The University of the State of New York

The State Education Department
State Review Officer
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No. 13-073

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Skyer & Associates, L.L.P., attorneys for respondents, Jesse Cole Cutler, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the student's tuition costs at the Ezra Hatzvy Learning Center (Ezra Hatzvy), for the 2011-12 school year, as well as for certain home-based services provided by the parents. The parents cross-appeal from the IHO's dismissal of their request for funding pursuant to the District's pendency obligations, the denial of reimbursement for extended school day services, the reduction in the amount of tuition reimbursement ordered by the IHO, and the denial of reimbursement for certain home-based services obtained by the parents. The appeal must be sustained. The cross-appeal must be sustained in part.

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 federal 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 regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At the time of the impartial hearing the student was attending Ezra Hatzvy (Tr. at p. 188; February 13, 2013 Tr. at p. 1230[1]). Ezra Hatzvy is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and services as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR Section 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

The student's educational programs have been the subject of two previous administrative appeals (see Application of a Student with a Disability, Appeal No. 09-019 and Application of a Student with a Disability, Appeal No. 11-164). The parties' familiarity with the student's prior educational history is presumed and the educational history described in those appeals will not be repeated herein.

As relevant to the instant case, the Committee on Special Education (CSE) convened on May 26, 2011 and developed an individualized education program (IEP) for the student for the 2011-12 school year with a projected initiation date of July 5, 2011 (Dist. Ex. 2 at p. 2). The CSE recommended placement for the student in a special class in a special school with a 12:1+4 ratio and the following related services: 1:1 health paraprofessional; individual speech/language therapy (5 times per week for 60 minutes per session); individual physical therapy (PT) (5 times per week for 45 minutes per session); individual occupational therapy (OT) (5 times per week for 60 minutes per session); and individual vision education services (4 times per week for 60 minutes per session) id. at p. 29. In addition, the CSE recommended that the student receive the programs and services for a 12-month school year (id. at p. 1; February 13, 2013 Tr. at pp. 1223-1224). The District issued a Final Notice of Recommendation (FNR) dated June 13, 2011 assigning the student to a particular school (Dist. Ex. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated May 25, 2012, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1 at p. 1). The parents specifically asserted that the program recommended for the student by the District in the May 2011 IEP was inappropriate because the CSE improperly disregarded procedures for participation of CSE members by teleconference (id. at p. 2); that the CSE did not "rely" on necessary evaluations to determine the student's skill levels (id. at p. 3); that the parents were denied meaningful participation in the development of an educational program for the student (id. at p. 3); that the IEP lacks academic and social/emotional/management needs that adequately configure the program to the student's severe and complex individualized needs (id. at p. 3); that the annual goals and short-term objectives on the student's IEP were not appropriate (id. at p. 4); that the CSE failed to recommend parent training and counseling as a related service (id. at p. 4); that the recommended 12:1+4 setting did not provide enough support to meet the student's needs (id. at pp. 4-5); that the proposed class at the assigned school would

[1] The transcript for the proceedings on February 13, 2013 is paginated nonconsecutively with the transcript for the remainder of the impartial hearing; citations to the February 13, 2013 proceedings are prefaced by (February 13, 2013 Tr. p. [page number]).

not have provided the student with an appropriate functional grouping for academic or social/emotional purposes (id. at p. 5); and that the recommended school did not have the requisite level of related services to meet the student's IEP mandate (id. at p. 5). In addition, the parents asserted that the student's placement at Ezra Hatzvy with a home program was appropriate for the 2011-12 school year and that equitable considerations favored their request (id. at p. 5). As relief, the parents requested reimbursement for tuition at Ezra Hatzvy and for home-based services (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

