The University of the State of New York

The State Education Department
State Review Officer
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No. 13-096

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, Brian J. Reimels, Esq., of counsel

Susan Luger Associates, Inc., Special Education Advocates for respondents, Lawrence D. Weinberg, 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') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Stephen Gaynor School (Stephen Gaynor) for the 2012-13 school year. The 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 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

In this case, the student attended a general education setting in a nonpublic parochial school for kindergarten through fourth grade (see Dist. Ex. 7 at p. 1). During fourth grade, the student received five sessions per week of special education teacher support services (SETSS), one session per week of individual speech-language therapy, and two sessions per week of speech-language therapy in a small group (see Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at pp. 2-4). For fifth grade during the 2011-12 school year, the parents unilaterally placed the student at Stephen Gaynor; on February 22, 2012, the parents executed an enrollment contract with Stephen Gaynor for the student's

attendance for sixth grade during the 2012-13 school year (see Parent Exs. E at pp. 1-4; I at p. 2-9; K at pp. 1-11; see also Tr. p. 230; Dist. Ex. 8 at pp. 1-2).[1]

On April 23, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Exs. 3 at pp. 1, 10-11; 4 at p. 1). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the April 2012 CSE recommended a 12:1 special class placement in a community school, together with related services consisting of two 40-minute sessions per week of individual speech-language therapy and one 40-minute session per week of speech-language therapy in a small group (see Dist. Ex. 3 at pp. 7, 10-11).[2] In addition, the April 2012 IEP included annual goals targeting the student's identified needs in the areas of expressive and receptive language, reading comprehension, writing, and mathematics (id. at pp. 4-6).

By final notice of recommendation (FNR) dated August 14, 2012, the district summarized the student's special education program recommended in the April 2012 IEP as a 12:1+1 special education class in a community school with related services, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 5).

By a letter dated August 16, 2012, the parents informed the district that they had not received an FNR offering the student a "program/placement" for the 2012-13 school year (Parent Ex. D at p. 1). As a result, the parents had "no alternative" but to unilaterally place the student at Stephen Gaynor beginning September 6, 2012 (id.). In addition, the parents notified the district of their intention to seek funding from the district for the costs of the student's tuition at Stephen Gaynor (id.).[3]

On or about August 20, 2012, the district sent the parents a "second copy" of the August 14, 2012 FNR, which summarized the student's special education program recommended in the April 2012 IEP as a 12:1+1 special education class in a community school with related services, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Parent Ex. O).[4]

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

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

[3] The parents also indicated in this letter that they previously sent the district a letter dated February 20, 2012, advising of their execution of an enrollment contract with Stephen Gaynor and payment of a deposit to secure a seat for the student in the event that the district failed to offer the student an appropriate "program/placement . . . in a timely manner for the 2012-13 school year" (Parent Ex. D at p. 1). The hearing record does not otherwise include a February 20, 2012 letter (see Tr. pp. 1-303; Dist. Exs. 1-12; Parent Exs. B-O).

[4] The parents testified that they did not receive the August 14, 2012 FNR—which the district mailed to the parents on August 14, 2012, but was then returned to the district—until August 22, 2012 because the district did not have the correct address (see Tr. pp. 218-20, 239-44; compare Dist. Ex. 5, with Parent Ex. C and Parent Ex. O). The parents sent a copy of the August 14, 2012 FNR via facsimile to their advocates' office on August 23, 2012 (see Tr. pp. 239-40; Parent Ex. O).

On August 29, 2012, the parents visited the assigned public school site with a special education advocate, and in a letter dated August 31, 2012, the parents informed the district that it was not appropriate for the student and rejected the assigned public school site (see Parent Ex. C at p. 1; see also Tr. pp. 227-28). The parents indicated that the assistant principal could not provide information about the classroom the student would attend "until the start of the school year, including the classifications of the students and the range of math and reading levels in the classroom" (Parent Ex. C at p. 1). In addition, the parents noted that based upon the visit, the assigned public school did not offer "specialized instruction or methodology for students with language based disabilities," and the students functional levels in the "self contained classes" did not appear "similar" to the student's levels (id.). The parents also noted that during the previous school year, the assigned public school experienced "disciplinary problems" due to staff changes, the physical education class appeared "very crowded with 50 students" and one teacher, and the assigned public school site offered "limited opportunities" for mainstreaming (id.). As a result, the parents notified the district of their intentions to continue the student's placement at Stephen Gaynor and to seek reimbursement for the costs of the student's tuition for the 2012-13 school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 13, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. B at pp. 1-7). In particular, the parents asserted that the April 2012 CSE ignored concerns expressed at the CSE meeting that the recommended program was not appropriate, which deprived the parents of the opportunity to meaningfully participate (id. at p. 2). Next, the parents alleged 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.).

The parents also 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 her disability, the "formulation" of the annual goals "excluded" the parents from participating in the development of the IEP, and the April 2012 CSE's "exchange" with the Stephen Gaynor teacher "excluded" the parents (id. at pp. 2-3). In addition, the parents asserted that the April 2012 IEP was not individualized for the student because the April 2012 CSE placed the student's name into a set of "generic pre written" annual goals, and the annual goals used the same "'criteria' and 'method'" for "very different areas of weakness" (id. at p. 3). The parents also alleged that the April 2012 IEP included annual goals with "minor changes" from the previous school year, and although the April 2012 CSE read the annual goals "aloud," the April 2012 CSE discussed the annual goals with the Stephen Gaynor teacher and not the parents (id.).

Next, the parents asserted that the April 2012 CSE was not properly composed because neither the special education teacher nor the district representative met the regulatory criteria, the April 2012 CSE did not include a regular education teacher or an additional parent member, and "team members" did not attend for the entire CSE meeting (Parent Ex. B at p. 3). The parents also asserted that the April 2012 CSE failed to recommend an appropriate "program;" the April 2012

CSE did not have sufficient, current evaluative information upon which to make a recommendation, and the evaluative information did not support the "proposed recommendation;" the April 2012 CSE predetermined the recommendation; and the recommendation was not consistent with "opinions" of individuals with direct knowledge of the student (id.). In addition, the parents contended that 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, and the student would not have sufficient opportunity for "1:1 instruction or attention" (id. at pp. 3-4). The parents also alleged that the recommended "program" did not offer "adequate or appropriate instruction, supports, supervision or services" to meet the student's needs (id. at p. 4). Finally, the parents alleged that the district's failure to provide prior written notice and to issue an accurate and timely FNR resulted in a failure to offer the student a FAPE (id.).

With respect to the assigned public school site, the parents alleged that they wrote to the district in a letter dated September 7, 2012, explaining that the assigned public school site was not appropriate (see Parent Ex. B at p. 4).[5] In the due process complaint notice, the parents asserted that the assigned public school site was not appropriate for the following reasons: the assistant principal could not provide information about the "composition of the class" or the teacher; the reading levels of the students in the classroom ranged from second to fifth grade, with some students in "alternative assessment programs;" the assistant principal could not provide information about the classifications of the other students in the classroom; the assigned public school did not use "special methodologies" for students with language based disabilities; the student would attend two periods per day in classes with up to 30 students and one teacher, and the student would attend a physical education with 50 students; the assigned public school site experienced "organizational difficulties and discipline problems" during the previous school year; a "Quality Review" revealed "low test scores" for the special education students at the assigned public school; and the assigned public school site experienced "a lot of teacher turnover" and vacancies remained for special education teachers (Parent Ex. B at pp. 4-5). Additionally, the parents asserted that the assigned public school site had "one social worker, one school psychologist, three guidance counselors and three speech pathologists" for the total student population; the assigned public school site had "discipline and safety personnel" to remove students from classrooms; the "class size" and "student to teacher ratio" were too large for the student to benefit educationally; the student would not have sufficient opportunity for "1:1 instruction or attention;" and the assigned public school site did not employ appropriate teaching methodologies that had been successful for the student (id. at p. 5). Next, upon information and belief, the parents indicated that the assigned public school site could not implement the April 2012 IEP, and the student would not be functionally grouped in the proposed classroom (id. at pp. 5-6).

With respect to the student's unilateral placement, the parents alleged that Stephen Gaynor provided the "instruction, supports, supervision and services" specially designed to meet the student's unique needs, and the student made progress (Parent Ex. B at p. 6). 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 payment of the costs of the student's tuition at Stephen Gaynor for the 2012-13 school year, as well

[5] The hearing record does not otherwise include a September 7, 2012 letter (see Tr. pp. 1-303; Dist. Exs. 1-12; Parent Exs. B-O).

as payment or compensatory educational services for the student's related services (id. at pp. 6-7). In addition, the parents requested round-trip special education transportation pursuant to pendency, door-to-door special education transportation or suitable transportation, reimbursement for the costs of evaluations, and payment of costs and fees (id.).

B. Impartial Hearing Officer Decision

On November 9, 2012, the parties proceeded to an impartial hearing, which concluded on March 7, 2013 after four days of proceedings (see Tr. pp. 1-303). By decision dated April 29, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at Stephen Gaynor was appropriate, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 15-28).

Initially, the IHO found that the April 2012 CSE—which included the attendance of an additional parent member and a special education teacher from Stephen Gaynor who was dually licensed as a regular education teacher—was properly composed (see IHO Decision at pp. 7, 15). The IHO also found that the April 2012 CSE relied on sufficient evaluative information and reports from Stephen Gaynor in order to develop the April 2012 IEP and to make its recommendations for the 2012-13 school year (see IHO Decision at pp. 7-8, 15-16). The IHO noted that the Stephen Gaynor reports provided detailed information about the student's functioning in the classroom, and the April 2012 CSE appropriately relied on the description of the student's functional levels provided by the student's then-current teacher at Stephen Gaynor (Stephen Gaynor teacher) who attended the April 2012 CSE meeting (id. at p. 16). As a result, the IHO determined that the April 2012 IEP "satisfied standards required for appropriate IEP development" (id.).

Next, the IHO found that, contrary to the parents' assertion, the April 2012 CSE was not required to conduct a classroom observation of the student because the Stephen Gaynor teacher at the April 2012 CSE meeting appropriately conveyed information about the student's "current functioning in the classroom" (see IHO Decision at p. 16).

Notwithstanding these findings, however, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 16-22). First, the IHO concluded that the annual goals were "unlawfully developed" and not appropriate to meet the student's needs (id. at p. 16). The IHO found that the April 2012 CSE neither discussed, nor developed, the annual goals at the meeting (id. at pp. 16-17). Consequently, the creation of the annual goals outside of the April 2012 CSE meeting precluded input from CSE members—and in particular, the Stephen Gaynor teacher, who the IHO described as "uniquely in a position to contribute to meaningful development of the academic goals in the IEP" since she provided the April 2012 CSE with information about the student's functional academic levels (id. at pp. 16-17).

Relying heavily upon the Stephen Gaynor teacher's testimony at the impartial hearing, the IHO found that the annual goals were not appropriate because they did not reflect the student's "present performance" in the classroom and the student had not developed the "skills necessary to accomplish" or make any meaningful progress" on the annual goals (IHO Decision at p. 17). In reaching the determination that the lack of appropriate annual goals in the April 2012 IEP resulted in a failure to offer the student a FAPE, the IHO explicitly rejected the district's explanation that time constraints prevented the April 2012 CSE from discussing and developing the annual goals at the meeting (id. at pp. 18-19). Ultimately, the IHO found that the parents were deprived of the

opportunity to meaningfully participate in the development of the annual goals and the annual goals were not "rationally based" on the student's present levels of performance (id. at p. 19).

Next, the IHO found that the 12:1 special class placement in a community school was not appropriate because the April 2012 CSE did not have sufficient information to indicate that the student "could function in a less restrictive setting" than the 11:1+1 special class program she attended at Stephen Gaynor during the 2011-12 school year (IHO Decision at pp. 19-20). The IHO explained that given the student's "significant academic difficulty" in fourth grade while attending a general education setting and receiving SETSS, the hearing record was devoid of evidence to support the April 2012 CSE's recommendation for a "less restrictive (12:1) setting in a general education school" (id. at p. 19). Moreover, based upon a recommendation in the neuropsychological evaluation (2011 neuropsychological evaluation), the IHO indicated the student required a "small highly structured setting in a small school" with individualized "teaching" and "significant individual attention" (id.). Similarly, the IHO found that an auditory and language processing and reading comprehension evaluation (2010 language processing evaluation) included recommendations that identified Stephen Gaynor as a potential school that offered "speech, and special education with a favorable student/teacher ratio," and "individualized instruction" for the student (id. at pp. 19-20). Given the 11:1+1 student-to-teacher ratio at Stephen Gaynor in conjunction with the noted recommendations and the absence of evidence indicating the student did not require an "additional adult in the classroom to benefit from instruction," the IHO found that the 12:1 special class placement recommendation was "speculative" and not based on the student's needs (id. at p. 20). The IHO further found that the recommended 12:1 special class placement contradicted information given to the April 2012 CSE by the Stephen Gaynor teacher, who reported that the student required "two teachers in a small class setting to make academic progress," "significant 1:1 and small group instruction," and "more attention" than one teacher could provide (id.). The IHO indicated that while the district may not have a "smaller setting" for students with "significant learning difficulties" and who also participate in State and district-wide assessments—as opposed to alternate assessments—predetermination of a placement is not appropriate under the IDEA (id.). In this case, had the April 2012 CSE thought the student "might succeed in a less restrictive setting than the 11:1:1 setting" at Stephen Gaynor, the IHO noted that the CSE should have recommended transitional support services "in the form of a teaching assistant" for a portion of the 2012-13 school year in order to assist the student with the transition (id.).

Turning to the parents' challenges to the assigned public school site, the IHO concluded that the district's failure to provide the parents with sufficient information about the assigned public school site's ability to implement the April 2012 IEP constituted an "independent basis" upon which to find that the district failed to offer the student a FAPE (see IHO Decision at pp. 20-22). Initially, the IHO noted that no "reasonable basis" existed for the district's delay in providing the parents with an FNR in August 2012 when the CSE convened in April 2012 (id. at p. 21). As a result, the IHO found that the district failed to arrange for special education programs and services consistent with State regulation (id.). Next, the IHO found that the district "failed to have sufficient information available for the parent[s] to consider" when they visited the assigned public school site on August 29, 2012 (id.). The IHO specifically noted the lack of information regarding the "make up of the students in the proposed class, other than a generalized statement that the students functioned on a second grade level" (id.). The IHO found that in order for the parents to have the opportunity to meaningfully participate in "placement decisions," the parents must have a "certain minimum of information" about the students in the proposed classroom, which was not provided

to the parents in this case when it was requested (id. at pp. 21-22). While the IHO acknowledged that the district was not obligated to identify a particular public school on the student's IEP, the IHO also found that the parents had the right to meaningfully participate in this determination.

With respect to the student's unilateral placement, the IHO found that the evaluative information available to the parents in selecting a program "plainly indicated" that Stephen Gaynor was appropriate (IHO Decision at p. 23). The IHO also found that the "structure" of the educational program at Stephen Gaynor fit the student's learning profile and the student made significant progress during the 2012-13 school year (id. at pp. 24-25). In regard to equitable considerations, the IHO found that the parents participated in the April 2012 CSE meeting, visited the assigned public school site, and informed the district of their intention to unilaterally place the student at Stephen Gaynor (id. at pp. 25-26). In reaching this conclusion, the IHO rejected the district's contention that the parents had no intention of sending the student to a public school (id. at p. 26). Finally, the IHO found that although the hearing record contained no evidence that the student required special education transportation, the district was obligated to provide the student with suitable transportation pursuant to State law (id. at p. 27). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2012-13 school year upon proper proof of payment and to provide suitable transportation for the student (id. at pp. 27-28).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parent's requested relief. The district argues that the IHO erred in finding that the failure to discuss or create the annual goals at the April 2012 CSE meeting, as procedural violations, did not rise to the level of a failure to offer the student a FAPE. The district also argues that the IHO erred in finding that that the annual goals were not appropriate because they did not reflect the student's then-current present levels of performance. Next, the district contends that the IHO erred in finding that the recommended 12:1 special class placement was not supported by sufficient information indicating that the student could function in a setting that was less restrictive than the setting at Stephen Gaynor. With respect to the IHO's findings related to transitional support services, the district asserts that the parents did not raise this issue in the due process complaint notice, and therefore, the IHO exceeded the scope of his jurisdiction to consider the issue. Alternatively, the district argues that the hearing record lacks evidence that the student required transitional support services. To the extent that the IHO found that the April 2012 CSE impermissibly predetermined the student's program, the district alleges that the evidence in the hearing record does not support such a conclusion.

With respect to the IHO's findings related to the parents' challenges to the assigned public school site, the district argues that any determinations—whether substantive or concerning the selection process of the school site—were speculative as a matter of law and the IHO erred in addressing any such claims. Turning to issues raised by the parents in the due process complaint notice but not addressed by the IHO—such as the April 2012 IEP did not include statements of the student's academic and social/emotional performance to meet her unique needs, the district's failure to provide prior written notice, and the inaccuracy of the FNR—the district argues that these issues would not result in finding that the district failed to offer the student a FAPE for the 2012-13 school year. Finally, with regard to equitable considerations, the district asserts that the

hearing record indicated that the parents never seriously considered sending the student to a public school for the 2012-13 school year, and therefore, the IHO erred in finding that equitable considerations weighed in favor of the parents' requested relief.[6]

In an answer, the parents respond to the district's allegations and argue to uphold the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. The parents further argue that the district failed to offer the student a FAPE for the 2012-13 school year on additional grounds, including that the April 2012 CSE was not properly composed due to the absence of a regular education teacher, the district failed to provide a timely and accurate prior written notice to the parents, and the student would not be functionally grouped in the proposed classroom at the assigned public school site.

V. Applicable Standards

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

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

[6] Although adverse to the district, the district did not appeal the IHO's finding that the parents sustained their burden to establish that Stephen Gaynor was an appropriate unilateral placement for the student for the 2012-13 school year; as such, this determination is final and binding on both parties and will not be addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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).

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

With regard to the IHO's determination, the parents assert that the evidence in the hearing record reflected that the April 2012 IEP contemplated the student's participation in a general education setting for a portion of the school day, and therefore, the April 2012 CSE was not properly composed due to the absence of a regular education teacher. In this instance, while a review of the evidence in the hearing record generally supports the parents' assertion that the absence of a regular education teacher at the April 2012 CSE meeting constituted a procedural violation, the weight of the evidence does not support a finding that such procedural inadequacy resulted in a failure to offer the student a FAPE for the 2012-13 school year.

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]). However, as indicated 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 special education teacher, an additional parent member, the student's mother, the parents' special education advocate (parents' advocate), and the student's Stephen Gaynor teacher (via telephone) (Dist. Exs. 3 at pp. 12-13; see Tr. pp. 17-18, 245-46). The hearing record further reflects that the attendance page included with the April 2012 IEP did not include any space to document the attendance of a regular education teacher (see Dist. Ex. 3 at pp. 12-13). Additionally and notwithstanding evidence that the district special education teacher and the Stephen Gaynor teacher in attendance at the April 2012 CSE meeting both held dual certifications in special education and general education, the hearing record unequivocally indicates that neither teacher served in the role of a regular education teacher at the meeting (see Tr. pp. 17-18, 43-46, 244-76). Therefore, based solely on these facts, the hearing record does not support the IHO's conclusion that the attendance of the Stephen Gaynor teacher—who by virtue of holding a dual certification as a regular education teacher in this circumstance—comported with the procedural requirements of federal and State regulations as to the attendance of a regular education teacher at the April 2012 CSE meeting (see Application of the Dep't of Educ., Appeal No. 13-213; Application of the

Dep't of Educ., Appeal No. 13-165; Application of the Dep't of Educ., Appeal No. 12-058; Application of a Student with a Disability, Appeal No. 11-008; Application of the Bd. of Educ., Appeal No. 11-007; Application of the Dep't of Educ., Appeal No. 10-073; Application of a Student with a Disability, Appeal No. 9-137; see 20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).

However, as noted above, the IDEA only requires a CSE to include a regular education teacher member if the student is or may be participating in a general education environment. Although the parents argue that the district school psychologist's testimony indicated that the April 2012 IEP contemplated the student's participation in a general education setting for a portion of the school day, the evidence on this point can be characterized, at best, as a confused presentation of evidence on the district's part. In particular, when asked to explain the 12:1 special class placement recommendation in the April 2012 IEP in conjunction with the notations of "[a]ll academic areas" and "8 time(s) per day" written within the same section of the IEP, the district school psychologist testified that because the student "really shine[d]" in particular subjects—such as art, science, physical education, and computers—the student did not "necessarily need to be in a special class for those areas" and she did not "know how the particular school would accommodate [the student] for those particular subjects" (compare Dist. Ex. 3 at p. 7, with Tr. pp. 31-32). However, she further testified that the student required a "lot of support" in reading, writing, and mathematics, and therefore, the April 2012 IEP recommendation reflected that a 12:1 special class placement would be appropriate for those "core subjects" (compare Dist. Ex. 3 at p. 7, with Tr. pp. 31-34).

Upon cross-examination, the district school psychologist then testified that the "8 time(s) per day" notation addressed the "[8] periods of the school day"—and although the 12:1 special class placement was recommended "for all academic areas," she recognized that not all public schools viewed "academic areas" in the same manner: for example, some public schools might view art as a nonacademic subject (Tr. pp. 60-62). However, the district school psychologist further testified that the April 2012 CSE viewed art as an "academic" subject because the student "would probably" be in her 12:1 special class "throughout the day," and the CSE wanted to "make sure that all of the areas that were addressed were covered within the frequency of the school day" (Tr. p. 62). She then testified that the 12:1 special class placement recommendation in the IEP was also intended for the student's "specials like an art class or a science class" (Tr. pp. 62-63).

Noting the confusion, the IHO sought further clarification from the district school psychologist and specifically asked about "what would happen in the classes other than core academic classes" (see Tr. p. 62). In response, the district school psychologist testified that the April 2012 CSE wanted to "make sure" that if the student remained in the 12:1 special class for the "school day that it made sure to cover all of those non-academic areas as well"—but, again, this did not necessarily mean that the student "might be able to do well in a different type of setting for those specials" (Tr. pp. 63-64).

Aside from this confusing testimony, however, a review of the April 2012 IEP, itself, indicates that that there was a reasonable likelihood that the student would have participated in a general education setting for physical education—and perhaps other nonacademic areas, such as lunch or recess—because the April 2012 IEP does not otherwise describe the extent to which the student would be removed from the general education environment in these areas, and recommends that the student attend a community school (see Dist. Ex. 3 at pp. 9-10; see also Tr.

pp. 138-39).[7] As such, I find that the April 2012 CSE committed a procedural violation and should have included the attendance of a regular education teacher (34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 644-45 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ. 716 F. Supp. 2d 270, 287-88 [S.D.N.Y. 2010]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 365-66 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *5-*6; see also Application of the Dep't of Educ., Appeal No. 11-136; Application of the Bd. of Educ., Appeal No. 11-129; Application of a Student with a Disability, Appeal No. 08-035). However, under the facts of this case, the April 2012 CSE's procedural error and the IHO's technical error on this point are of little consequence because the hearing record does not otherwise provide a basis upon which to conclude that this particular 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 (see Davis v. Wappingers Cent. Sch. Dist., 431 Fed. App'x 12, 15 2011 WL 2164009 [2d Cir. June 3, 2011]; see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Instead, as further described below, the evidence demonstrates that the parent participated in the development of the student's IEP at the April 2012 CSE meeting, and that the parent and the Stephen Gaynor teacher were afforded the opportunity to participate in the review process and express their opinions as to the appropriateness of the recommended program for the student (see Tr. pp. 216-17, 228-29, 246-50, 274; Dist. Exs. 3 at pp.1-3; 4 at pp. 1-2).

Accordingly, the hearing record does not provide a basis upon which to conclude that this 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 (see Davis, 431 Fed. App'x 12, 15, 2011 WL 2164009; Dirocco v. Bd. of Educ., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *7 [S.D.N.Y. Nov. 27, 2012] [concluding that even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *6-*7 [S.D.N.Y. Sept. 29, 2012] [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

2. Predetermination/ Parental Participation

To the extent that the IHO found that the April 2012 CSE impermissibly predetermined the student's program, the district alleges that the evidence in the hearing record does not support this conclusion. The parents deny the district's assertion, and argue that the April 2012 CSE did not

[7] This reasoning is further supported by the notation in the "CSE Meeting Rationale," which indicated that the student would not participate in adapted physical education (see Dist. Ex. 4 at p. 3).

consider a more supportive classroom, which ignored concerns expressed by the Stephen Gaynor teacher. With respect to parental participation, the district argues that the IHO erred in finding that the failure to discuss or create the annual goals at the April 2012 CSE meeting contributed to a finding that the district failed to offer the student a FAPE. The parents contend that the formulation of the annual goals after the April 2012 CSE meeting deprived them of the opportunity to meaningfully participate in the IEP process.

Initially, a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009]). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco, 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 210 Fed. App'x 1, 2, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]). Moreover, the IDEA "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11, quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

In this case, the district school psychologist testified that, admittedly, the April 2012 CSE meeting began late because the CSE was "unaware" that the student was presently attending Stephen Gaynor, and therefore, the CSE needed to collect and review additional documents—namely, a 2011-12 Stephen Gaynor speech-language remediation report and a 2011-12 Stephen Gaynor midyear report card—before starting the meeting with the parent and the parents' advocate (Tr. pp. 13-16, 19-20, 30, 48-49, 133-34; see Dist. Exs. 4 at p. 1; 11 at pp. 1-3; 12 at pp. 1-11). In addition to gathering the Stephen Gaynor documents, the district school psychologist testified that

prior to the April 2012 CSE meeting, she also had the opportunity to review the following: a 2010 language processing evaluation, a 2011 neuropsychological evaluation, a 2011 psychological evaluation, and a 2011 interim progress report from the parochial school (see Tr. pp. 19-20; Dist. Exs. 6-9).

At the April 2012 CSE meeting, the Stephen Gaynor teacher described the student's needs, her instructional levels, the skills the student was working on, and generally, described the student as a "learner" (see Tr. pp. 20-24, 216-17, 247-48, 274; see also Dist. Exs. 3 at pp. 1-3; 4 at pp. 1-2). At the beginning of the April 2012 CSE meeting, the Stephen Gaynor teacher testified that she "was able to talk" about the student's "learning style" and her "gaps," and otherwise "share[d] information" (Tr. pp. 263-64). The Stephen Gaynor teacher testified that the April 2012 CSE discussed the student's "skills," but did not discuss or review the annual goals included in the April 2012 IEP (Tr. pp. 246-47, 273-75). In her experience attending CSE meetings, the Stephen Gaynor teacher testified that depending upon "who" ran the CSE meeting, she had had the ability to "participate" in drafting the annual goals (Tr. pp. 258-59).

The Stephen Gaynor teacher also testified that she participated in the discussion regarding the recommendation for a 12:1 special class placement at the April 2012 CSE meeting, voicing her disagreement with the recommendation because the student would not receive the "support" required with only one teacher in the classroom and stating at the CSE meeting that the student required a "second teacher" in the classroom (see Tr. pp. 246-49, 266-67, 272-73, 275). According to her testimony, the April 2012 CSE first discussed a "collaborative team teaching" (CTT) setting for the student—which was not appropriate—and she "push[ed]" for a 12:1 special class recommendation because she had been "told" it was the only other option (Tr. pp. 248-49). In addition, the Stephen Gaynor teacher testified that the April 2012 CSE meeting felt "very rushed" and as though the CSE was "just trying to kind of get it over with" (Tr. pp. 250-51). As the April 2012 CSE meeting progressed, the Stephen Gaynor teacher further testified that when she "voiced a concern" or "tried to object," she felt "shut down" or was told that "this was the way it was" (Tr. pp. 250-51, 264-65). The Stephen Gaynor teacher also testified that she believed she attended the entire April 2012 CSE meeting; however, although she missed an entire period of instruction for one subject at Stephen Gaynor, she could not recall the length of the April 2012 CSE meeting (see Tr. pp. 266-67, 270, 273).

At the impartial hearing, the parents initially testified that the April 2012 CSE did not discuss the student's 2011 neuropsychological evaluation, and the April 2012 CSE did not discuss the annual goals included in the April 2012 IEP because "they did not have enough time" (Tr. pp. 213-16). The parents further testified that although she recalled the April 2012 CSE recommendation for a 12:1 special class placement, the CSE did not discuss a "smaller class than a 12:1," the CSE did not discuss the student's "functioning in reading," and the CSE did not discuss "any general education options" (Tr. p. 216). The parents admitted, however, that the Stephen Gaynor teacher participated at the April 2012 CSE meeting by providing information about the student and by answering questions posed to her (see Tr. pp. 216-17). Upon cross-examination, the parents acknowledged that at the April 2012 CSE meeting both she and the Stephen Gaynor teacher expressed that the student required a "smaller class profile" than the 12:1 special class placement recommendation, and further, that both she and the Stephen Gaynor teacher brought up and spoke about the student's "third grade" functional level in reading at the CSE meeting (Tr. pp. 228-29).

With respect to the annual goals included in the April 2012 IEP, the district school psychologist testified that annual goals were created to address areas of weakness (see Tr. pp. 24-25). In this instance, the district school psychologist testified that she did not recall reviewing annual goals at the meeting because the CSE tended to "generate goals or write the goals after the meeting just because of time constraints" (Tr. pp. 24-25, 50). Due to other annual reviews scheduled for that same day, the district school psychologist further testified that the April 2012 CSE did not have time to review the annual goals with the parent, but explained that they "tried to derive" the annual goals "based on the input and the information" collected at the meeting from the parent and the Stephen Gaynor teacher—especially regarding the student's weaknesses (Tr. pp. 24-26, 50-51). The district school psychologist further testified that in drafting the annual goals in the April 2012 IEP, they considered the student's "present level of performance" at the third grade level, but also tried to "incorporate things" that were "more in terms of her grade level"—meaning, fifth grade (Tr. pp. 24-26). The district school psychologist further testified that they drafted the annual goals to address the student's weaknesses at her present functioning levels, but also to expose the student to the fifth grade curriculum (see Tr. pp. 25-28).

In reaching the decision to recommend a 12:1 special class placement, the hearing record indicates that the April 2012 CSE considered other options, such as SETSS, but rejected it because "prior interventions with SETSS" had not been "successful" in meeting the student's needs, which the parent indicated (Dist. Ex. 3 at p. 12; see Dist. Ex. 4 at pp. 2-3; see Tr. pp. 32-34). Given that the student's functional levels were approximately "two grade levels below where she should be" at the time of the April 2012 CSE meeting, the CSE "really considered" that a 12:1 special class—with a special education teacher and "exposure to the curriculum, but with modification and accommodations to her learning needs"—was appropriate to address her needs within a "small class" setting (Tr. pp. 32-34). In addition, the district school psychologist testified that the April 2012 CSE did not think a "general education classroom" or a "CTT" setting would address the student's specific needs, which included a "lot of teacher support" (Tr. pp. 34-36). As a result, the district school psychologist testified that the 12:1 special class placement was appropriate for the student in light of her functioning levels at the time of the April 2012 CSE meeting, the fact that prior interventions—such as SETSS—had not been effective, and because the student "truly needed a small class setting" to catch up in terms of reaching "grade level" and to ensure that the student received the modifications to the curriculum she needed (Tr. p. 36).

Although the April 2012 CSE meeting began late and the annual goals may not have been specifically discussed, overall the evidence in the hearing record indicates that the parents had an opportunity to participate in the development of the April 2012 IEP and did not raise any concerns about or ask to discuss the annual goals at the April 2012 CSE meeting, or request that the CSE reconvene to discuss the annual goals (see Tr. pp. 1-303; Dist. Exs. 1-12; Parent Exs. B-O). To the extent that the failure to discuss the annual goals at the April 2012 CSE meeting may have constituted a procedural violation—or as discussed more fully below, contributed to weaknesses in the overall substance of the annual goals—the hearing record does not contain sufficient evidence 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 to the student, or 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, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720; see E.A.M., 2012 WL 4571794, at * 8 [recognizing that the IDEA does not require

that goals be drafted at the CSE meeting]; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Therefore, based upon the foregoing, the hearing record establishes that the parent—and the Stephen Gaynor teacher—were provided with, and took advantage of, the opportunity to meaningfully participate in the development of the April 2012 IEP by contributing to the development of the April 2012 IEP and by expressly voicing their disagreements with the April 2012 CSE's recommendation of a 12:1 special class placement. Moreover, the hearing record also establishes that the April 2012 CSE's decision to recommend a 12:1 special class placement was not predetermined, but rather, was reached after consideration of the student's needs and other placement options.[8] While the parent and the Stephen Gaynor teacher disagreed on the appropriate setting for the student, the forgoing evidence shows that it did not amount to predetermination or significantly impeding the parent's participation, even the lateness of the meeting notwithstanding. Instead they had significant input in to the development of the IEP, which process was hardly perfect, but was not so infirm as to rise to the level of a denial of a FAPE. Therefore, the IHO's findings related to these issues must be reversed.

3. Prior Written Notice

Although not addressed by the IHO, the district asserts that even if it did not provide prior written notice in strict conformity with the State and federal regulations, the hearing record reveals that this procedural error did not impede student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits. The parents reject the district's assertions, arguing that the FNR did not provide prior written notice because it was late and inaccurate, and the district failed to send the parents the IEP.

Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has

[8] Placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]).

Here, the hearing record does not include evidence that the district provided the parents with prior written notice in conformity with the State and federal regulations described above (see Tr. pp. 1-303; Dist. Exs. 1-12; Parent Exs. B-O). In addition, any assertions that the August 2012 FNR satisfied the regulatory requirements of prior written notice are not substantiated by the hearing record (see Parent Ex. O). In this case, even if the August 2012 FNR accurately identified the 12:1 special class placement recommendation, it otherwise failed to include information required in a prior written notice, as described above (compare Parent Ex. O, with 34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

As I have cautioned in previous decisions, the district is obligated to provide parents with prior written notice consistent with State and federal regulations on the form prescribed for that purpose by the Commissioner (see 34 CFR 300.503; 8 NYCRR 200.5[a]; see also http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html). In this instance, however, this procedural violation would not result in a denial of FAPE as the parents do not allege that the failure to provide prior written notice 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 benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).[9]

B. April 2012 IEP

1. Present Levels of Performance

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides the background context for the remaining disputed issues to be resolved—namely, whether the annual goals in the April 2012 IEP were appropriate and whether the 12:1 special class placement was appropriate.[10]

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

[9] To be clear, the "CSE Meeting Rationale" submitted as evidence would also not be sufficient to meet the district's obligation to provide prior written notice to the parents for the same reasons articulated above with respect to the August 2012 FNR.

[10] Overall, the IHO concluded that the April 2012 IEP "satisfied standards required for appropriate IEP development," and in support of that conclusion, the IHO cited, in part, to federal and State regulations directly pertaining to the present levels of performance (IHO Decision at p. 16). Therefore, while the district elected to characterize this issue as not being addressed by the IHO, the parents neither admitted nor denied the allegation as a legal argument presented, but then otherwise denied the allegation in the answer (Pet. ¶43; Answer ¶ 43).

student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In developing the student's April 2012 IEP, the hearing record indicates that the April 2012 CSE considered and relied upon the following: 2010 language processing evaluation, a 2011 neuropsychological evaluation, a 2011 psychological evaluation, and a 2011 interim progress report from the parochial school; a 2011-12 Stephen Gaynor progress report; a 2011-12 Stephen Gaynor speech-language remediation report; and a 2011-12 Stephen Gaynor midyear report card (see Tr. pp. 13-16, 19-20, 30, 48-49, 133-34; Dist. Exs. 6-9; 11-12).

With respect to the present levels of performance and individual needs section of the IEP, the April 2012 CSE first reflected the results of standardized testing administered to the student and included testing results obtained from the 2011 neuropsychological evaluation and the 2010 language processing evaluation, along with updated medical information about the student's health status (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 6 at pp. 3-9, and Dist. Ex. 7 at pp. 2-10). In addition, a review of the present levels of performance reflects information provided to the April 2012 CSE by the Stephen Gaynor teacher and information obtained from the 2011 Stephen Gaynor speech-language remediation report (see Tr. pp. 17, 25, 246-48; compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 11 at pp. 1-2).

Next, the April 2012 IEP detailed the student's strengths and weaknesses within the academic achievement, functional performance and learning characteristics section of the IEP (see Dist. Ex. 3 at pp. 1-2). With respect to the student's academic performance—and consistent with the 2011-12 Stephen Gaynor midyear report card—the April 2012 IEP indicated the student read fluently, but lacked comprehension of materials read (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 12 at p. 1). The April 2012 IEP also noted the student's difficulty listening, even when putting forth effort to do so (see Dist. Ex. 3 at p. 1). The April 2012 IEP reported that the student had beautiful handwriting and spelling, but demonstrated difficulty in writing related to the classroom content and sentence structure elements (id.). The April 2012 IEP noted that the student's skills continued to strengthen during the school year, the student's concept development remained weak and required "a lot of support" (id.).

In addition the present levels of performance and individual needs section of the April 2912 IEP reflected information obtained from the 2011-12 Stephen Gaynor speech-language remediation report, noting in part, that the student remembered concepts related to her interests but not those related to the curriculum; she used simple vocabulary; she did not seek information or clarification independently; and she demonstrated difficulty with understanding concepts of time and space, which required repetition and visual support from a teacher (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 11 at pp. 1-3). In addition, the April 2012 IEP reflected the student's difficulty answering "why" questions, as a "concrete thinker," her difficulty with higher order thinking skills (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 11 at p. 2). While the present levels of performance and individual needs in the April 2012 IEP noted the student's ability to write clear sentences and identify the sentence types, the April 2012 IEP also noted the student's struggle to write clear and organized paragraphs due to difficulties with sequencing and using conjunctions (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 11 at p. 3). In addition, the April 2012 IEP reported that the student demonstrated good motivational skills and organized her personal belongings, it also noted the student's lack of connections between concepts and the parents' concerns regarding

the student's reading comprehension and focus (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 12 at pp. 9-10).

However, in this case, while the present levels of performance and individual needs section of the April 2012 IEP accurately and adequately described the student's language and reading functional performance, the April 2012 IEP provided minimal information about the student's instructional needs in mathematics, as reflected in the 2011-12 Stephen Gaynor midyear report card (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 12 at p. 5). Here, the April 2012 IEP indicated that the student could add and subtract fractions, but lacked conceptual skills in any area (i.e., elapsed time) (see Dist. Ex. 3 at p. 1). In contrast, the 2011-12 Stephen Gaynor midyear report card noted the skills and concepts covered during the semester, and further noted the following as the student's strengths: number sense; reading and understanding numbers; solving addition and subtraction problems with regrouping; understanding multiplication and division concepts, as well as multiplication and division facts; and multiplying three-digit numbers without check lists (see Dist. Ex. 12 at p. 5). According to the 2011-12 Stephen Gaynor midyear report card, the student needed support with money concepts, as well as to retain learned skills and grasp abstract concepts and to comprehend language in word problems (id.).

With regard to social development, the present levels of performance and individual needs section of the April 2012 IEP described the student as respectful to peers and adults, and noted that she played well in structured and unstructured situations and initiated play with peers (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 11 at p. 10). The April 2012 IEP further indicated, however, that the student exhibited difficulty with her "tone" when communicating with peers, which required adult cues, and that the student was well-behaved, well-liked, and motivated (Dist. Ex. 3 at p. 2).

Regarding the student's physical development, the April 2012 IEP reflected the student's recent medical information (see Dist. Ex. 3 at p. 2). More specifically, the April 2012 IEP indicated the student's difficulty with word recognition in "noise," especially in her right ear (id.). The April 2012 IEP further noted, as indicated in the 2011 neuropsychological evaluation, the student received a diagnosis of an attention deficit hyper activity disorder (ADHD), inattentive type (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 7 at p. 5). Otherwise, the April 2012 IEP reported that the student demonstrated good physical skills and she enjoyed gym class (see Dist. Ex. 3 at p. 2).

Finally, the April 2012 IEP included recommendations for a number of management needs to support the student, including the following: rereading, repetition, refocusing via signal, proximity working with others, use of high interest and low readability books especially in expository topics, instruction by a certified special education teacher, visual supports, pictures, multisensory instruction, scaffolding due to difficulty understanding concepts of time and space, the use of hands-on-materials, and teacher check-ins to ensure the student understood directions and materials (see Dist. Ex. 3 at p. 3). As a result of the student's average cognitive abilities—but noted difficulties with tasks requiring listening and understanding concepts—the April 2012 IEP documented the student's ability to make progress in the general curriculum when presented at a "slower pace" and when provided with instruction modified by a certified special education teacher in a "small, structured classroom" (id.).

2. Annual Goals

Turning to the dispute regarding the annual goals, the district asserts that the IHO erred in finding that that the annual goals were not appropriate because they did not reflect the student's

then-current present levels of performance. The parents assert that the evidence in the hearing record demonstrates that the annual goals in the April 2012 IEP were not substantively appropriate.

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]).

The April 2012 IEP included six annual goals addressing the student's needs in the areas of language and reading, and one annual goal to address the student's needs in the area of mathematics (see Dist. Ex. 3 at pp. 4-6). Initially, a review of the annual goals indicates that four of the annual goals include multiple student targets: for example the first annual goal indicates that the student "will increase expressive language by telling a historical fiction or biography using logical sequence (first, next, then, last) and with sufficient content (characters, setting events, problem, solution); and by producing complex sentences with conjunction and coordination (e.g. 'and, but, then') and causation ('because, if, so')" (Dist. Ex. 3 at p. 4).[11]

To address the student's third-grade reading comprehension skills, the April 2012 IEP included an annual goal to address the student's ability to identify the main ideas; write chapter summaries; and answer comprehension questions related to the main idea, drawing conclusions, and cause and effect and inferences, on a fourth to fifth grade level, per leveled books (see Dist. Ex. 3 at p. 5). Although the annual goal includes multiple skill targets within a single annual goal, the targeted skills align with the student's reading comprehension needs as identified in the 2011-12 Stephen Gaynor midyear report card (compare Dist. Ex. 3 at p. 5, with Dist. Ex. 12 at p. 1).

Next, to address the student's writing needs, the April 2012 IEP included an annual goal to address the student's ability to develop a three-paragraph story, essay, or research; to develop paragraphs with topic sentences, three to four supporting sentences, and a concluding sentence; and to develop an outline using a graphic organizer (see Dist. Ex 3 at p. 5). In this case, the annual goal appears to be misaligned with the description of the student's present level of performance as described in the April 2012 IEP, which noted that the student tried to "write paragraphs, generate[] ideas and personal experiences," but could not link her writing to the curriculum (see id. at pp. 1-2). The annual goal also appears to be misaligned with the student's difficulty sequencing sentences and writing in a clear and organized fashion (id.).

With respect to mathematics, it is not unexpected that the one annual goal does not adequately address the student's needs in this area when the April 2012 IEP provided little, if any, information describing the student's functional ability or needs related to mathematics (compare

[11] Generally, the annual goals incorporated multiple skills or components, which may complicate or hinder a provider's ability to not only guide the student's instruction, but may also complicate or hinder a provider's ability to measure the student's progress on a specific annual goal. However, while not well-written, this deficiency would not, alone, render the annual goals so inappropriate that they would fail to address the student's needs.

Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 3 at p. 6). Here, the mathematics annual goal targets the student's ability to solve 10 multistep math calculation and word problems (see Dist. Ex. 3 at pp. 1, 6). However, the annual goal does not address the student's needs identified in the 2011-12 Stephen Gaynor midyear report card related to mathematics, which indicated that the student needed support to retain learned skills and concepts, to grasp abstract concepts, to identify key words to determine the "correct operation consistently" related to word problems, and to develop money skills (see Dist. Ex. 12 at p. 5).

Overall the noted deficiencies, the annual goals in the April 2012 IEP might not have, in and of themselves, amounted to a denial of a FAPE because there was significant alignment with the student's present levels of performance and areas of identified needs (compare Dist. Ex 3 at pp. 1-2, with Dist. Ex. 3 at pp. 4-6; see P.K. v. New York City Dep't of Educ. (Region 4), 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]). However, when the identified deficiencies are considered cumulatively with the deficiency in the educational placement on the IEP discussed further below, I cannot conclude that the district's IEP was, overall, sufficient to offer the student a FAPE.

3. 12:1 Special Class Placement

Next, the district contends that the IHO erred in finding that the recommended 12:1 special class placement was not supported by sufficient information indicating that the student could function in a setting that was less restrictive than the setting at Stephen Gaynor. The parents argue that the 12:1 special class placement was not appropriate because the student required additional adult support in the classroom. As discussed more fully below, a review of the hearing record ultimately supports the IHO's conclusion that the 12:1 special class placement was not appropriate, and as a result, the district failed to offer the student a FAPE for the 2012-13 school year.[12]

In this case, the audiologist who administered the 2010 language processing evaluation recommended that the parents consider placing the student in a school that provided "speech-language services and special education with a favorable student-to-teacher ratio" so the student could receive "individualized instruction" with limited pull-out services (Dist. Ex. 6 at p. 10). The audiologist based this recommendation on the student's auditory processing disorder; phonological processing disorder affecting reading; receptive and expressive language disorder; and difficulty understanding concepts, following directions, and word retrieval deficit (see id. at pp. 8-10). Similarly, the 2011 neuropsychological evaluation recommended that the student attend a "small school, which would be a highly-structured setting with small class size" and geared toward students with language-based learning disabilities (Dist. Ex. 7 at pp. 5-6). The evaluator based this recommendation on the student's need for a "great deal of individualized attention to help explain and reinforce content areas and improve basic skills," along with continued speech-language services (id.at p. 6). More specifically, the evaluator recommended this level of support in order to address the student's language impairment, which affected "word retrieval," "syntactic formulation," and "language understanding" (id. at p. 5). The evaluator further noted that the student required individualized attention due to an ADHD and executive functioning difficulties,

[12] The crux of the parties' dispute with respect to the 12:1 special class placement focuses on whether the student would receive sufficient adult support given the complexity of the student's needs and her academic functional levels.

which affected her ability to plan, organize, and manage time and which also affected working memory and learning tasks across linguistic and non-linguistic modalities (id.). The evaluator opined the student's speech, language and cognitive difficulties significantly affected her educational achievement, and in particular, the student's reading comprehension, mathematics, and writing when organization and language were involved (id. at pp. 5-6).

In addition, the hearing record included documentation describing the level of support the student required, as reflected in the 2011-12 Steven Gaynor midyear report card (see Dist. Ex. 12 at pp. 1-11). In particular, the 2011-12 Stephen Gaynor midyear report card indicated the following: the student worked one-on-one with a reading specialist once a week to preview and review text information; she required one-on-one discussions with a teacher prior to writing to help organize her thoughts; she required teacher assistance to understand cause and effect; she needed redirection to sustain focus and redirection throughout the day; at times, the student needed assistance in following game rules and strategies; and she required support from a "language therapist" in the classroom five times per week in writing and social studies in order to support her understanding of the content of the material (id. at pp. 1, 3, 6, 8-9, 11). Furthermore, the hearing record supports the student's need for repetition, review, redirection, teacher support to resolve peer conflicts, visual supports, hands-on activities, adult prompting, information broken down into small language units, preview and review of material, and adult support to maintain focus (see Dist. Exs. 4 at p. 2; 11 at pp. 1-2; 12 at pp. 1-3, 6, 11).

As noted above, the district school psychologist testified that the April 2012 CSE recommended the 12:1 special class placement based upon information that the student functioned at least two grade levels below where expected and that within a 12:1 special class placement, she would be exposed to the fifth grade curriculum but with the necessary modifications and accommodations provided by a special education teacher in a "small class" setting (Tr. pp. 32-34, 36). In addition, the district school psychologist testified that the student required a "lot of support" to meet grade-level standards, but expressed that the 12:1 special class placement could accommodate the student's numerous management needs (Tr. pp. 34-36). However, the hearing record does not reflect that the April 2012 CSE addressed either the Stephen Gaynor teacher's concern expressed at the meeting indicating that the student required additional adult support within the classroom—or the information described above—as relevant factors to be considered in reaching the decision to recommend a 12:1 special class placement. Therefore, based on the foregoing, the weight of the evidence supports the IHO's conclusion that the 12:1 special class placement was not appropriate because it would not have provided the student with sufficient support. The deficiencies in the IEP, including the deficiencies in the content of goals combined with the insufficiency of the support within a 12:1 special class resulted in an IEP that was not reasonably calculated to enable the student to receive educational benefits.

C. Challenges to the Assigned Public School Site

As discussed more fully below, the district correctly argues that any determinations with respect to the assigned public school site—either concerning the selection process or the perceived inadequacies of the resulting choice—were speculative and the IHO erred in finding denial of a FAPE regarding these claims.

First, the district argues that contrary to the IHO's determination, it fulfilled its obligation to have an IEP in effect at the start of the 2012-13 school year and any delay in sending an FNR

to the parents after the April 2012 CSE meeting is without merit. The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[13] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y., 584 F.3d 412). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]).

Additionally, the district correctly asserts that contrary to the IHO's finding, the district was not required to provide the parents with a particular amount of information about the assigned public school site at the visit. The Second Circuit has clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013] [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[14]

Therefore, the IHO's conclusion that the district's failure to provide the parents with sufficient information about the assigned public school site's ability to implement the April 2012 IEP at the time of the parents' visit must be reversed.[15]

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[13] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

[14] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [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.

[15] Notably, aside from the content required in the IEP and the prior written notice, the IDEA does not contain any standard identifying what specific information must be provided to parents in advance regarding the anticipated delivery of services after an IEP has been developed (see 20 U.S.C. §§ 1400-1482). School districts charged with

To the extent that the IHO found that the district failed to allow the parents to participate in the selection process of the assigned public school site, the IHO confused the term "educational placement" with "location" of services. The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. Aug. 19, 2011]; R.K. v. Dep't of Educ., 2011 WL 1131492, at *15-*17 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, 694 F.3d 167; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). Moreover, the R.E. Court found that "[t]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site," and that "[t]he [district] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP" (R.E., 694 F.3d at 191-92; see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *5 [N.D.N.Y. Feb. 28, 2013]; J.L. v. City Sch. Dist. of City of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *12 [S.D.N.Y. Oct. 16, 2012]); K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 668 [S.D.N.Y. Nov. 18, 2011]; S.F., 2011 WL 5419847, at *12, *14; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8-*9 [S.D.N.Y. Oct. 28, 2011]; A.L, 812 F. Supp. 2d at 504). As a result, the IHO erred in concluding that the parents had a right to participate in the selection of the assigned public school site.

As explained most recently, [i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP. M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]) Instead, "[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. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 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., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because

implementing IEPs have been given considerable administrative discretion in the delivery of services so long as they are provided in conformity with State regulations and each student's IEP as written.

necessary services included in the IEP were not provided in practice'" (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 187 n.3).

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 Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I continue to find it necessary to depart from those cases.

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, deviation from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P., 370 Fed. App'x at 205; Van Duyn, 502 F.3d at 822; see D. D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502-03). [16, 17]

VII. Equitable Considerations

As noted previously, the district did not appeal from the IHO's determination that Stephen Gaynor was an appropriate placement for the student. Turning next to equitable considerations, the district asserts that the hearing record indicates that the parents never seriously considered sending the student to a public school for the 2012-13 school year. The parents deny the district's assertion and argue that they cooperated with the April 2012 CSE, visited the assigned public school, and provided timely notice of their intention to unilaterally place the student at Stephen Gaynor.

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

[16] Moreover, both the assistant principal of the assigned public school site and the parents' representative testified that the assigned public school site could implement the April 2012 IEP (see Tr. pp. 111-13, 281).

[17] The IHO's credibility finding in the district's favor regarding the parents' August 29, 2012 visit to the assigned public school site is not consistent with the IHO's finding that the district failed to provide the parents with sufficient information that the assigned public school site could implement the IEP (see IHO Decision at pp. 21-22 n.7).

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, 192 Fed. App'x 62, 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]).

Contrary to the district's allegation that equitable considerations should preclude relief in this instance because the parents never seriously considered sending the student to a public school for the 2012-13 school year, a review of the evidence in the hearing record reveals otherwise. Initially, the district school psychologist testified that the parents came to the April 2012 CSE seeking a public school placement (see Tr. pp. 41-42). In addition, the hearing record supports the IHO's findings that the parents participated in the April 2012 CSE meeting, visited the assigned public school site, and timely informed the district of their intention to unilaterally place the student at Stephen Gaynor for the 2012-13 school year (see Tr. pp. 17, 22-23, 84, 213, 220, 223, 225-27; Dist. Exs. 3 at pp. 2, 13; 4 at pp. 1-2; Parent Ex. D). Further, although the parents signed an enrollment contract with Stephen Gaynor prior to the April 2012 CSE meeting and prior to visiting the assigned public school site, the enrollment contract provided that if prior to September 6, 2012, the parents withdrew the student from Stephen Gaynor and placed the student in a public school, then the parents would be relieved from additional payment obligations and would receive a refund for previous tuition payments, "including the otherwise non-refundable tuition deposit" (see Parent Ex. E at p. 2). Second Circuit has also recently opined upon this issue, holding that where parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even

assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale, 744 F.3d at 840). Therefore, in accord with the IHO's finding, equitable considerations in this case do not bar the parents from relief.

VIII. Conclusion

In summary, the evidence in the hearing record supports the IHO's ultimate determination that the district failed to offer the student a FAPE for the 2012-13 school year, to the extent indicated in the body of this decision, and that equitable considerations support payment of the tuition costs for the student's 2012-13 school year at Stephen Gaynor (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

Dated: **Albany, New York**
April 22, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER