The University of the State of New York

The State Education Department
State Review Officer
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No. 13-153

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, Neha Dewan, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Neal H. Rosenberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Aaron School 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

On April 23, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 3 at pp. 1, 10-12).[1] Finding that the student remained eligible for special education programs and related services as a student with a speech or language impairment, the CSE recommended: integrated co-teaching (ICT) services for mathematics,

[1] On February 27, 2012, the parents executed an enrollment contract for the student's attendance at the Aaron School for the 2012-13 school year (Parent Ex. E at pp. 1, 3). The student had continuously attended the Aaron School since second grade during the 2004-05 school year (see Tr. p. 199). The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

English language arts (ELA), social studies, and science; one 40-minute session per week of individual speech-language therapy; two 40-minute sessions per week of speech-language therapy provided to the student in the classroom; one 40-minute session per week of individual occupational therapy (OT); one 40-minute session per week of OT provided to the student in the classroom; one 40-minute session per week of individual counseling; and one 40-minute session per week of counseling provided to the student in the classroom (id. at pp. 6-7, 10).[2]

By final notice of recommendation (FNR) dated August 3, 2012, the district summarized the recommendations made by the April 2012 CSE and notified the parents of the particular public school site to which it had assigned the student (see Dist. Ex. 12).

In a letter dated August 22, 2012, the parents acknowledged receiving notice of a public school site, and "reiterate[d]" their concerns that the student required "a more restrictive special education program" than the recommended ICT services (Parent Ex. H). Unable to visit the assigned public school site during the summer, the parents informed the district that they planned to visit in September and requested a class profile "detailing the functional level[s]" of the other students in the assigned ICT classroom (id.). In addition, the parents indicated that, until they could determine the "appropriateness of the placement," the student would attend the Aaron School, and they reserved the right to seek tuition reimbursement (id.).

On September 10, 2012, the parents contacted the assistant principal at the assigned public school site via email (Parent Ex. I; see Tr. pp. 122-23). The parents informed the assistant principal about the student's IEP recommendations and inquired as to whether the assigned public school site had a "place" for the student (Parent Ex. I). On September 12, 2012, the parents visited the assigned public school site (see Parent Ex. J at p. 1).

In a letter to the district dated September 24, 2012, the parents again "reiterate[d]" their concerns that the student required a "more restrictive special education program" than the recommended ICT services (Parent Ex. J at p. 2). The parents also noted that the district had not responded to their August 22, 2012 letter and that they had expressed their "concerns" at the student's April 2012 CSE meeting (id.). With respect to their visit to the assigned public school, the parents expressed concerns about: the size of the school and how "distracting" it would be for the student; the number of students in the observed ICT class, and the fact that some students did not speak English; the lack of small group instruction in reading and mathematics within the ICT class; the "high level of noise" at lunch; and the disruptive effect of the provision of related services by removing the student from the class "six times per school week" (id. at pp. 2-3). Based upon their own internet research, the parents also expressed concerns that the assigned public school site had "bullying issues" (id. at p. 3). As a result, the parents indicated that the student would continue to attend the Aaron School, and they would seek tuition reimbursement (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated January 25, 2013, the parents alleged that the April 2012 IEP contained "multiple procedural and substantive errors," and failed to offer the student a

[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]).

free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1 at p. 1). The parents alleged that the April 2012 CSE was not validly composed, the annual goals and short-term objectives did not appropriately address the student's needs, the April 2012 CSE did not follow proper procedures in conducting the CSE meeting, the April 2012 CSE did not consider all of the "relevant documentation" in order to make its recommendations, and the "program and placement" were not appropriate for the student (id.). In addition, the parents specifically alleged that the assigned public school site was not appropriate (id.). After reasserting many of the same concerns about the assigned public school site as set forth in their September 24, 2012 letter, the parents also asserted that it was not appropriate for the following reasons: the student would attend large classes "without special education support," the student would not receive the "level of small group and individualized special education support" he required, the student would not receive all of his classes within an ICT model, and the student would not receive all of his instruction from special education teachers (id.).

Next, the parents indicated that the Aaron School provided the student with an appropriate education and, as a proposed resolution, requested tuition reimbursement and the provision of transportation and related services (Dist. Ex. 1 at p. 2).

B. Impartial Hearing Officer Decision

On May 14, 2013, the parties proceeded to an impartial hearing, which concluded on June 11, 2013, after two days of proceedings (Tr. pp. 1-359). In a decision dated July 12, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the Aaron School was an appropriate unilateral placement for the student, and equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 14-18). Due to the IHO's "substantial legal concerns" surrounding the development of a draft IEP prior to the April 2012 CSE meeting and her finding that the district failed to provide the parents with a copy of the draft IEP, the IHO determined that the parents' "claim that the recommendation was predetermined, without appropriate evaluation of [the student] and without meaningful opportunity for the parent[s] to participate" was supported by the hearing record (id. at pp. 15-16). In addition, the IHO held that the April 2012 CSE did not include a regular education teacher and that, given the student's "severe sensory deficits," the recommendation for ICT services and the April 2012 CSE's refusal to consider a full-time special education program for the student was not appropriate (id. at pp. 16-17). Finally, the IHO rejected the parents' testimony regarding their visit =to the assigned public school site (id.).

The IHO also held that the parents satisfied their burden of proving that Aaron School was an appropriate unilateral placement for the 2012-13 school year, in that the school addressed the student's special education needs and the student made progress at the school (IHO Decision at pp. 17-18). The IHO also found that equitable considerations did not operate to deny the parent's request for tuition reimbursement (id. at p. 18). Consequently, the IHO ordered the district to pay the costs of the student's tuition at the Aaron School for the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year; that the Aaron School was an appropriate

unilateral placement for the student; and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. The district asserts that the IHO exceeded her jurisdiction in addressing the issue of predetermination because the parents did not allege that the district predetermined the student's April 2012 IEP in the due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE. Alternatively, the district contends that the IHO erred in finding that the recommended program was predetermined. Next, the district alleges that the IHO erred in finding: that the parents were not provided a meaningful opportunity to participate during the April 2012 CSE; that the April 2012 CSE was not properly composed due to the absence of a regular education teacher or, alternatively, that the absence of a regular education teacher did not rise to the level of a denial of a FAPE; and that the program recommendation was not appropriate.

Next the district argues that the IHO erred in concluding that the Aaron School was an appropriate placement for the student for the 2012-13 school year, alleging that the hearing record fails to contain sufficient evidence that the student received speech-language therapy or that the student would receive related services. Finally, the district asserts that the IHO erred in concluding that equitable considerations weighed in favor of the parents' request for tuition reimbursement.

The parents answer, denying the allegations raised in the district's petition and asserting that the IHO correctly determined that the district failed to offer the student a FAPE, that the Aaron School was an appropriate placement for the student, and that equitable considerations weighed in favor of awarding the parents tuition reimbursement. The parents also assert that the IHO did not exceed her jurisdiction by addressing the issue of predetermination, since the due process complaint raised the issue by alleging that the district failed to follow proper procedures in conducting the CSE meeting and in not considering all the relevant documentation. The parents assert that the district failed to appeal the IHO's finding that the IEP did not address the student's social and emotional deficits and, therefore, the issue is outside the scope of appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school

districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic,

developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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. Scope of Impartial Hearing and Review

An independent review of the entire hearing record supports the district's argument that the IHO exceeded her jurisdiction by addressing and relying upon issues that were not raised in the parents' due process complaint notice in order to conclude, in part, that the district failed to offer the student a FAPE for the 2012-13 school year (see Dist. Ex. 1). Specifically, the IHO concluded that the CSE's recommendation for an ICT program was predetermined, stating that "[t]he existence of the draft IEP, complete with recommendation for the following school year, supports the parents' claim that the recommendation was predetermined, without appropriate evaluation of [the student] and without meaningful opportunity for the parent to participate" (IHO Decision at pp. 15-17).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR

300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S, Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In this case, the parents' due process complaint notice cannot be reasonably read to allege that the April 2012 CSE impermissibly predetermined the student's special education placement recommendations (see Dist. Ex. 1 at pp. 1-2). Contrary to the parents' assertion, the allegation in the due process complaint notice that the district failed to follow proper procedures in conducting the CSE meeting was not sufficiently specific to raise the issue of predetermination (see id. at p. 1). Further, the hearing record does not reflect that the parents requested or that the IHO authorized an amendment to the due process complaint notice to include this issue. Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice, the IHO should not have considered whether or not the district engaged in impermissible predetermination.[3]

[3] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M., 2013 WL 1972144, at *5-*6), the issues raised and addressed sua sponte by the IHO in the decision were initially raised—if at all during the impartial hearing—by counsel for the parents during opening statements (see, e.g., Tr. p. 10). While the district solicited testimony regarding the creation of the draft IEP (see Tr. pp. 42-43), which ultimately formed the basis for the IHO's determination that IEP was predetermined, this examination of the witness constituted a mere solicitation of general background information as part of routine questioning and did not serve to "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at *10-*11; J.C.S., 2013 WL 3975942, at *23; B.M., 2013 WL 1972144, at *6).

Based on the foregoing, the IHO exceeded her jurisdiction in finding that April 2012 CSE recommendation was predetermined and that this issue contributed, in part, to the overall determination that the district failed to offer the student a FAPE for the 2012-13 school year. This determination must, therefore, be reversed. Notwithstanding the foregoing and out of an abundance of caution, alternative findings on the issue of predetermination have been set forth below.

With respect to the parents' claim that the district failed to appeal the IHO's determination that the April 2012 IEP did not address the student's social and emotional deficits, an IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, upon review of the district's petition, the issue of the appropriateness of the program recommendations set forth in the April 2012 IEP was sufficiently raised and the IHO's reasoning underlying her decision that the ICT was not appropriate, including her consideration of the student's social and emotional deficits, is encompassed in the district's appeal.

B. CSE Process

1. Predetermination / Parent Participation

Even assuming for the sake of argument that a predetermination claim was properly before the IHO, it is without merit. The IHO's finding of predetermination was based on her conclusions that the district developed a draft IEP prior to the April 2012 CSE meeting, did not provide a copy of that draft IEP to the parents, and deprived the parents a meaningful opportunity to participate at the meeting (IHO Decision at pp. 15-16).

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 & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [indicating that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d

130, 136 [E.D.N.Y., 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

A district is permitted to develop a draft IEP prior to a CSE meeting so long as the parents are not deprived of the opportunity to meaningfully participate in the development of the IEP (Dirocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013]). With respect to the draft IEP utilized at the April 2012 CSE meeting, the hearing record includes a copy with handwritten notations, which the district representative testified were added during the course of the April 2012 CSE meeting (Tr. p. 40; Dist. Ex. 4). There is a handwritten notation on the draft IEP that reads “continue [ICT],” indicating that the note was added during the CSE meeting and not before (Dist. Ex. 4 at p. 9). Moreover, the draft IEP does not reflect the CSE's recommendations as they appear on the completed version of the April 2012 IEP (compare Dist. Ex. 3 at p. 10 with Dist. Ex. 4 at p. 8). Thus, the draft IEP document does not support a conclusion that the CSE's recommendations for the student were predetermined.

Moreover, the hearing record reflects meaningful and active parental participation in the development of the student's April 2012 IEP. A review of the hearing record reveals that the April 2012 CSE considered a March 2010 social history, a March 2010 educational report, a February 2010 speech-language evaluation; and December 2011 and March 2012 Aaron School reports (Tr. p. 31; Dist. Exs. 6; 7; 8; 9; 10). The district representative testified that the draft IEP, which was developed prior to the April 2012 meeting, contained present levels of performance derived from the student’s reports (Tr. p. 39). The district representative testified that the draft IEP was reviewed "section by section," at the meeting (Tr. p. 40).

The district representative stated that the parents "absolutely" were provided the opportunity to give input regarding development of the April 2012 IEP (Tr. p. 45). The district representative testified that both the parents and private school teacher "participated" and provided perspective on what related services were effective for the student, based on the services that the student had been receiving at the time (Tr. p. 57).[4] The district representative testified and the April 2012 IEP reflects that the student's private school teacher and the parents contributed information regarding the student's present levels of performance (Tr. pp. 76-77, 291; Dist. Ex. 3 at pp. 1-2).

Although the parent described the CSE meeting as "pretty short" and stated that it was clear to him that the district was “just going through the motions" in order to recommend ICT services for the student, the parent also testified that there were "heated discussions" concerning the

[4] According to the record, the student's group speech therapy was increased from one time to two times per week, as a result of input from the parents and the Aaron School teacher (Tr. p. 57).

recommendation for ICT services (Tr. p. 273). The parent testified that he and the private school teacher participated in those discussions, expressing their disagreement with the recommendation for ICT services (see Tr. pp. 273-75). The parent confirmed that the CSE engaged in a "big discussion" over the student's inability to perform in a general education setting (Tr. pp. 287-88). The parent expressed that he was given minimal opportunity to participate in the April 2012 CSE meeting but clarified that the district did not limit what he was able to say but, rather, assigned less weight to his contributions in the development of the IEP (Tr. pp. 301-03).

In this instance, the hearing record does not show that the preparatory activities that the district engaged in prior to the April 2012 CSE meeting led to impermissible predetermination of the program and placement recommendations (see M.W., 869 F. Supp. 2d at 333-34 [holding that the fact that the district CSE participants were prepared for the meeting did not mean that the IEP developed for the student was predetermined]). Based upon foregoing, the evidence in the hearing record does not support the IHO's conclusion that district predetermined the student's program for the 2012-13 school year and I find that the district did not significantly impede the parents from the opportunity to meaningfully participate in the IEP development process (T.P., 554 F.3d at 253; see M.W., 869 F. Supp. 2d at 333-34; R.R., 615 F. Supp. 2d at 294).

2. CSE Composition

The district asserts that the IHO erred in concluding that the April 2012 CSE team was not properly composed due to the absence of a regular education teacher or, in the alternative, such a procedural violation did not rise to the level of a denial of a FAPE. 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 the determination of 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]).

In this case, a review of the April 2012 IEP reflects that attendees at the CSE meeting included the parent, the district representative, a district special education teacher, an additional parent member, and the student's teacher from the Aaron School (Dist. Ex. 3 at p. 12). The hearing record further reflects that the attendance record of the April 2012 CSE meeting does not include a signature of a regular education teacher (id.).

The district asserts that the Aaron School teacher served as a regular education teacher at the April 2012 CSE meeting. However the record is inconclusive regarding the teaching certifications held by the Aaron School teacher (compare Tr. pp. 200-202, 207 with Tr. p. 354).[5]

[5] During cross-examination concerning the credentials of the student's Aaron School teachers, the private school administrator was asked to clarify whether all teachers at the private school were certified in general education (see Tr. pp. 200-207). She responded in pertinent part, "[y]es, I believe [the student's]—all the teachers have certification in education' (Tr. p. 207). The record is not clear as to whether the administrator was referring to all of the student's current teachers or all the teachers at the school including the teacher who attended the April 2012 CSE meeting.

The hearing record does not otherwise establish that a regular education teacher participated in the CSE meeting. Therefore, the IHO correctly determined that the April 2012 CSE was improperly composed.

However, 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 v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [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]). As discussed above, a review of the hearing record indicates that the parents and the private school 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. 44-48, 51-54, 57, 60-61, 65, 73, 79-80, 273-76, 287-88, 291, 296-98, 302-03). The IHO concluded that the presence of a general education teacher was required at the April 2012 CSE meeting because the IEP recommendation "envisioned [the student's] participation in non-core general education classes as well as the ICT class" (IHO Decision at p. 16). However, as discussed below, the recommended placement was appropriate and the April 2012 IEP provided the student with appropriate supports in the recommended setting. Accordingly, the IHO erred in finding a denial of a FAPE based, in part, upon a determination that the April 2012 CSE was inappropriately constituted because it did not include a regular education teacher (see 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]; see also S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]).

C. April 2012 IEP—ICT Services

The district argues that the April 2012 CSE's recommendation for an ICT class with related services was appropriate, and the IHO erred in concluding otherwise.

According to the hearing record, the April 2012 CSE considered various current evaluative materials in developing the student's IEP for the 2012-13 school year (see Dist. Exs. 3, 6, 7, 8, 9, 10). The April 2012 IEP noted that the student functioned within the average range for most areas of academic achievement (Dist. Ex. 3 at p. 1). The April 2012 IEP identified the student's individual needs in the areas of writing, oral reading and expressive language, comprehension, operational skills, word problem solving, coping with challenging situations, pragmatic language and conversation, stamina, graphomotor skills, and sensory processing (Dist. Ex. 3 at pp. 1-2). Specifically, the IEP described the student's difficulties organizing and editing his writing (id. at p. 1). The student's IEP indicated that he had difficulty with multistep math problems (id.).

With regard to the student's social/emotional management needs, the IEP indicated that the student had difficulty with social functioning (id. at pp. 1-2). The student's present levels of performance further stated that he had difficulty managing his emotions in class, acted "silly," and became nervous during social situations (id. at pp. 1, 5). The IEP noted that the student was better able to communicate with adults but was able to relate to students who were on his level socially (id. at pp. 1-2).

The parents expressed concerns regarding the student's tendency to rush, which the April 2012 CSE addressed by recommending that the student be provided reminders to slow down (Dist. Ex. 3 at p. 1-2). The April 2012 IEP noted the student's difficulties in the area of attention and concentration (id. at p. 1). With regard to the student's health and physical development, the IEP identified needs related to stamina, strength, graphomotor ability and sensory processing (id. at p. 6). The IEP also indicated that the student demonstrated general knowledge of the importance of hygiene and nutrition and their application in the real world (id. at p. 2).

The April 2012 CSE recommended ICT services in math, ELA, social studies, and science (Dist. Ex 3 at pp. 6-7). State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving [ICT] services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]).

According to the district representative, the parents and the student's Aaron School teacher informed the April 2012 CSE that they believed that the ICT class was insufficiently supportive and that the size and noise level of the class would cause the student to experience anxiety (Tr. pp. 60-61). Similarly, the IHO concluded that ICT services were not appropriate because the student was not regulated enough, became overwhelmed in large situations, was unable to focus if there was a lot of noise, and was less able to attend to directions in a large class (IHO Decision at p. 16).

In contrast, the district representative indicated that the student experienced delays in academics but that attention "wasn't a huge issue" for the student (Tr. p. 78). Furthermore, the district representative testified that, at the April 2012 CSE meeting, the parents stated that they expected their son to go to college (Tr. p. 60). The district representative expressed that the student would have to be instructed in the general education curriculum in order for that to occur (id.). She further testified that, although the student was struggling in some areas academically, for which he did need some support during the school day; he was functioning in the average range academically in all areas and could follow a general education curriculum (Tr. pp. 59). Therefore, the district representative concluded that the student should have full access to the general education curriculum and typically developing peers throughout the school day (Tr. pp. 59-60). She further opined that the student's disability was not severe enough to warrant a special class environment (Tr. p. 61).

The record also reflects that, at the time of the April 2012 CSE meeting, the student had shown improvement in social functioning and had a preferred group of friends in his then current environment (Dist. Ex. 3 at p. 1). Given the student's improvements in social skills and his abilities relative to the regular education curriculum, the hearing record reveals that the district's

recommended placement, consisting of an ICT classroom along with the related services of speech, OT and counseling represented the LRE for the student (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145 (2d Cir. 2013).

In addition to ICT services, the April 2012 CSE recommended related services for the student (Dist. Ex. 3 at p. 7). To address the student's speech-language needs, the April 2012 CSE recommended that the student receive speech-language therapy for one 40-minute session per week individually in a separate location and two 40-minute sessions per week in the classroom (id.). In addition, to address the student's graphomotor skills, the CSE recommended OT for one 40-minute session per week individually in a separate location and one 40-minute session per week in the classroom (id.). With respect to the student's social emotional needs, the CSE recommended counseling for one 40-minute session per week individually in a separate location and one 40-minute session per week in the classroom (id.). The April 2012 IEP also included objectively measurable goals, consistent with the student's needs and abilities, and as described in the information provided by the Aaron School during the April 2012 CSE meeting (Dist. Ex. 3 at pp. 3-6; see generally Dist. Exs. 6; 7). The hearing record shows that the goals were designed to meet the student's needs resulting from the student's disability and to enable the student to be involved in and make progress in the general education curriculum.

Furthermore, the district representative stated that the student's speech therapy, counseling, and OT services would be provided within the classroom environment for part of the day, in order to provide the student with additional curriculum support and that counseling provided within the classroom would serve to address the student's self-advocacy and coping skills (Tr. pp. 62-64). She asserted that, for this student, providing related services within the classroom was beneficial because pulling the student out for related services would disrupt content area instruction (Tr. p. 81).

Based upon the foregoing and contrary to the IHO's finding, the evidence contained in the hearing record supports the conclusion that the district's recommendation for ICT and related services was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

D. Challenges to the Public School Site

Although the IHO rejected the parents' claims about the assigned public school site, to the extent that the IHO relied upon evidence regarding the public school site to determine that the April 2012 CSE's recommendations for the student were not appropriate, and because the district appealed such determination, the IHO's consideration of the evidence relating to the public school site will be addressed.[6]

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] The parents have not appealed the IHO's determination regarding the assigned public school site (see IHO Decision at pp. 16-17). Accordingly this determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

*6).[7] 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. v. New York City Dep't of Educ., 584 F.3d 412 [2d Cir. 2009]). 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., 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]).

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 677-78 [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

[7] 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]).

a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally 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 Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187). 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]).[8]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing and under the circumstances of this case, I find that the IHO erred in determining that the April 2012 IEP was inappropriate for the student, in part, based upon a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned public school site, which was not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the April 2012 IEP containing the recommendations of the CSE by the district and instead chose to maintain the student's enrollment at the Aaron School (see Parent Ex. J at pp. 2-3). While I can understand the parents' concern that IEP services would not be put into effect for their son in conformity with federal and State regulations if they placed him in the public school, the district cannot escape its

[8] 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 T.Y., 584 F.3d at 420 [noting that the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

obligation to put the IEP into effect and such concerns are not automatically transformed into viable claims simply by the parents visiting the public school site and viewing other students receiving services under different IEPs (see F.L., 2012 WL 4891748, at *13-*14).[9] Accordingly, the parents' claims regarding the assigned public school site were speculative and the IHO's findings relying on evidence relating to potential events at the assigned public school site must be reversed.

VII. Conclusion

In summary, the IHO's conclusion that the district failed to offer the student a FAPE for the 2012-13 school year must be reversed as it is not supported by the hearing record. The April 2012 CSE's recommendations for ICT services and related services were reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE in the LRE for the 2012-13 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S., 2011 WL 3919040, at *13).

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 12, 2013, is modified by reversing that portions which found that district failed to offer the student a FAPE for the 2012-13 school year, and directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2012-13 school year.

Dated: **Albany, New York**
October 25, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

[9] While not required, the practice of visiting an assigned school in a unilateral placement case has value for purposes of equitable considerations, especially if it helps the parents further explain to the district their views regarding the alleged defects in the IEP which require correction.