On July 13, 2012 an impartial hearing convened and concluded on February 13, 2013, after 10 days of testimony **(**Tr. pp. 1-1124; February 13, 2013 Tr. pp. 1109-1236). In a decision dated March 27, 2013, the impartial hearing officer found that the district failed to offer the student an appropriate program and placement for the 2011-12 school year (IHO Decision at pp. 47-48). The impartial hearing officer noted that the student required 1:1 instructional work to achieve educational success and that the program described by the district's witnesses would not have provided the necessary one-on-one work (id.). Regarding the parents' unilateral placement, the impartial hearing officer found, "It is a very close decision as to whether Ezra Hatzvy should be considered appropriate based on the lack of visual therapy. Parties can go either way. I find that the school did provide an educational benefit and on that basis the school is considered appropriate in this decision, even though there was no visual therapy" (id. at p. 50). However, the impartial hearing officer reduced the amount of tuition reimbursement as follows: he reduced the tuition, in the amount of $60,000.00, by 10% as the school released students and closed on Friday afternoons for religious reasons. He also deducted $17,640.00, the cost of private visual therapy services provided by the parents, which he found the parents would not have incurred had visual therapy services been provided by Ezra Hatzvy (id. at p. 50). The impartial hearing officer denied reimbursement for the cost of the student's summer program (id. at p. 51). He also denied reimbursement for related services provided at Ezra Hatzvy including aquatic therapy (id. at pp. 51-52) and for private school-based speech therapy, physical therapy, occupational therapy, feeding therapy, a feeding evaluation, an augmentative assistive technology evaluation, a 1:1 paraprofessional, and Behavior Academic Instruction, finding that Ezra Hatzvy was "double dipping" by charging hourly rates for related services that were provided by full-time salaried employees during the school day (id. at pp. 51-55). The impartial hearing officer directed the District to reimburse the parents for the services of a vision therapist that were provided in the parents' home, since such service was recommended by the District on the student's IEP and was not offered by Ezra Hatzvy (id. at p. 52).

Regarding the home-based services provided to the student, in addition to ordering reimbursement for visual therapy services, the impartial hearing officer found that feeding therapy as a home-based service was necessary for the purpose of carryover in the home, and he ordered reimbursement for the private home-based speech-language therapist who provided feeding therapy, PROMPT therapy, and worked on the student's receptive and expressive language skills (IHO Decision at p. 56). The impartial hearing officer denied reimbursement for a second outside private provider of speech and language therapy (id. at pp. 56-57), as well as for a home-based SEIT, occupational therapy, physical therapy, and music therapy in the home (id. at pp. 57-59). In sum, the impartial hearing officer awarded the parents partial tuition reimbursement and

reimbursement for home-based services provided by a vision therapist and one speech therapist (id. at p. 59).

IV. Appeal for State-Level Review

In an appeal from the impartial hearing officer's decision, the district asserts that the impartial hearing officer erred in determining that the district did not offer the student a FAPE for the 2011-12 school year; erred in finding that Ezra Hatzvy was an appropriate placement and that the student required home-based services; erred in finding that the equities warranted reimbursement to the parents; and erred in ordering the remedy of direct funding. As relief, the district requests reversal of the impartial hearing officer's finding that it did not offer the student FAPE for the 2011-12 school year; a finding that the parents did not meet their burden in demonstrating that Ezra Hatzvy was an appropriate placement for the student; a finding that the parents did not demonstrate that home-based services were necessary; a finding that equitable considerations disfavor the parents in whole or in part; a finding that the parents did not prove they were entitled to the remedy of direct funding; annulment of the IHO's award of relief in its entirety; and dismissal of the parents' action with prejudice.

In an answer, the parents assert admissions and denials. In a cross-appeal, the parents assert that the impartial hearing officer improperly dismissed their request for funding pursuant to the district's pendency obligations; asserts that as of June 10, 2013, the district did not comply with its obligations under pendency, and asks the State Review Officer to order the district to immediately comply with such obligation regardless of the final decision on the merits of the district's claim; asserts that the impartial hearing officer improperly held that the parents did not establish the appropriateness of the student's extended school year; asserts that the impartial hearing officer improperly reduced tuition reimbursement by 10% due to half days on Fridays; improperly reduced tuition reimbursement by the cost of vision therapy obtained outside of school (vision therapy was not offered at Ezra Hatzvy), since the parents would have been responsible for the payment of vision therapy regardless of the location of the provision of the service; and alleges that the impartial hearing officer erred in failing to order reimbursement for aquatic therapy, speech and language therapy, physical therapy, and occupational therapy provided at Ezra Hatzvy, as well as denying reimbursement for a paraprofessional and Behavior Academic Instruction at Ezra Hatzvy, and home-based music therapy, physical therapy, a SEIT, and reimbursement for the services of a second outside private speech therapist.

In an answer to the parents' cross-appeal, the district alleges that it is currently processing payment for pendency services and the parents' appeal in that regard is therefore moot; alleges that the parents are not entitled to reimbursement (exclusive of pendency) for that portion of tuition for the 2011-12 school year that relates to non-secular studies; alleges that the impartial hearing officer properly denied reimbursement for in-school aquatic therapy, speech and language therapy, physical therapy, occupational therapy, a paraprofessional, and Behavioral Academic Instruction, as well as home-based music therapy, physical therapy, SEIT services, and speech therapy provided by a second outside private provider. The district requests dismissal of the parents' cross-appeal in its entirety, and findings that the district offered the student a FAPE for the 2011-12 school year; that the parents did not meet their burden in demonstrating the appropriateness of Ezra Hatzvy; that the parents did not demonstrate that home-based instruction was necessary; that equitable considerations disfavor the parents in whole or in part; that the parents did not prove they

were entitled to the remedy of direct funding; annulment of the impartial hearing officer's award in its entirety; and dismissal of the parents' action with prejudice.

V. Applicable Standards

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

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

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the

student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement…'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

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

VI. Discussion

A. Preliminary Matter - Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Application of the Dep't of Educ., Appeal No. 08-061; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of a Student with a Disability, Appeal No. 08-003; Application of a Student with a Disability, Appeal No. 08-001; Application of a Child with a Disability, Appeal No. 07-095; Application of a Child with a Disability, Appeal No. 07-062). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197[OSEP 2007]). Moreover, a prior

unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

It is uncontested by the parties that this student's pendency placement is established by the Decision of the State Review Officer in Appeal No. 11-164; that no appeal was taken as a result of Appeal No. 11-164; that no agreement was entered into by the parties that would amend or modify the student's pendency placement from the Decision of the State Review Officer in Appeal 11-164; and that the Decision of the State Review Officer in that matter constitutes the last agreed upon program between New York State and the parents (Answer ¶¶ 24-28, 30; Reply ¶ 1). Therefore, pendency consists of tuition reimbursement for the 10-month program at Ezra Hatzvy, together with a 1:1 paraprofessional in the private school program, and related services in the areas of occupational therapy, physical therapy, and speech-language therapy, together with reimbursement for a home-based program consisting of physical therapy, speech and language therapy, and vision therapy. Moreover, the student's pendency placement includes payment for ESY home-based physical therapy, speech-language therapy, and vision therapy services. Accordingly, if it has not already done so, the district is required to pay for the costs of the student's tuition for the 10-month portion of his program at Ezra Hatzvy, together with home-based services which constitute the student's 12 month portion of his program for the 2011-12 school year, pursuant to pendency.

B. May 26, 2011 CSE

1. CSE Composition

Although not determined by the IHO, the district asserts on appeal that the parents cannot prevail on their claims, contained in the Due Process Complaint Notice, regarding certain alleged deficiencies in the process used by the May 26, 2011 CSE. The hearing record demonstrates that attendees at the May 26, 2011 CSE meeting included both of the student's parents; a district representative who also served as the special education teacher; a district general education teacher; a parent member; a district educational vision services supervisor (by telephone); a district school psychologist; and a district school social worker, as well as Ezra Hatzvy employees by telephone, including the student's occupational therapist, clinical director and two special education teachers, and the student's private school speech and language therapist (Tr. at pp. 182-185; Dist. Ex. 2 at p. 2). The Parents opted not to invite the student's home-based providers to the CSE meeting (February 13, 2013 Tr. at p. 1175). The Parents allege that the program recommended for the student was inappropriate because "the CSE improperly disregarded procedures for participation of CSE members by teleconference." Specifically, they assert that the CSE failed to comply with NYSED guidelines governing teleconferencing in that reports, evaluations and other pertinent written documents utilized by the review team were not provided to the members of the private school who participated by telephone, and that the parents were not provided with copies of the requisite documents five days prior to the conference.

The hearing record shows that CSE meeting lasted between 2 and 3 hours; that there was full participation by the teachers and related service providers who attended the CSE meeting by telephone; that the information provided by them was considered; and that many, if not most, of their observations and recommendations were adopted (Tr. at pp. 186-212, 238-284). Furthermore, there is no evidence in the hearing record that the failure to provide copies of the written documents to those members who participated by teleconference or to the parents less than five days prior to the conference amounted to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

2. Evaluative Information Considered by the CSE

The parents assert that the CSE did not rely on necessary evaluations to properly gauge the student's current skill levels. Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The hearing record establishes that the description of the student's present levels of performance and academic and social/emotional needs set forth in the May 26, 2011 IEP was based on various evaluative measures. The CSE was in possession of the student's entire file and reviewed a number of documents at the CSE meeting (Tr. at pp. 186-187, 292-293; Dist. Ex. 6), including a classroom observation dated January 20, 2011 (Dist. Ex. 5); a psychoeducational evaluation dated August 17, 2009 (Dist. Ex. 7); a speech-language progress report dated March 20, 2011 (Dist. Ex. 8); an occupational therapy progress report dated March 14, 2011 (Dist. Ex. 9); a physical therapy progress report dated March 22, 2011 (Dist. Ex. 10); a teacher's progress report dated March 22, 2011 (Dist. Ex. 11); a pediatric ophthalmic re-evaluation dated September 23, 2009 (Dist. Ex. 12); and an observation report dated May 11, 2010 (Dist. Ex. 13).

The hearing record shows that the student's strengths and weaknesses were discussed at the CSE meeting with input from his then current service providers at Ezra Hatzvy. The student was instructed using three methodologies, including Sensory Integration, ABA, and Floor Time (Tr. at pp. 188-191; Dist. Ex. 2 at pp. 3-7, 9). He was functioning at a pre-kindergarten level in academic skills, and was able to do some matching, some pointing, and some labeling, and was able to respond to certain commands (Tr. at pp. 191-192; Dist. Ex. 2 at p. 3). The student's private school speech therapist provided information regarding the student's present levels of performance both in the classroom and in the use of his AAC (alternative augmentative communication) device, as well as his abilities relating to activities of daily living (Tr. at pp. 193-194; Dist. Ex. 2 at pp. 3-4).

The hearing record also reflects that information regarding the student's social and emotional development was shared with the CSE (Tr. at pp. 187-197). It was reported that the student showed interest in others but had difficulties due to his speech and language communication deficits (Tr. at pp. 195-196). He had neurological impairments that affected all areas of his functioning, including learning, communication, fine and gross motor skills, and visual processing, identified as cortical blindness and visual cortical impairment (Tr. at pp. 197-198; Dist. Ex. 2 at pp. 8-10). The student's parents, teachers, and service providers emphasized the importance of individualized attention for the student, and as a result the CSE recommended a 1:1 health paraprofessional to provide him with individualized attention to address, amongst other things, issues with attention and safety issues relating to his difficulty in ambulating. The CSE also recommended adaptive physical education (Tr. at pp. 203-204).

Based on the above, I find that the evaluative data considered by the May 26, 2011 CSE and the input from the participants during the CSE meeting provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see S.F., 2011 WL 5419847 at * 12).

3. Parental Participation

The IDEA sets forth procedural safeguards that include providing parents with the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. Section 1415[b][1]). Federal and State regulations governing parental participation requires that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR

300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F.Supp.2d 371, 282 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]].

A review of the hearing record shows that the Parents were active participants in the CSE meeting and they provided input that was considered by the CSE. They provided information on the student's health and physical management needs (Tr. at pp. 205-206); they discussed the home-based services that were provided to the student after the regular school day at Ezra Hatzvy (Tr. at pp. 280-283); they requested numerous services to be provided by the CSE, including music therapy, aquatic therapy, a bi-weekly augmentative device consultant, and a SEIT to act as a service coordinator, as well as placement for the student in Ezra Hatzvy (Tr. at pp. 208-212, 284-288); and they voiced their disagreements with respect to the CSE's recommendations and stated their intention to proceed to an impartial hearing (Tr. at pp. 272-274, 277-278; Dist. Exs. 2 at pp. 28-29; 4).

C. May 26, 2011 IEP

The gravamen of the district's appeal concerns the IHO's determination that the district failed to offer the student a FAPE because it did "not appear that the program was individually designed for the student" (IHO Decision at p. 47) and the recommended program failed to provide appropriate instruction and support to address the student's multiple disabilities (id. at pp. 46-48). In considering the appropriateness of the program with respect to the student's needs, I will address the various components of the program below.

1. 12:1+4 Special Class Placement

The district asserts that the IHO erred in finding that the recommended 12:1+4 special class placement was inappropriate for the student (IHO Decision at pp. 46-48). State regulations provide that a 12:1+4 special class placement is designed for students "with severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (8 NYCRR 200.6[h][4][iii]). 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 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). 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 the following: the levels of academic or educational achievement and learning characteristics; the levels of social development; the 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 shall 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, the management needs of students may vary and 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]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . ,in the class, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

The student presents with hemivertebrae; cortical visual impairment and a history of strabismus; severe global delays in language and communication, cognition, oral motor and feeding, and gross, fine, and visual-perceptual motor areas; as well as altered tone in all four extremities and trunk (Dist. Exs. 2 at pp. 1, 8; 9 at p. 1; 10 at p. 1; 11 at p. 1). The student learns best in a 1:1 setting or small groups for social activities, in order for him to have the focused staff attention that he needs in order to receive an "optimal educational experience" (Dist. Ex. 11 at p. 1). Instructional methodologies that have been used with the student in his private school setting include ABA, Floor Time, and Sensory Integration (Dist. Exs. 2 at p. 3; 11 at p. 1). The student functions at a pre-kindergarten level in the areas of reading and math. He is working on a variety of academic skills, including matching, identifying animal sounds, and labeling body parts, colors and objects. He is learning to play with a variety of toys with varied degrees of assistance including wooden blocks, shape sorters, puzzles, and a keyboard. He uses an AAC device, i.e., Tech Talk, in the private school, to request desired items, and is learning to say "no" when offered non-desired items. He does not use an AAC device at home. He has also started to use his device to answer social questions. Although the IEP states that the student is able to self-feed with guided assistance of bringing his hand to his mouth, and is learning to undress himself, both the Parent and the private school speech and language therapist confirmed that he is not able to self-feed or independently undress himself, and that he is still working on these activities of daily living (Tr. at pp. 846-847, 849-855; February 13, 2013 Tr. at pp. 814, 1129-1130, 1174, 1217-1218; Dist. Exs. 2 at pp. 4, 6, 8, 18, 22, 26; 11 at p. 3). The student is highly sociable and seeks out staff members for attention (Dist. Exs. 2 at p. 5; 11 at p. 1). However, due to his severe global delays, he is unable to interact with others in an age-appropriate level. He is becoming more aware of his environment, maintains eye contact for a short period of time, and is becoming more functional in a social setting (Dist. Ex. 2 at p. 7). He also has poor gait and mobility issues (Tr. at pp. 205-206

For the 2011/12 school year, the District recommended placement for the student in a special class with a ratio of 12:1+4 in a specialized school, together with a 1:1 health paraprofessional to ensure supervision for the student's safety in and out of his chair, in the classroom and school environments, and to provide assistance in feeding, toileting, and hygiene (Dist. Ex. 2 at p. 10). The CSE also recommended related services including vision education services, speech-language therapy, occupational therapy, and physical therapy. Specifically, the CSE recommended individual occupational therapy on a pull-out basis 5 times per week for 60 minutes; individual physical therapy on a pull-out basis 5 times per week for 45 minutes; individual

speech-language therapy on a pull-out basis 5 times per week for 60 minutes; individual vision education services on a pull-out and push-in basis 4 times per week for 60 minutes; and an individual health paraprofessional 5 times per week for 100 minutes. The CSE also recommended participation in alternate assessment due to the student's significantly low cognitive and functional levels, and participation in adaptive physical education (Tr. at pp. 584-585; Dist. Ex. 2 at p. 29). Other recommendations included special education transportation and assistive technology (R. 276-280; Dist. Ex. 2 at p. 1). Alternatively, the CSE recommended Special Education Teacher Support Services ('SETSS") for 15 hours per week, together with related services, if the student was parentally-placed and paying tuition (Tr. at pp. 283-284; Dist. Ex. 2 at p. 28).

The student's IEP also provides the student with academic management needs, including repetition, rephrasing and redirection and a small, structured, therapeutic environment and positive reinforcement (Dist. Ex. 2 at p. 3). In addition, the IEP includes "praise and encouragement" as a social/emotional management need (id. at 7) and an augmentative communication device, supervision for safety getting in and out of his chair - as well as generally within the class and school environment - and assistance feeding, toileting and hygiene as health and physical management needs (id. at p. 10). Moreover, as further discussed below, the IEP contains extensive goals in all identified areas of need for the student (id. at pp. 11-25). Accordingly, I find that the CSE's recommendation of a 12:1+4 class, in conjunction with the related services, goals and management needs contained in the IEP, provided a placement reasonably calculated to allow the student to obtain educational benefit. Below, I will address the other aspects of the student's program – namely the 1:1 health paraprofessional, related services and goals recommended by the CSE – in more detail below.

2. 1:1 Health Paraprofessional

The hearing record reflects that the student has neurological deficits that affect all areas of functioning, including but not limited to learning, communication, fine and gross motor skills, vision, coordination, posture, his ability to sustain attention, and his ability to learn and function. He also had significant feeding and oral motor deficits. The CSE recommended a 1:1 health paraprofessional for the student 5 times per week for 100 minutes per session, to provide the student with individualized attention under the direction of the special education teacher and related service providers, to assist the student with identified needs in the areas of academics, social needs, and feeding tasks, while at the same time assist the student in navigating his environment safely, given his issues with vision, and assist the student with self-help and activities of daily living, including but not limited to toileting, by providing prompting and assistance. The 1:1 paraprofessional would also assist with his attention issues. The Parent confirmed that the student needs a 1:1 paraprofessional, stating, "He couldn't manage without having somebody help him one-on-one." The clinical director at Ezra Hatzvy stated that the student needed a 1:1 paraprofessional because he was very prone to harm and agreed that it was an appropriate recommendation. The special education teacher at Ezra Hatzvy testified regarding the use and purpose of the student's 1:1 paraprofessional in her classroom. The speech therapist at Ezra Hatzvy testified regarding use of the paraprofessional to work on the student's oral motor exercises and feeding. In sum, the hearing record supports a finding that the CSE's recommendation for a 1:1 health paraprofessional for the student 5 times per week for 100 minutes per session, both inside and outside the classroom was appropriate (Tr. at pp. 197-206, 270-271, 521, 576, 793-794, 856-857; February 13, 2013 Tr. at p. 1129; Dist. Ex. 2 at pp. 2, 4, 8-10, 18, 22, 26-27).

3. Physical Therapy

The hearing record reflects that the student has cortical blindness and presents with severe delays in gross and fine motor skills. He also presents with altered tone in all four extremities and trunk. He demonstrates large delay in his locomotion skills and object manipulation skills. He walks in a rigid gait and has no heel-to-toe pattern or coordinated arm swing. Running and jumping abilities are also significantly delayed. He demonstrates impaired coordination and poor dynamic and static balance. The student requires gross motor strengthening gait and balance training to ensure his safety in the school, home and play environment (Tr. at pp. 206-207, 259-265; Dist Exs. 2 at p. 9; 10 at p. 1). The CSE recommended individual PT in a separate location 5 times per week for 45 minutes per session to work on his static and dynamic balance, negotiation of stairs, use of objects and toys in an age appropriate matter, and performing age appropriate jumping skills, with the goal of improving the student's strength and endurance (Dist. Ex. 2 at pp. 19-20). Ezra Hatzvy's clinical director confirmed that the recommendation for individual physical therapy 5 times per week for 45 minutes per session is appropriate. The parent agreed. It should be noted that the director of Ezra Hatzvy confirmed that most related services were provided 1:1 on a pull-out basis due to the students' distractibility. The hearing record supports a finding that the CSE's recommendation for individual PT 5 times per week for 45 minutes per session in a separate location is appropriate (Tr. at pp. 405, 598-599; February 13, 2013 Tr. at pp. 1214-1215; Dist. Ex. 10).

4. Occupational Therapy

The hearing record reflects that the student has hemivertebrae, cortical blindness and strabismus and presents with significant feeding and oral motor deficits. The student eats only soft foods that do not require chewing, although this skill is emerging. Moreover, neuromuscular abnormalities directly affect his gross, fine and visual-perceptual-motor development. He also has sensory integration, fine motor, and visual processing difficulties (Tr. at pp. 207, 242-244, 250, 257-259; Dist. Exs. 2 at pp. 12-13, 15, 18; 9 at p. 1). The student's occupational therapists at Ezra Hatzvy emphasized that his gains were slowly emerging and are continuously expected to develop, and that individual occupational therapy should continue for the 2011/12 school year to address his needs for motor, academic, and social/emotional success. Ezra Hatzvy's clinical director agreed that the provision of individual OT 5 times per week for 60 minutes was an appropriate amount of service for the 2011-12 school year. The parents agreed. The hearing record supports a finding that the CSE's recommendation for individual OT 5 times per week for 60 minutes per session in a separate location is appropriate (Tr. at p. 575; February 13, 2013 Tr. at pp. 1214-1215; Dist. Ex. 9).

5. Speech-Language Therapy

The hearing record reflects that the student has difficulties with communication. He uses an AAC device to request desired items, and is learning to say "no" when offered non-desired items. He is starting to learn to touch a picture of an item he wants when presented with a choice. He is also starting to use his device to answer social questions. He initiates interactions through vocalizations and pulling. He has a hard time imitating sounds and words. He often demonstrates a response lag to stimuli. He is starting to self-feed more with guided assistance of bringing his hand to his mouth. He is more consistently being able to bite on his molars when presented with

julienne strips of biscuit cookies. His oral sensitivity is becoming more integrated as he is less defensive around his oral cavity and allows for different stimulation from a nuk brush, toothbrush, and slightly different foods. He shows distinct pleasure for high drama with voice and songs and is highly responsive to interactive games with gross physical movements. He has made significant progress in stopping to suck on his hand with a prompt of hands down. Overall, he is able to demonstrate likes through smiling and interaction or trying to have the items presented again and displeasure through resistance or slight whining (Dist. Exs. 2 at pp. 5-6; 8 at p. 1). The CSE recommended individual speech-language therapy in a separate location 5 times per week for 60 minutes per session to work on sensory-motor, affective, motor, sensory, and cognitive skills. The student's speech therapist at Ezra Hatzvy agreed that the nature, duration, and frequency of speech services as recommended by the CSE for the 2011/12 school year is appropriate, and that he needs pull-out services due to his need for a "tremendous amount of one-on-one prompting" and to ensure his full attention. The hearing record supports a finding that the CSE's recommendation for individual speech/language therapy 5 times per week for 60 minutes per session in a separate location is appropriate (Tr. at pp. 244-247, 251-257, 265-267, 879, 881; Dist. Exs. 2 at pp. 14, 16-17, 21-22; 8 at p. 2).

6. Vision Education Services

The hearing record reflects that the student has been diagnosed with cortical visual impairment. Cortical visual impairment is a visual impairment that involves the way the brain processes visual information, rather than a problem with the eyes or the optic nerve. It is possible to have well functioning eyes while still not being able to see normally due to faulty brain processing of visual information. He also has a history of strabismus, which has been resolved through eye muscle surgery (Tr. at pp. 365-366; Dist. Ex. 12 at p. 1). He has been receiving the services of a vision therapist since he was one year of age. The hearing record indicates that the student has progressed from barely using his vision to using his vision in daily activities and most recently in ambulation (Dist. Ex. 15 at p. 2). The District's supervisor for educational vision services explained in detail the manner in which her predecessor evaluated the extent to which the student's cortical visual impairment characteristics have resolved over time (Tr. at pp. 354-364; Dist. Ex. 14). The CSE recommended individual vision education services on a push-in and pull-out basis 4 times per week for 60 minutes per session, to work on receptively identifying a variety of objects or pictures of any size; improving use of his residual vision by scanning for a requested objects of increasing complexity, color, multi-color and size; and pairing an object with a visual representation of the object. The District's supervisor for educational vision services confirmed that the student needs vision services in school in order to access the curriculum. Ezra Hatzvy's clinical director testified that the student's diagnosis with cortical visual impairment renders him "legally blind," and the student's pediatric ophthalmologist stated that given the student's substantial visual processing impairments, he must be "treated educationally as blind." The clinical director confirmed that the CSE's recommendation for individual vision education services 4 times per week for 60 minutes per session was an appropriate amount of service for the 2011/12 school year. The student's home-based vision therapist stated her belief that the student requires vision services and it is appropriate for the student to receive vision education services during the school day. The hearing record supports a finding that the CSE's recommendation for individual vision education services 4 times per week for 60 minutes per session, both inside and outside of the classroom, is appropriate (Tr. at pp. 269, 376-377, 498, 575-576, 1037-1038; *Compare* Dists. Ex. 2 at pp. 25, 29; 12; 15).

7. Educational Methodology

The district also contends that to the extent the IHO held that the lack of use of a particular methodology in the district's proposed classroom, which has been successful for the student in the past, is dispositive of a FAPE, such a determination was in error. Although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66, 2014 WL 3715461 [2d Cir. July 29, 2014]; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; F.L., 2012 WL 4891748, at *9; K.L., 2012 WL 4017822, at *12; Ganje, 2012 WL 5473491, at *11-*12; H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at *15, *17 [S.D.N.Y. May 24, 2012], aff'd, 528 Fed. App'x 64 [2d Cir. June 24, 2013]). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 2014 WL 5463084, at *4; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also R.B., 2014 WL 5463084, at *4; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

There is no evidence of any information before the CSE that the student could not receive educational benefit through the use of educational methodologies other than the ABA model. In fact, the record reflects that in addition to ABA, the student's special education teacher at Ezra Hatzvy instructed him through the use of Floor Time and Sensory Integration (Dist. Ex. 11 at p. 1).

8. Annual Goals

The goals developed by the CSE and included in the IEP also addressed the student's needs and provided additional support for the student's academic instruction, development of social and emotional skills and related services. 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]).

The hearing record reflects that annual goals and short-term objectives were developed by the CSE in conjunction with the student's parents, private school instructors and private related service providers (Tr. at pp. 238-242, 246-250; Dist. Ex. 2 at pp. 11, 15). The CSE also created goals and objectives in the area of occupational therapy with the assistance of the student's occupational therapist at Ezra Hatzvy (Tr. at pp. 243-244; Dist. Ex. 2 at pp. 12-13). Similarly, speech and language goals and objectives were developed at the CSE with input from the student's speech and language therapist at Ezra Hatzvy (Tr. at pp. 245-246, 251-256, 265-267; Dist. Ex. 2 at pp. 14, 16-17, 21-22), as well as goals and objectives in the areas of vision therapy (Tr. at pp. 256-257, 268-269; Dist. Ex. 2 at pp. 17, 25), physical therapy (Tr. at pp. 259-262; Dist. Ex. 2 at pp. 19-20), activities of daily living (Tr. at pp. 257-259, 267; Dist. Ex. 2 at pp. 18, 22), adaptive physical education (Tr. at pp. 269-270; Dist. Ex. 2 at p. 26), and goals and objectives relating to the 1:1 paraprofessional, who provides services under the supervision of the special education teacher (Tr. at pp. 270-271; Dist. Ex. 2 at p. 26). The evidence shows that all of the goals and objectives were reviewed with the parents and they did not disagree with any of them (Tr. at pp. 271-273, 293; February 13, 2013 Tr. at p. 1154, 1174; Dist. Exs. 6, 8, 9, 10, 11, 15).

The IEP contains a number of pre-academic goals, including demonstrating knowledge of various pre-math concepts including counting and responding to requests of "give me 1 or 2"; demonstrating pre-reading skills involving identification of tangible shapes and colors and sequencing; increasing knowledge of identification of shapes, colors, objects and animals; and receptively identifying numbers 1 through 10 with a 1:1 correspondence (Tr. at pp. 238-242, 272-273; Dist. Ex. 2 at pp. 11, 14-15).

The record also reflects that the IEP contains annual goals and short-term objectives in addressing the student's needs relating to receptive language, one of which was identified by the District's special education teacher as receptively identifying numbers 1-10 with a 1:1 correspondence, stating that she would have worked with the student on that goal in her classroom (Tr. at pp. 110-111; Dist. Ex. 2 at pp. 15, 17). In addition, the IEP contained an annual goal and short-term objectives to address the student's need in the area of listening comprehension, and in following directions in any setting (Tr. at p. 111; Dist. Ex. 2 at p. 17).

The hearing record reflects that each of the student's annual goals and short-term objectives were prepared by the teachers and related service providers who worked with the student and that the student's then current teachers and related service providers reviewed the appropriateness of each of the goals and short-term objectives with the full CSE at the meeting held on May 26, 2011. The hearing record supports a finding that the recommended goals and objectives are appropriate (Tr. at pp. 238-273; Dist. Exs. 2 at pp. 11-26; 8 at p. 2; 9 at pp. 2-3; 10 at pp. 1-2; 11; 15).

D. Challenges to the Assigned Public School Site

The district also contends that the IHO erred in finding that the district denied the student a FAPE due to its failure to establish that the assigned school would have been able to implement various aspects of the student's IEP. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when

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

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[2] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free

[2] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on claims regarding implementation of the May 2011 IEP because a retrospective analysis of how the district would have implemented the student's May 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the district's program and elected to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the May 2011 IEP (see Parent Exs. B at pp. 1-2; C at pp. 1-2; M; N at pp. 1-2; O). Therefore, the district is correct that the issues raised and the arguments asserted by the parent 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 parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's 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 claims that the assigned public school site would not have properly implemented the May 2011 IEP, and the IHO erred in determining that the district failed to offer the student a FAPE on that basis.[3]

[3] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86, 588-50 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary to consider the appropriateness of Ezra Hatzvy or to consider whether equitable factors weigh in favor of an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations here.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the impartial hearing officer's decision dated March 27, 2013 is modified, by reversing those portions that concluded that the district failed to establish that it offered the student a FAPE in the LRE for the 2011-12 school year and ordered the district to reimburse the parents for the costs of the student's Ezra Hatzvy tuition; and

IT IS FURTHER ORDERED that the district, if it has not already done so, is directed to pay for the costs of the student's tuition for the 10-month portion of his program at Ezra Hatzvy, together with home-based services which constitute the student's 12 month portion of his program for the 2011-12 school year, pursuant to pendency.

Dated: **Albany, New York**
March 3, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER