger Associates, Inc., Special Education Advocates for petitioners, Lawrence D. Weinberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Lang School for the 2012-13 school year. The 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

During the 2011-12 school year while the student continued to attend a preschool program, the Committee on Preschool Special Education (CPSE) convened on March 12, 2012 to develop an IEP for the remainder of the 2011-12 school year, as well as July and August 2012 (see Parent Ex. C at pp. 1, 3, 14-16). As a preschool student with a disability, the March 2012 CPSE recommended a 12-month school year program in a 12:1+2 special class placement with related services consisting of two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group, one 30-minute session per week of

individual counseling, and one 30-minute session per week of counseling in a small group (id. at pp. 1, 14-16). In addition, the March 2012 CPSE recommended curb-to-curb bus transportation as special transportation, and included annual goals in the March 2012 IEP to address the student's needs in the areas of attention, fine motor skills, activities of daily living (ADLs), self-regulation, and social skills (id. at pp. 7-12, 18).

On April 7, 2012, the parents executed an enrollment contract with the Lang School for the student's attendance during the 2012-13 school year and paid a deposit to hold the student's place (see Parent Exs. J at pp. 1, 3; I at p. 1).

On April 11, 2012, the CSE convened to conduct the student's "turning five" conference and to develop an IEP that would be implemented beginning September 2012 for the 2012-13 school year (see Parent Ex. B pp. 1, 5-6, 9-10; see also Parent Ex. C at p. 16).[1] Finding the student eligible for special education and related services as a student with an other health impairment, the April 2012 CSE recommended a 12:1+1 special class placement in a community school (id. at p. 1, 5, 8-9).[2] The April 2012 CSE also recommended the following related services: two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a small group, one 30-minute session per week of individual counseling, and one 30-minute session per week of counseling in a small group (id. at p. 5). The April 2012 IEP also included annual goals to address the student's needs in the areas of attention, fine motor skills, ADLs, self-regulation, and social skills (id. at pp. 3-5).

By letter dated April 30, 2012, the parents notified the district that they signed a contract with the Lang School and paid a deposit to "reserve a seat" for the student's attendance during the 2012-13 school year in the event that the district did not offer the student an "appropriate program/placement" in a "timely manner" (Parent Exs. F at p. 1). In addition, the parents indicated that although they expressed "some" of their concerns about the "recommended program" at the April 2012 CSE meeting, they remained "willing" to visit the "recommended school" upon receipt of a "placement letter" (id.). The parents further noted that if the district offered an "appropriate program/placement," they would enroll the student, but if the district failed to offer an "appropriate program/placement," they intended to unilaterally place the student at the Lang School and seek tuition reimbursement from the district (id.).[3] The parents requested that the district send a "placement letter" by June 15, 2012, so they could visit the "recommended program/placement" (id.).

By final notice of recommendation (FNR) dated May 21, 2012, the district summarized the special education and related services recommended in the April 2012 IEP, and identified the

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[1] When a student in the district transitioned from receiving special education programs and related services through the CPSE to receiving special education programs and related services through the CSE as a school age student, the district referred to the initial CSE meeting as a "turning five" conference (Tr. pp. 94-95; see generally Dist. Ex. 2 at p. 1).

[2] The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

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

particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 13).

On June 1, 2012, the parents visited the assigned public school site, and in a letter dated June 8, 2012, notified the district that based upon the visit and discussions with the principal, the assigned public school site was not appropriate for the student either academically or socially (see Parent Ex. G at p. 1). According to the parents, the principal explained that the student would be the "only" kindergartener in the classroom of second graders, the students in the classroom "functioned at a very low level," and the student did not "seem like the right fit for the school" (id.). Further, the parents noted that the assigned public school site was "too large and noisy for [the student's] sensory" and attention deficit hyperactivity disorder (ADHD) issues (id.). Consequently, the parents notified the district of their intentions to place the student at the Lang School and to seek tuition reimbursement if the district failed to offer an "appropriate program/placement" in a "timely manner" for the 2012-13 school year (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 19, 2012, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year (see Parent Ex. A at pp. 1-4). Initially, the parents alleged that a district social worker observed the student on March 22, 2012 "at his school" without the parents' signed consent, the meeting had to be rescheduled in order to accommodate the receipt of a privately obtained evaluation submitted by the parents, the April 2012 CSE meeting started late, the April 2012 CSE mistakenly referred to the student by his last name instead of his first name, and the district school psychologist repeatedly left the meeting and announced they "'had no reports'" (see id. at pp. 2-3). In addition, the parents asserted that the April 2012 CSE was not properly composed because neither the special education teacher nor the regular education teacher met the regulatory criteria, the April 2012 CSE did not include anyone from the student's then-current program, "[t]eam members" did not attend for the entire CSE meeting, and the district school psychologist "unilaterally made all decisions and recommendations" (id. at p. 4). The parents also alleged that the April 2012 CSE did not consider the parents' privately obtained evaluation (id. at p. 3). Next, the parents asserted that the April 2012 IEP—including the statement of academic performance and the annual goals—did not meet all of the student's unique academic needs (id.). In addition, the parents indicated that the April 2012 IEP—including the statement of social/emotional performance and the annual goals—did not address all of the student's unique social/emotional and behavioral needs (id.). Turning to the annual goals, the parents asserted that the annual goals were not reasonably calculated to confer educational benefit upon the student; the April 2012 CSE did not formulate the annual goals with regard to the student's present levels of performance resulting from his disability; the April 2012 CSE did not discuss or develop the annual goals at the meeting; and all of the annual goals did not contain evaluative criteria, procedures, or schedules to measure progress (id.). The parents further asserted that the annual goals were vague, not measurable, and repeatedly used the same criteria and methods to measure progress (id. at p. 4).

The parents also alleged that the April 2012 CSE failed to recommend an appropriate "program;" the April 2012 CSE predetermined the recommendation; the recommendation was not consistent with "opinions" of individuals with direct knowledge of the student; the April 2012 CSE could not provide "information" about the program; the "class size and the student to teacher ratio"

were "too large" for the student; the student would not have sufficient opportunity for "1:1 instruction or attention;" and the recommended "program" did not offer "adequate or appropriate instruction, supports, supervision or services" to meet the student's needs (Parent Ex. A at p. 4).

Turning to the assigned public school site, the parents alleged, upon information and belief, that the assigned public school site could not implement the April 2012 IEP, including the management needs, behavioral needs, and related services (see Parent Ex. A at pp. 4-5). The parents also alleged upon information and belief that the student would not be appropriately functionally grouped, and the school was "too noisy" for the student (id. at p. 5).

With respect to the student's unilateral placement, the parents alleged that the Lang School provided the "instruction, supports, supervision and services" specially designed to meet the student's unique needs (Parent Ex. A at p. 5). With regard to equitable considerations, the parents alleged that they cooperated with the April 2012 CSE, they did not impede the April 2012 CSE's ability to offer the student a FAPE, and they timely notified the district of their intention to seek tuition reimbursement (id.). As relief, the parents requested that the student receive related services of OT and counseling under the pendency (stay-put) provision of the IDEA consistent with the student's CPSE IEP; reimbursement for the costs of the student's tuition at the Lang School; the provision of door-to-door special education transportation services; reimbursement, compensatory educational services, or the issuance of related services authorizations (RSAs) to obtain related services; reimbursement for the costs of evaluations; payment of costs and fees; and any further relief deemed appropriate (id. at p. 6).

B. Events Post-Dating the Due Process Complaint Notice

On July 18, 2012, the IHO conducted a prehearing conference, which scheduled the impartial hearing to begin on August 9, 2012 (see IHO Ex. VII).

By letter dated August 16, 2012, the parents indicated that the district failed to offer the student an "appropriate program/placement" for the 2012-13 school year, and reiterated their intentions to unilaterally place the student at the Lang School for the 2012-13 school year, beginning September 2012, and to seek reimbursement for the costs of the student's tuition at the Lang School at public expense (Parent Ex. H. at p. 1). At this time, the parents requested that the district provide the student with busing to the Lang School (id.).

On August 20, 2012, the parties—through their attorneys—appeared before the IHO to address the district's motion to dismiss and various subpoena issues (see Tr. pp. 1-54; IHO Exs. I-VI).

In an FNR dated August 31, 2012, the district summarized the special education and related services recommended in the April 2012 IEP, and identified a second assigned public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. M at p. 1; compare Dist. Ex. 13, with Parent Ex. M at p. 1).

On September 14, 2012, the parents visited the second assigned public school site with their special education advocate, and in a letter of the same date, rejected it because the 12:1+1 special class was not "academically appropriate" for the student, the students in the classroom functioned "one year below their actual grade level" and were otherwise "unlike" the student, and

they had "grave concerns" about the overall size of the assigned public school site (Parent Ex. R at p. 1). In addition, the parents indicated that in light of the student's "sensory integration issues and ADHD," he could not "handle the stimulation overload" in such a large, populated student body (id.). Also, the parents noted that the "related services" were not "up and running," further noting that the "OT room" at the assigned public school site did not have therapy swings needed to provide the student with "vestibular and proprioceptive input" (id.). In addition, the parents indicated that the guidance counselor did not see students in her office, but only in the classroom (id.). As a result, the parents notified the district of their intentions to unilaterally place the student at the Lang School for the 2012-13 school year and to seek tuition reimbursement from the district (id.). Finally, the parents requested that the district arrange for "busing" (id.).

In an amended due process complaint notice, dated September 14, 2012, the parents reasserted all of the issues in the June 2012 due process complaint notice (compare Parent Ex. D at pp. 1-5, 7-8, with Parent Ex. A at pp. 1-6). In addition, the parents asserted the following as new issues in the September 2012 amended due process complaint notice: the April 2012 CSE failed to recommend special education transportation; various challenges to the second assigned public school site identified in the August 2012 FNR, including that the student would not be appropriately functionally grouped, the assigned public school site could not implement the April 2012 IEP, and the assigned public school site was too large and could not accommodate the student's sensory issues; the provision of curb-to-curb special education or suitable transportation pursuant to pendency; and reimbursement for any payments made for transportation services (compare Parent Ex. D at pp. 4-8, with Parent Ex. A at pp. 1-6).

On September 19, 2012, the parties proceeded to the impartial hearing, which concluded on January 4, 2013 after six days of proceedings (see Tr. pp. 55-904; see also IHO Exs. VII-XIII).[4]

C. Impartial Hearing Officer Decision

By decision dated February 26, 2013, the IHO concluded that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 19-23). More specifically, the IHO found that although the April 2012 CSE did not include a special education teacher of the student, such procedural violation did not result in a failure to offer the student a FAPE because the student's special education teacher participated in the March 2012 CPSE meeting and "her contributions were reflected in both the March and April 2012 IEPs" (id. at pp. 20-21). Next, the IHO determined the April 2012 CSE did not need to conduct a classroom observation of the student because the April 2012 "'turning five'" conference was not an "initial evaluation;" however, even if the April 2012 CSE constituted an initial evaluation of the student, the IHO indicated that the April 2012 CSE had sufficient evaluative information available to develop the student's IEP, including a "detailed report" from the student's special education teacher that described his "functioning within the school environment" (id.). Further, the IHO determined that although the April 2012 IEP mistakenly reported the student's achievement levels in reading and mathematics and did not indicate the student's "superior IQ," the present levels of performance section of the April 2012 IEP accurately described the student's areas of need requiring special education supports, the student's impulsivity, the student's difficulties with socialization and awareness of

[4] On the record close date, the IHO admitted the parties' closing briefs into evidence (compare IHO Decision, with IHO Exs. XIV-XV).

physical space and surroundings, his inappropriate behaviors, his sensory processing difficulties, and his fine motor delays (id. at pp. 21-22). Turning to the annual goals, the IHO concluded that April 2012 IEP included appropriate and measureable annual goals to address the student's deficits in self-regulation, social interactions, attention, fine motor skills, and motor planning (id. at p. 22). In addition, the IHO found that the hearing record supported the April 2012 CSE's decision to carry over the annual goals from the March 2012 IEP into the April 2012 IEP since the student continued to work on those annual goals (id.).

With respect to the 12:1+1 special class placement, the IHO found that it provided a "small, structured program" consistent with the student's needs as described by the professionals who evaluated him, and furthermore, the 12:1+1 special class placement in a community school represented the least restrictive environment (LRE) for the student (IHO Decision at pp. 22-23). The IHO indicated that based upon the evidence in the hearing record, the student previously made progress in his preschool program, which included 12 students, one teacher and two assistants (id. at p. 23). In addition, the IHO noted that having an adult in "close proximity" to the student in the classroom made him "easier to manage" (id.). The IHO further noted that the parents agreed with the 12:1+1 student-to-teacher ratio at the April 2012 CSE meeting due to concerns that a "smaller class" would place the student with "lower functioning" students (id.). Next, the IHO found that while the parents did not raise the failure to include a behavioral intervention plan (BIP) in either the June 2012 due process complaint notice or in the September 2012 amended due process complaint notice, the April 2012 IEP specifically addressed the student's impulsivity and inappropriate behaviors through the recommended management needs, the annual goals, and the recommendation for counseling (id.).

Next, the IHO addressed the parents' challenges to the assigned public school sites (see IHO Decision at pp. 23-24). The IHO concluded that the evidence in the hearing record supported findings that the assigned public school sites could implement the April 2012 IEP and that the student would be appropriately functionally grouped (id. at p. 24). In addition, the IHO found no "legal or factual support" for the parents' request for reimbursement for any privately obtained evaluation of the student (id. at p. 25). Also, the IHO found no evidence in the hearing record to support the parents' assertion that the student required special education transportation, but indicated that the district was obligated to provide the student with suitable transportation pursuant to State law (id.). Having determined that the district offered the student a FAPE for the 2012-13 school year, the IHO denied the parents' request for reimbursement of the costs of the student's tuition at the Lang School, but ordered the district to provide the student with suitable round-trip transportation to the Lang School (id. at p. 26).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parents assert that the IHO erred in finding that the April 2012 CSE was properly composed and that the April 2012 CSE was not obligated to conduct a classroom observation of the student. In addition, the parents argue that the IHO erred in finding that the annual goals in the April 2012 IEP were appropriate, the present levels of performance in the April 2012 IEP accurately reflected the student's academic performance, the student did not require a BIP, and the 12:1+1 special class placement was appropriate. The parents also argue that the management needs in the April 2012 IEP failed to

include physical prompts to help the student calm his body, and lacked specificity with regard to redirecting and refocusing the student. Next, the parents assert that the district failed to sustain its burden to establish that the assigned public school sites could implement the April 2012 IEP, the student would be appropriately functionally grouped at the assigned public school sites, and that the district provided timely notice of the assigned public school sites or prior written notice to the parents. In addition, the parents argue that the Lang School was an appropriate unilateral placement for the student for the 2012-13 school year and that equitable considerations weighed in favor of their requested relief.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety. In addition, the district argues that the parents did not sustain their burden to establish the appropriateness of the student's unilateral placement at the Lang School, and in this case, equitable considerations precluded an award of tuition reimbursement.[5]

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)

[5] Since neither party appealed the IHO's determinations that the student was not entitled to special education transportation, the parents were not entitled to reimbursement for privately obtained evaluations, and that the district was obligated to provide the student with suitable round-trip transportation to the Lang School under State law, these determinations are final and binding on both parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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. CSE Process

1. April 2012 CSE Composition

The parents argue that because the district failed to establish that a certified special education teacher attended the April 2012 CSE meeting, the IHO erred in concluding that the April 2012 CSE was properly composed. The district denies these allegations, and asserts that the hearing record contains sufficient evidence to establish that the district special education teacher who attended the April 2012 CSE meeting met the regulatory criteria. In this case, although a review of the evidence in the hearing record generally supports a finding that the April 2012 CSE was not properly composed, the weight of the evidence in the hearing record does not support a determination that such procedural inadequacy resulted in a failure to offer the student a FAPE for the 2012-13 school year.

At the time of the April 2012 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg.

46670 [Aug. 14, 2006]).[6] However, as noted above, 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]).

In this case, the hearing record indicates that the following individuals attended the April 2012 CSE meeting: a district school psychologist (who also served as the district representative), a district regular education teacher, a district special education teacher, an additional parent member, the parent, and the parents' special education advocate (see Parent Ex. B at p. 12; see also Tr. pp. 113-15). At the impartial hearing, the district school psychologist who attended the April 2012 CSE meeting testified that although she did not have independent knowledge of the district special education teacher's certifications, she "strongly believed" that the individual had the appropriate certification (Tr. pp. 115-17, 193-94). The district school psychologist explained that the district special education teacher attended the April 2012 CSE as a person with "knowledge into or about the special education programs offered" in the district; in addition, the district school psychologist testified that this particular district special education teacher had experience working in a "general education classroom," which afforded her a "broad range of knowledge of the continuum of services and the curriculum for the special education and general education population" (Tr. pp. 115-16). During redirect examination of the district school psychologist, the IHO, upon objections, curtailed further questioning about whether the district special education teacher who attended the April 2012 CSE was properly certified, but stated on the record that she would allow the parties to recall the district school psychologist for further testimony if the IHO heard "evidence" that the district special education teacher was "uncertified" (see Tr. pp. 234, 236-39).[7] The district school psychologist was not recalled as a witness (see Tr. pp. 256-904).

In finding that the April 2012 CSE was properly composed, the IHO did not address the particular argument raised by the parents on appeal, although the parents did raise the issue in both due process complaint notices (compare Parent Ex. A at p. 4 and Parent Ex. D at p. 4, with IHO Decision at pp. 20-21).[8] Regardless, based upon a review of the hearing record, the weight of the

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

[7] During the redirect examination of the district school psychologist, the IHO also questioned whether the parents' attorney had a good faith basis for the inquiry into the special education teacher's certification, whether a particular teacher's certification—or lack thereof—was a matter of public knowledge and was, therefore, publicly available, and whether a teacher who taught in public schools was legally required to be certified (see Tr. pp. 237-39). Information about a particular teacher's certification status may be available through publicly accessible websites, such as http://www.highered.nysed.gov/tcert and http://eservices.nysed.gov/teach/certhelp/CpPersonSearchExternal.jsp.

[8] In closing briefs, both parties primarily focused arguments on whether the absence of the student's preschool special education teacher resulted in a conclusion that the April 2012 CSE was not properly composed (see IHO Exs. XIV at pp. 3-5; XV at pp. 3-6).

evidence sufficiently establishes that although the district special education teacher held the proper certification, the hearing record lacks evidence to support a finding that the district special education teacher would have been responsible for implementing the student's April 2012 IEP; therefore, the district special education teacher who attended the April 2012 CSE meeting did not meet the regulatory criteria and constituted a procedural violation. However, to the extent that this constitutes a procedural violation, the hearing record does not provide any basis under these circumstances upon which to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits to how or why this procedural violation rose to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, *5-*6 [S.D.N.Y. Mar. 26, 2014] [finding that the CSE's reliance, in part, upon progress reports created by the student's teacher "significantly mitigated" the absence of a special education teacher at the CSE meeting who was not the student's "own special education teacher"]; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, *6-*7 [S.D.N.Y. Aug. 9, 2013]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011]). Here, the evidence demonstrates that the parent attended the April 2012 CSE meeting with a special education advocate, the April 2012 CSE relied upon the student's March 2012 IEP developed by the CPSE to develop the student's April 2012 IEP, the April 2012 CSE also relied upon information created by the student's preschool providers to develop the April 2012 IEP, and the parent had the opportunity to participate in the development of the April 2012 IEP by expressing opinions about the program and placement recommendations in the April 2012 IEP and by asking questions (see Tr. pp. 758-61, 793-95).[9]

2. Evaluative Information/Classroom Observation

The parents contend that the IHO erred in finding that the April 2012 CSE was not obligated to conduct a classroom observation because the district failed to provide any evidence that it "had ever" conducted a classroom observation of the student. The district denies the parents' assertion, and argues to uphold the IHO's findings. A review of the evidence in the hearing record supports the IHO's findings, and the parents' arguments must be dismissed.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the

[9] The parents also testified that the April 2012 CSE meeting lasted approximately one hour (see Tr. p. 794).

student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

At the impartial hearing, the district school psychologist testified that in preparation for the CSE meeting, she reviewed the student's "file," which included a November 2011 multidisciplinary evaluation, a December 2011 educational progress report, a December 2011 social history update, a December 2011 OT progress report, a December 2011 counseling progress report, a March 2012 Preschool Evaluation Scale-Second Edition (PES-2) (school version rating form), and the student's March 2012 IEP (see Tr. pp. 94-95, 100-01, 104-07; Dist. Exs. 4-7; 9-10; Parent Ex. C). In addition, the district school psychologist explained the "relevance or import" of each document noted above in the review and planning process, as well as the importance of the parent's participation at the April 2012 CSE meeting (see Tr. pp. 107-11). The district school psychologist testified that the April 2012 CSE did not conduct a classroom observation of the student because the reports available to the CSE were "comprehensive" and "very thorough," the reports from the student's related services providers "covered all of his areas of needs and strengths," and at least one report available to the CSE included an "observation section" within the report itself (Tr. pp. 111-12, 190-91, 235-36).[10]

Based upon a review of the hearing record and given that the parents cite no legal authority to disturb the IHO's conclusion that the April 2012 CSE meeting was not an initial evaluation (or a reevaluation) triggering the obligation to conduct a classroom observation of the student, the April 2012 CSE was not automatically obligated to perform a classroom observation of the student by operation of law and, as further described—and as noted by the IHO—the April 2012 CSE otherwise had sufficient evaluative information available to develop the student's April 2012 IEP. Thus, even if required in this case, the absence of a classroom observation did not result in a failure to offer the student a FAPE for the 2012-13 school year.

B. April 2012 IEP

1. Present Levels of Performance

The parents argue that the IHO erred in finding that the present levels of performance in the April 2012 IEP accurately reflected the student's academic performance. Specifically, the parents assert that the present levels of performance reported incorrect functioning levels for the student in reading and mathematics, which was compounded by the absence of academic annual goals in the IEP. The district admits that the April 2012 IEP mistakenly identified the student's functional levels, but argues that this error, alone, cannot result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year. A review of the evidence in the hearing record reveals no reason to disturb the IHO's determination on this issue.

[10] The December 2011 educational progress report indicated that the information in the report was obtained through classroom observations (see Dist. Ex. 6 at p. 1).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

At the impartial hearing, the district school psychologist testified that the April 2012 CSE discussed the student's academic functioning, and indicated that he "actually perform[ed] very well academically, on grade [or] even above" grade level (Tr. pp. 131-32). When reviewing the April 2012 IEP, the district school psychologist testified that the first page of the IEP accurately represented the student's ability in academic functioning at that time, and the April 2012 CSE derived that information from the March 2012 IEP, the December 2011 educational progress report, and the November 2011 multidisciplinary evaluation (see Tr. pp. 132-33; Dist. Exs. 4; 6; Parent Exs. B at p. 1; C). Turning to page nine in the April 2012 IEP, the district school psychologist admitted that the instructional levels reported as "[p]re-[k]indergarten" in the areas of mathematics and reading were not accurate (Tr. p. 133; see Parent Ex. B at p. 9). She explained the inaccuracies as an "oversight" by the person responsible for typing the April 2012 IEP (Tr. p. 133). The district school psychologist also explained that the inaccurate instructional levels would not cause confusion because the description of the student's present levels of performance on the first page of the April 2012 IEP reported in detail "where the [student was] currently functioning academically" and described "exactly what the student [could] do and accomplish" (Tr. pp. 133-35). The district school psychologist further testified that once a teacher or provider began working with the student, the teacher or provider would recognize the "oversight" with regard to the instructional levels (Tr. pp. 134-35). The district school psychologist later clarified that the April 2012 IEP should have reported the student's instructional levels in mathematics and reading as "[h]igh kindergarten, beginning of first grade," which reflected the grade levels associated with the more detailed information presented on the first page of the IEP, as well as the information in the December 2011 educational progress report (Tr. pp. 207-11; see Dist. Ex. 6).

A review of the April 2012 IEP supports the district school psychologist's testimony, as well as the IHO's findings, with respect to the present levels of performance in the April 2012 IEP. The April 2012 IEP clearly described the student's abilities by naming specific skills that he demonstrated in these areas (see Parent Ex. B at p. 1). For example, within the present levels of performance and individual needs section of the IEP, the April 2012 CSE reported that the student could recognize "all of the letters of the alphabet, colors, shapes, and number recognition up to 100 plus;" the student could "rote count to 100 plus;" the student could also "complete various patterns, sequence pictures, and identify opposites;" the student could "identify seven days of the week" and all 12 months of the year; the student could "recognize his name and his peers names in print;" and the student could answer "simple and more complex 'WH' questions," and "retell past events in great detail" (id.). The April 2012 IEP also reflected that the student enjoyed being read to, as well as reading independently, and that he read "various words and signs throughout the day" (id.).

Based upon a review of the evidence and despite this error, the hearing record does not otherwise indicate that the inaccurate instructional levels in the April 2012 IEP altered the accuracy of the April 2012 IEP, where, as here, the April 2012 IEP, when read as a whole, contained sufficient information to provide the student with educational benefits under the plan (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]). Moreover, even assuming that this error constituted a procedural violation, the hearing record does not support a finding that the error impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefit upon which to conclude that the district did not offer the student a FAPE for the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii] M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011]). In this particular instance, to a teacher or a provider, the typographical error would be both very obvious and very easily correctable, and thus did not rise to the level of a denial of a FAPE. To find otherwise, would be to "exalt form over substance" (M.H., 2011 WL 609880, at * 11).

2. Annual Goals

Next, the parents contend that the the IHO erred in finding that the annual goals in the April 2012 IEP were appropriate. The parents argue that although the annual goals in the April 2012 IEP were "identical" to the annual goals in the March 2012 IEP, the April 2012 IEP failed to include short-term objectives. In addition, the parents contend that the annual goals in the April 2012 IEP were not appropriate because the student was expected to achieve all of the annual goals in the March 2012 IEP before the anticipated implementation date of the April 2012 IEP in September 2012. The district denies these contentions, and argues that the hearing record established that the annual goals in the April 2012 IEP remained appropriate for the student and short-term objectives were not required for the student. A review of the evidence in the hearing record supports the IHO's conclusion, and therefore, the parents' contentions must be dismissed.

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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[11]

[11] An alternate assessment has been described as a "datafolio-style assessment in which students with severe cognitive disabilities demonstrate their performance toward achieving the New York State P-12 Common Core Learning Standards in English language arts and mathematics" (http://www.p12.nysed.gov/assessment/nysaa).

Turning first to the parents' allegation that the annual goals in the April 2012 IEP were not appropriate because, although identical to the annual goals in the March 2012 IEP, the April 2012 IEP did not include short-term objectives, as noted above both State and federal regulations only require a CSE to develop short-term objectives for students who participate in alternate assessments (8 NYCRR 200.4[d][2][iv]; see 34 CFR 300.320[a][2][ii]). State regulation also requires short-term instructional objectives and benchmarks for each preschool student with a disability (8 NYCRR 200.4[d][2][1v]). Therefore, consistent with State regulation, the annual goals in the March 2012 IEP—created by the March 2012 CPSE for the student as a preschool student with a disability—included short-term objectives; however, also consistent with State and federal regulations, the annual goals in the April 2012 IEP did not include—and were not required to include—corresponding short-term objectives because the April 2012 CSE did not recommend that the student participate in alternate assessments (see Parent Exs. B at pp. 1, 3-5, 7-8; C at pp. 1, 7-12). Furthermore, the hearing record contains no evidence that the student should have participated in alternate assessments (see Tr. pp. 1-904; Dist. Exs. 2-10; 13-14; 16-19; Parent Exs. A-W; IHO Exs. I-XV). Thus, the parents' argument is without merit and must be dismissed.

Next, the parents assert that the annual goals in the April 2012 IEP were not appropriate because the student was expected to achieve all of annual goals in the March 2012 IEP before the anticipated implementation date of the April 2012 IEP in September 2012. At the impartial hearing, the district school psychologist testified that the April 2012 CSE discussed that the "goals were just created" in the March 2012 IEP, the student had not met the annual goals in the March 2012 IEP since they had been created one month prior, and the student should "continue to work on the goals since they had not been reached" (Tr. p. 157; see Tr. pp. 165, 213-14). In addition, the district school psychologist testified that "it was agreed upon by every (sic) in attendance at that meeting that the goals would be carried on for the following year" (id.). She further testified that the April 2012 CSE did not develop "academic goals" for the student because he did not have a "need to be worked on" within that area, and at that time, the student functioned, academically, "on grade level or above" (Tr. pp. 157-58, 213).[12] According to the evidence, the April 2012 CSE developed the annual goals based upon the annual goals in the March 2012 IEP, as well as the "reports" and the "reports from the related service providers" (Tr. p. 158; see Tr. pp. 213-14, 233-34; Dist. Exs. 6-7; 9; Parent Ex. C at pp. 7-12). The parents testified, however, that the April 2012 CSE did not discuss the annual goals at the meeting (see Tr. pp. 760-61).

In this case, a review of the April 2012 IEP indicates that it included eight annual goals designed to address the student's needs as identified in the present levels of performance and individual needs section related to attention, fine motor skills, ADLs, self-regulation, and social skills (see Parent Ex. B at pp. 3-5; see also Tr. pp. 159-63, 242). In addition, a review of the April 2012 IEP indicates that the annual goals included the following: the specific criteria for mastery for each annual goal (i.e., requiring success in either four out of five trials or at a rate of 80 percent), the specific methods to be used to measure the student's progress (i.e., teacher or provider observations and classroom activities), and how the student's progress toward each annual goal

[12] To the extent that the parents' assert that the April 2012 IEP was not appropriate because it did not include academic annual goals, a review of the hearing record does not support this argument. As described in detail above, the student's academic ability as reflected in the present level of performance and individual needs section of the IEP indicated that he demonstrated strong academic skills at the time of the April 2012 CSE meeting (see Parent Ex. B at p. 1; see also Tr. pp. 157-58, 213).

would be measured (i.e., one time per quarter) (see Parent Ex. B at pp. 3-5; see also Tr. pp. 164-65).

Furthermore, a comparison of the annual goals in the March 2012 IEP and in the April 2012 IEP reveals that although the annual goals in both IEPs are similar and address the same areas of deficits, the annual goals in both IEPs are not—as the parents' claim—identical (compare Parent Ex. B at pp. 3-5, with Parent Ex. C at pp. 7-12). For example, the annual goals in the April 2012 IEP incorporated specific skills reflected in the short-term objectives in the March 2012 IEP (id.). The annual goals in the April 2012 IEP also differed from those in the March 2012 IEP with respect to changes in the criteria required for mastery (compare Parent Ex. B at pp. 4-5, with Parent Ex. C at pp. 7, 9-10). More specifically, the annual goals in the April 2012 IEP reflected an increased criteria for mastery in four of the annual goals, a decreased criteria for mastery in one annual goal, and no change in the criteria for mastery in three of the annual goals (compare Parent Ex. B at pp. 3-4, with Parent Ex. C at pp. 7, 9-10, 12). Additionally, the April 2012 CSE modified the schedule to measure the student's progress toward some of the annual goals (i.e., every three months changed to one time per quarter) (id.). Thus, given that the hearing record contains no evidence that the student's areas of identified need changed between the March 2012 CPSE meeting and the April 2012 CSE meeting, it follows that the annual goals created to address those needs would remain similar, if not identical (compare Parent Ex. B at pp. 1-5, with Parent Ex. C at pp. 4-12). Moreover, even if the student mastered the annual goals in the March 2012 IEP by August 2012—which the hearing record does not suggest occurred—the student could not have mastered the annual goals in the April 2012 IEP, which modified the criteria required for mastery of the annual goals in the April 2012 IEP (compare Parent Ex. B at pp. 3-4, with Parent Ex. C at pp. 7, 9-10, 12).

Notwithstanding the foregoing, the parents also failed to cite to any legal authority to support their contention that the annual goals in the April 2012 IEP were not appropriate because the student was expected to achieve all of the annual goals in the March 2012 IEP prior to the implementation of the April 2012 IEP. According to a State guidance document, annual goals are "statements that identify what knowledge, skills and/or behaviors a student is expected to be able to demonstrate within the year during which the IEP will be in effect" (see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 33, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). Moreover, the same guidance document explains that evaluation schedules indicate the date or intervals of time by which evaluation procedures will be used to measure a student's progress and do not reflect the "date by which the student must demonstrate mastery" (see id.). Consequently, a review of the evidence in the hearing record indicates that the April 2012 CSE acted reasonably in deciding to carry over, as described above, similar, updated annual goals in the April 2012 IEP for the 2012-13 school year to address the student's areas of need.

Thus, overall, the hearing record supports a finding that the annual goals in the April 2012 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL

4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

3. 12:1+1 Special Class Placement

Next, the parents argue that the IHO erred in determining that the 12:1+1 special class placement was appropriate. The parents argue that the 12:1+1 special class placement was not appropriate because the student would not be functionally grouped and the district failed to present sufficient evidence regarding the functional grouping of the classroom.[13] The parents also argue that the student required a smaller student-to-teacher ratio due to his need for constant redirection and difficulty regulating his body. The district denies the parents' allegations, and generally argues that the 12:1+1 special class placement—as a smaller, structured environment—would provide the student with the redirection and focusing he required. A review of the hearing record supports the IHO's finding that the 12:1+1 special class placement was appropriate, and therefore, the parents' arguments must be dismissed.

State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In reaching the decision to recommend a 12:1+1 special class placement, the April 2012 CSE considered the evaluative information available, which reflected the student's then-current functioning related to behavior, social/emotional development, motor skills, self-help skills, cognitive ability, language, psychiatric and social history, and the types of supports currently in place for the student (see Tr. pp. 105-11, 126, 215; Dist. Exs. 4-7; 9-10; Parent Ex. C). The district school psychologist testified that after reviewing the evaluative information at the April 2012 CSE meeting, the CSE discussed the needs of the student, his strengths, the continuum of services, what the district had to offer, and what services would "best meet the student's needs" (see Tr. pp. 120-21). The district school psychologist also testified that the parent was asked "her opinion," whether she had any questions, and whether she needed "anything clarified" or "repeated" (Tr. p. 121). According to her testimony, the April 2012 CSE considered and rejected several other placement options, including a general education setting, integrated co-teaching (ICT) services, and a special class placement in a specialized school (see Tr. pp. 126, 128-30, 222-23; see Parent Ex. B at p. 10). The district school psychologist also testified that the parent was "very concerned" and stressed that "she needed [the student] to be in a smaller class," but agreed with the 12:1+1 special class (Tr. p. 126). Overall, and based upon the evaluative information, the district school psychologist testified that the April 2012 CSE agreed with the recommendation of a 12:1+1 special class placement (id.). In addition, the district school psychologist testified that

[13] To the extent that the parents' contend that the 12:1+1 special class placement was not appropriate because the student would not be appropriately functionally grouped in the classroom, such argument is more directly related to the implementation of the student's April 2012 IEP at the assigned public school site, and therefore, will be addressed more fully below.

the 12:1+1 special class placement in a community school was appropriate for the student for several reasons (see Tr. pp. 126-28).[14] She indicated that the 12:1+1 special class placement in a community school met the student's needs for a smaller and very structured environment, constant redirection and refocusing, and provided a smaller classroom within which to address his sensory needs (see Tr. pp. 126-27). For this student, a "structured and smaller classroom" allowed the special education teacher to better attend to the student's "deficits and needs," as opposed to attempting to address those same needs within a general education setting with perhaps 35 students (Tr. p. 127). The district school psychologist also described the importance of the structure of the 12:1+1 special class placement, noting that the student responded "well" to structure, and required "structure in order for his academic level to be apparent" (Tr. pp. 127-28). In addition, the district school psychologist testified that with respect to the student's needs for "sufficient individual attention and support," the "small group and the two teachers" in the 12:1+1 special class would provide the "higher level of support" that the student required (Tr. p. 128; see Tr. pp. 167-68). Given that the 12:1+1 special class placement offered the support of both a special education teacher and an assistant teacher, the district school psychologist believed the student could "function" within that setting without an additional adult (see Tr. pp. 168-70).

According to the district school psychologist, the parent and her special education advocate "push[ed]" for the 12:1+1 student-to-teacher ratio (see Tr. pp. 170-71, 217-18). In addition, the parent and the special education advocate were "completely against" the ICT services, but did not disagree with the recommendation for a community school, as the parent "knew the school in her area very well and was very pleased with the school and the class" (Tr. p. 171). The parents testified that the April 2012 CSE discussed the 12:1+1 special class and class sizes (see Tr. p. 758). The parents further testified about expressing concerns about the 12:1+1 special class because "it might still be too big" for the student, but indicated similar concerns about a class with a smaller student-to-teacher ratio due to the possibility that the "range of the students would be so varied" or "really be below his level" (Tr. pp. 759-60). The parents admitted accepting the 12:1+1 special class placement recommendation at the April 2012 CSE meeting, but with the reservation that they wanted to "see the school" and "go to the classroom" before making a decision (id.).

In addition to the foregoing, the April 2012 CSE further recommended strategies to address the student's management needs, including the provision of a small structured learning environment in which redirection, refocusing and modeling for pragmatic language and social skills could be provided throughout the day (see Parent Ex. B at pp. 2). The April 2012 IEP also reflected that the student responded well to positive reinforcement, such as praise and tangible reinforcers (i.e., edibles and stickers); verbal redirection; he enjoyed movement activities; and further noted the student's needs related to task completion, impulse control, eye contact, his awareness of his physical space and surroundings, and his perception of and ability to relate to other people (id. at pp. 1-2). Recognizing the student's academic strengths, the April 2012 IEP noted that while the student's needs precluded his participation in the general education setting at that time, the general education curriculum should be followed closely (id. at p. 2).

[14] According to the district school psychologist, a community school included a "general education population" that allowed access to "mainstreaming" opportunities in "recess, and lunch, and classes perhaps like gym or art" (Tr. p. 123; see Tr. p. 222).

Contrary to the parents' arguments, the hearing record does not contain evidence that the student required a smaller student-to-teacher ratio due to his need for constant redirection and difficulty regulating his body. Rather, the evidence in the hearing record establishes that the structure and support offered in the 12:1+1 special class placement, together with the annual goals and management needs in the April 2012 IEP, amply supports the IHO's conclusion that the 12:1+1 special class placement in a community school was appropriate to meet the student's needs, was reasonably calculated to enable the student to receive educational benefits, and adequately addressed the student's needs for redirection and refocusing.

4. Consideration of Special Factors—Interfering Behaviors

Finally, the parents argue that the April 2012 IEP was not appropriate because it lacked a BIP, and the management needs did not reflect that the student required physical prompts to calm his body and lacked specificity regarding the redirection and refocusing the student required. The district denies these assertions, and argues that the parents did not raise the issue of the absence of a BIP in the due process complaint notice. Alternatively, the district contends that the April 2012 IEP otherwise addressed the student's behavioral needs, and moreover, the April 2012 IEP included annual goals to address the student's needs for self-regulation and repeatedly emphasized the student's needs for redirection and refocusing and recommended strategies to address those needs. As discussed more fully below, a review of the hearing record does not support the parents' assertions.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State

procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student’s behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student’s behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[15] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], <u>available at</u> http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, the evidence in the hearing record indicates that at the time of the April 2012 CSE meeting, the student did not require a BIP. Here, the December 2011 educational progress report reviewed and relied upon by the April 2012 CSE indicated that when distracted, the student only required verbal redirection in order to return to a variety of classroom tasks, such as during circle time or story time (i.e., group activities); to maintain a correct grasp when tracing, writing,

[15] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

or eating; to transition; or to remain focused on his balance when completing an obstacle course (see Dist. Ex. 6 at pp. 1-4). The December 2011 educational progress report further reflected that, at times, the student became very excited and silly and required "reminders" to "calm his body," and further reflected that during play, the student, at times, had difficulty sharing and taking turns, and he would "grab a toy from a peer without using his words," which required appropriate modeling (id. at p. 4).

However, while the December 2011 educational progress report reflected that the student was easily redirected using verbal redirection, reminders, or verbal modeling when distracted or to calm his body, in contrast, testimonial evidence elicited from a social worker from the student's preschool program indicated that the student required a much more intensive level of support, including frequent physical redirection (compare Dist. Ex. 6 at pp. 1-4, with Tr. pp. 692, 697-98, 699, 700, 711-12). However, the social worker did not attend the April 2012 CSE meeting, and the December 2011 social history update she completed, which the April 2012 CSE relied upon, in part, to develop the student's IEP did not indicate that the student required a more intensive level of support—such as frequent physical redirection—in order to address his distractibility or to calm his body (see Dist. Ex. 5 at pp. 1-3; Parent Ex. B at pp. 11). In addition, the Lang School psychologist testified that she participated in the development of a BIP for the student to address his impulsive behavior, noting that it was "next to impossible" for students who exhibited impulsivity and hyperactivity to "demonstrate skills" learned "without gradually shaping the behavior with immediate reinforcement and consistency" (Tr. pp. 635-36, 658-59; see Parent Ex. T at pp. 1-2). However, the hearing record reflects that the Lang School did not implement the BIP for the student until mid-December 2012, nearly three months after the student began attending the Lang School (see Tr. pp. 256, 419-20, 662). Based on the above, the hearing record does not demonstrate that at the time of the April 2012 CSE meeting the student required a BIP in order to address his impulsivity and hyperactivity.

Next, although the parents assert that the management needs in the April 2012 IEP were not appropriate because they did not reflect that the student required physical prompts in order to calm his body, as discussed above, the hearing record does not support this assertion (see Dist. Ex. 6 at pp. 1-4). In addition, the April 2012 IEP included strategies to address the student's management needs that were consistent with the student's level of need reflected in the December 2011 educational progress report, which did not indicate that the student required physical prompts in order to calm his body (compare Dist. Ex. 6 at pp. 1-4, with Parent Ex. B at pp. 2).

Based on the above, the April 2012 IEP otherwise addressed the student's behavioral needs with the provision of strategies to address the student's management needs, and through the recommendation of a 12:1+1 special class placement, provided for a small structured learning environment where the student could receive redirection, refocusing, and modeling for pragmatic language and social skills.

C. Challenges to the Assigned Public School Site

The parents assert that the 12:1+1 special class placement was not appropriate because the student would not be functionally grouped and the district failed to present sufficient evidence regarding the functional grouping of the classroom. The parents also argue that the district failed

to sustain its burden to establish that the assigned public school sites could implement the April 2012 IEP. As discussed more fully below, the parents' arguments must be dismissed.

Initially, 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 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], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 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 [Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom 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, 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 D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13, 2013 WL 1234864 [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 the 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. However, 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 placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x. at 87 [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 (see, e.g., C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at

*13 [S.D.N.Y. Dec. 23, 2013]). 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]).

As explained 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; 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 is "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 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'"]). 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 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 this instance, the parents rejected the district's April 2012 IEP and both assigned public school sites by letters dated June 8, August 16, and September 14, 2012, and notified the district of their intention to enroll the student at the Lang School for the 2012-13 school year by letters of the same dates (see Parent Exs. G-H; R). Under these circumstances, where the parents rejected the April 2012 IEP prior to the time the district became obligated to implement it, claims that the district would have failed to implement the April 2012 IEP would require a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned public school site and would not be an appropriate inquiry (K.L., 530 Fed. App'x at 87, 2013 WL 3814669; R.E., 694 F3d at 186, 195; A.M., 2013 WL 4056216, at *13; R.C., 906 F. Supp. 2d at 273). Notably, in R.E., the Second Circuit also acknowledged that some information is inherently speculative in noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP (R.E., 694 F.3d at 187, 192). Generally, the identification of the particular students in a proposed classroom is the same type of information as the identification of a specific teacher of the classroom, to the extent that, like a teacher, a district cannot guarantee that a particular student will not relocate or otherwise become unavailable (see R.E., 694 F.3d at 187; Cerra, 427 F.3d at 194 [the IDEA does "not expressly require school districts to provide parents with class profiles"]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Therefore, given the inherently speculative nature about the

particular students in a proposed classroom, the district was not obligated to demonstrate that the student would have been appropriately functionally grouped in order to establish that it offered the student a FAPE for the 2012-13 school year.[16] In view of the foregoing, the parents cannot prevail on their claims that the district would have failed to implement the April 2012 IEP at either of the assigned public school sites because a retrospective analysis of how the district would have executed the April 2012 IEP 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).[17] Here, the parents rejected the assigned public school sites, and instead, chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. G-H; J). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school sites would not have properly implemented the April 2012 IEP.

VII. Conclusion

In summary, having determined that the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Lang School was an appropriate placement or whether

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[16] State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [upholding a district's determination to group a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students should be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students may vary, the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6 [a][3][iv]). Thus, although State regulations require that a district adhere to the functional grouping requirements for special classes, such functional grouping is not required to be noted in an IEP.

[17] Moreover, the hearing record contains sufficient evidence to support a finding that the district could implement the April 2012 IEP if the student attended either of the assigned public school sites (see Tr. at pp. 272, 275-77, 284-85, 292-93, 301).

equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12).

THE APPEAL IS DISMISSED.

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

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CAROL H. HAUGE
STATE REVIEW OFFICER