The University of the State of New York

The State Education Department
State Review Officer
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No. 13-163

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, Alexander M. Fong, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, Diana Gersten, 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 Stephen Gaynor School (Stephen Gaynor) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a preschool 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 Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).[1]

[1] Similarly, when a student in New York is eligible for special education services as a preschool student with a disability, State regulations call for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) (see 8 NYCRR 200.1[mm], 200.3, 200.16).

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 § 4410; 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 § 4410; 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 30 days after the expiration period or adjusted period for the resolution process (Educ. Law § 4410; 34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5], 200.16). A party may seek a specific extension of time of the 30-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], 4410; 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 CPSE met on May 9, 2012 to develop the student's IEP for the 2012-13 school year (Dist. Ex. 16 at pp. 1, 21).[2] As a preschool student with a disability, the May 2012

[2] During the 2011-12 school year, the student attended a general education preschool setting with five hours per week of special education itinerant teacher (SEIT) services and related services of occupational therapy (OT), speech-language therapy, and physical therapy (PT) (see Dist. Ex. 12 at pp. 1-2, 16-18; see also Tr. pp. 47-48).

CPSE recommended eight hours per week of SEIT services, three 45-minute sessions per week of individual speech-language therapy, three 45-minute sessions per week of individual OT, and two 45-minute sessions per week of PT (id. at p. 17). In addition, the May 2012 CPSE created 16 annual goals with corresponding short-term objectives, and management needs to address the student's needs (see id. at pp. 6-11). At the conclusion of the meeting, the district provided the parents with a final notice of recommendation (FNR) dated May 9, 2012, summarizing the recommendations made by the May 2012 CPSE (see Dist. Ex. 23).

On June 19, 2012, the parents executed an enrollment contract with Stephen Gaynor for the student's attendance during the 2012-13 school year beginning in September 2012 (see Parent Ex. G at pp. 1-4).[3]

By letter dated July 30, 2012, the parents provided the district with a copy of a privately obtained psychological evaluation report (June 2012 evaluation) (Dist. Ex. 29; see Dist. Ex. 27 at pp. 1-10). The parents indicated that as noted by the student's SEIT and as reflected in the student's June 2012 IEP, the student was not "making progress" (Dist. Ex. 29). The parents further indicated that according to the enclosed June 2012 psychological evaluation, the student required a "far more comprehensive full-time special education program," and requested a "new meeting for a change of placement to a center-based pre-school for September" (id.; see Dist. Ex. 27 at pp. 1-10).

Pursuant to the parents' request, the CPSE reconvened on August 6, 2012 (see Dist. Exs. 25; 26 at p. 1; 28 at pp. 12-13). As a result, the August 2012 CPSE modified the May 2012 IEP, and recommended a 12-month special education program in a full day, 12:1+2 special class in a center-based preschool setting in the August 2012 IEP (compare Dist. Ex. 26 at pp. 1, 19-20, 22, with Dist. Ex. 16 at pp. 1, 17-18, 20). In addition, the August 2012 CPSE modified the duration of the related services from 45-minute sessions to 30-minute sessions, and initiated two 30-minute sessions per week of individual counseling for the student (compare Dist. Ex. 26 at p. 19, with Dist. Ex. 16 at p. 17). At the conclusion of the meeting, the district provided the parents with an FNR/Modification of IEP form, dated August 6, 2012, summarizing the recommendations made by the August 2012 CPSE, and identifying the particular preschool site the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 22).

On August 7, 2012, the parents visited the assigned preschool site (see Dist. Ex. 28 at pp. 1-2). In an e-mail dated August 13, 2012 to the CPSE administrator, the parents rejected the assigned preschool because they felt it was not appropriate to meet the student's needs (see id.).[4] The parents expressed concern about the functional levels of the other students in the observed preschool classroom, and described it as "cluttered, crowded with objects and highly distracting" for the student (id. at p. 2). In addition, the parents were concerned that the assigned preschool site shared space in the building with a daycare center, including a shared play yard and shared bathrooms (id.). The parents noted further concerns about the use of the principal's office as the therapy room, and the absence of both the OT and speech-language therapy providers on the date

[3] 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).

[4] The CPSE administrator participated in both the May and August 2012 CPSE meetings (see Dist. Exs. 16 at p. 21; 26 at p. 23). In addition, the CPSE administrator participated at the student's initial review in May 2011 (see Dist. Ex. 12 at pp. 1-2).

of the visit (id.). Finally, the parents expressed concern about the distance of the assigned preschool site from their home (id.). For all of these reasons, the parents rejected the assigned preschool site, and inquired whether "other possible placements" existed for the student (id.).

Within 10 minutes, the CPSE administrator responded to the parents' August 13, 2012 e-mail, advising that she had "just learned" that another preschool site (preschool 2) had "12:1+2 seats available," and asked if the parents were interested in pursuing that school (Dist. Ex. 28 at p. 1). In an e-mail later that day, the parents expressed their willingness to "look at anything," but indicated that they had previously rejected preschool 2 when it was offered as a site for their older son (id.). The parents and CPSE administrator continued to exchange e-mail communications, and in an August 14, 2012 e-mail to the CPSE administrator, the parents agreed to visit preschool 2 when the director returned (see Dist. Ex. 28 at p. 1; Parent Ex. C at pp. 1-2).

In a further e-mail to the CPSE administrator on August 20, 2012, the parents indicated that they visited Stephen Gaynor and "really liked it" (Parent Ex. C at p. 1). The parents asked the CPSE administrator in the e-mail whether she could recommend "any schools similar" to Stephen Gaynor (id.). Responding to the parents on the same day, the CPSE administrator indicated that Stephen Gaynor was a "non-approved school," and therefore, she could not recommend it (id.). The CPSE administrator also indicated that she strongly believed that preschool 2 was the "right school" for the student (id.).

By letter dated August 22, 2012, the parents notified the district of their intentions to unilaterally place the student at Stephen Gaynor for the 2012-13 school year, and to seek funding for the student's placement from the district (Parent Ex. A at p. 1). The parents alleged that the August 2012 IEP failed to offer the student a free appropriate public education (FAPE), and further asserted that the district failed to create a valid IEP, the parents had been denied meaningful participation in the development of the IEP, and the CPSE had "not recommended an appropriate placement with a suitable peer group" (id. at pp. 1-2). In addition, the parents contended that they visited the assigned preschool site identified in the August 6, 2012 FNR, and rejected that site as "completely inappropriate" for the student (id. at p. 2). The parents further indicated that they had written the CPSE and outlined their concerns, and learned that preschool 2 had seats available, but that they could not see that program until the director's return on August 27, 2012 (id.). As a result, the parents asserted that the district's failure to "recommend a placement prior to the start of the school year" resulted in a failure to offer the student a FAPE (id.). Additionally, the parents advised that unless the district cured these defects and offered the student an appropriate placement, they intended to place the student at Stephen Gaynor and seek funding for such placement at public expense (id.). The parents also requested that the district provide transportation for the student's attendance at Stephen Gaynor (id.).

By letter dated October 10, 2012, the parents notified the district that they had "still" not received a "final notice of placement" for the student (Dist. Ex. 30 at p. 1). The parents indicated that they had rejected the assigned preschool site as "completely inappropriate" in August 2012, the CPSE administrator suggested that they visit preschool 2—which the parents did visit on two separate occasions—and "after lengthy discussions" with administrators at the preschool 2, the parents learned that it no longer had a seat available for the student (id.). The parents further indicated that the CPSE should advise them if there were other placements "to view at this late point in the school year" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated January 7, 2013, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 school year, and sought reimbursement for the costs of the student's unilateral placement at Stephen Gaynor (Parent Ex. B at p. 1).[5] The parents contended that the August 2012 CPSE was not properly composed in that it did not include an additional parent member and a regular education teacher (id. at pp. 2-3). In addition, the parents asserted that the August 2012 CPSE was not properly composed because it did not include an individual qualified to interpret the results of the student's June 2012 evaluation, which resulted in a failure to reflect the "instructional implications" of the June 2012 evaluation in the August 2012 IEP (id. at p. 3). Next, the parents asserted that due to the August 2012 CPSE's failure to "meaningfully use" the June 2012 evaluation, the August 2012 IEP failed to include appropriate annual goals, which could not be implemented in the "recommended program" (id.). The parents contended that notwithstanding the "significant change" in the student's "program recommendation," the August 2012 IEP retained the same annual goals from the May 2012 IEP, and the August 2012 CPSE did not "update and change" the annual goals based upon the change in the student's program recommendation to a "full-time special education curriculum" (id.). Similarly, the parents asserted that the August 2012 CPSE failed to "modify and update" the management needs in the August 2012 IEP, despite having the June 2012 evaluation and recommending a "full-time special education program" for the student (id.).

The parents additionally asserted that the assigned preschool site "was not capable of conferring educational benefits" on the student or providing the student with a "suitable functioning peer grouping" (Parent Ex. B at pp. 3-4). The parents expressed concern about the functional levels of the other students in the observed preschool classroom, and described it as "cluttered, crowded with objects and highly distracting" for the student (id.). In addition, the parents were concerned that the assigned preschool site shared space in the building with a daycare center, with a shared play yard and shared bathrooms (id. at p. 4). The parents noted further concerns about the use of the principal's office as the therapy room, and the absence of both the OT and speech-language therapy providers on the date of the visit (id.). In addition, the parents expressed concern about the distance of the assigned preschool site from their home (id.). With respect to preschool 2 identified by the CPSE administrator as a possible alternative site, the parents asserted that after visiting it and meeting with the director, they "were advised that the director had offered the spot to another student before the start of the school year" and that because "no valid final placement" had been offered to the student prior to the start of the 2012-13 school year, the district failed to offer the student a FAPE (id.).

The parents also contended that the unilateral placement of the student at Stephen Gaynor was appropriate for the student, and equitable considerations weighed in favor of the parents' requested relief (Parent Ex. B at pp. 4-5). As a proposed resolution, the parents requested an award of tuition reimbursement for the student's unilateral placement at Stephen Gaynor for the 2012-13 school year (id. at p. 5).

[5] The parents did not challenge the May 2012 IEP in the due process complaint notice (see Parent Ex. B at pp. 1-6; see also Tr. pp. 44-46 [stipulating that the parents agreed with the May 2012 IEP]; Pet. ¶¶ 11-12 [maintaining that the May 2012 IEP was not at issue in this case]).

B. Impartial Hearing Officer Decision

The impartial hearing began on May 1, 2013, and concluded on June 25, 2013, after three days of proceedings (see Tr. pp. 1, 127, 287). In a decision dated July 26, 2013, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year, the parents' unilateral placement of the student at Stephen Gaynor was appropriate, and equitable considerations did not preclude an award of tuition reimbursement (IHO Decision at pp. 17-21).

With respect to the district's failure to offer the student a FAPE, the IHO found that the August 2012 CPSE was not properly composed due to the absence of an additional parent member and a regular education teacher (IHO Decision at pp. 17-18). The IHO also concluded, however, that she was "unpersuaded" by the parents' allegation that the August 2012 CPSE was not properly composed due to the absence of an individual to interpret the results of the student's June 2012 evaluation (id. at p. 18). With respect to the August 2012 IEP, the IHO found that it failed to include an "itemization or summary of the testing that had triggered" the change in the student's placement to a special class in a center-based preschool program (id.). The IHO also noted that the August 2012 CPSE failed to change the annual goals or management needs developed at the May 2012 CPSE meeting, despite having the June 2012 evaluation report and despite recommending a "significant" change in the student's program (id.). Regarding the assigned preschool site, the IHO found that the district failed to provide a "valid placement recommendation" for the student (IHO Decision at p. 18). The IHO declined to render a determination about the appropriateness of the assigned preschool site, because she found that the parents had been offered preschool 2 (see id. at pp. 18-19).

With respect to the appropriateness of the parents' unilateral placement of the student at Stephen Gaynor, the IHO found that the program provided the student with "specific regulatory support," as well as related services of OT and speech-language therapy (IHO Decision at pp. 19-20). The IHO also found that the student made progress in his behavior at Stephen Gaynor (id. at p. 20). Regarding equitable considerations, the IHO found that the parents "cooperated" with the district and communicated "their concerns and their actions" (id. at pp. 20-21). Based upon her conclusions, 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 (id.at p. 21).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district did not offer the student a FAPE for the 2012-13 school year, that Stephen Gaynor was an appropriate placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. The district asserts that the IHO erred in concluding that the August 2012 CPSE was not properly composed due to the absence of an additional parent member or a regular education teacher. The district contends that the IHO erred in finding that the August 2012 CPSE failed to update or change the annual goals or management needs based upon the June 2012 evaluation or in light of the change in the student's placement. Next, the district argues that the IHO erred in finding that the failure to include a summary of the testing from the June 2012 evaluation in the August 2012 IEP because the IEP otherwise adequately described the student's present levels of performance. Finally, the district asserts that the IHO erred with respect to her finding that the district did not offer the student a valid placement recommendation. The district also asserts that the IHO erred in finding that Stephen Gaynor was an appropriate placement and

that equitable considerations weighed in favor of the parents' requested relief. As such, the district seeks to vacate the IHO's decision in its entirety.

In an answer, the parents respond to the district's allegations and seek to uphold the IHO's decision in its entirety. The parents also assert additional arguments to uphold the IHO's decision, including that the August 2012 CPSE was not validly composed due to the district's failure to include an individual to interpret the results of the June 2012 evaluation. The parents further allege that the August 2012 CPSE failed to meaningfully use the June 2012 evaluation in the development of the August 2012 IEP, which resulted in the failure to incorporate various techniques suggested within the June 2012 evaluation, and a failure to accurately portray the student's present levels of performance and the student's needs.

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 or CPSE 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. August 2012 CPSE Composition

On appeal, the district contends that the IHO erred in concluding that the August 2012 CPSE was not properly composed due to the absence of an additional parent member or a regular education teacher because neither member was a required participant. Alternatively, the district asserts that the absence of an additional parent member and/or a regular education teacher did not impede the student's right to a FAPE, deprive the student of educational benefit, or significantly impede the parents' ability to meaningfully participate in the development of the student's IEP. The parents reject the district's contentions, and assert that the IHO properly determined that the August 2012 CPSE was not properly composed. In addition, the parents argue that the August 2012 CPSE was not properly composed based upon the district's failure to include an individual qualified to interpret the results of the student's June 2012 psychological evaluation. A review of the hearing record supports the district's contentions, and therefore, the IHO's conclusions with respect to the absence of an additional parent member and a regular education teacher must be reversed.

At the time of the August 2012 CPSE meeting, relevant State law and regulations in effect required that a CPSE convened to develop a student's IEP shall include: an additional parent member, unless the parents declined the participation of such member; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment;[6] and an individual to interpret the instructional implications of evaluation results (see Educ. Law § 4410[3][1][ii], [v], [vi]; 8 NYCRR 200.3[a][2][ii], [v], [vi]).[7] 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

[6] 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]).

[7] Effective August 1, 2013, amendments to State law provide that an additional parent member is no longer a required member of a CPSE unless specifically requested in writing by the parents, or another CPSE member at least 72 hours prior to the meeting (see Educ. Law § 4410[3][1][iv]). Changes to conform State regulations to this change in statute are currently pending.

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]).

First, it is undisputed that the August 2012 CPSE did not include an additional parent member or a regular education teacher, the parents did not waive the presence of an additional parent member at the August 2012 CPSE meeting, and the student attended a general education preschool setting during the 2011-12 school year (Tr. pp. 39-48, 87-88; Dist. Ex. 26 at p. 23). Notwithstanding these procedural inadequacies, however, the hearing record does not contain evidence upon which to conclude that the absence of the additional parent member or the regular education teacher—either separately or collectively—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. Rather, the evidence demonstrates the parents' familiarity with the CPSE and IEP processes, as both parents had participated in previous meetings for this student, as well as for the student's older sibling (see Dist. Exs. 12 at pp. 1-2; 16 at pp. 1, 21; 26 at pp. 1, 23; see also Tr. pp. 109-10, 261).[8] Additionally, the evidence demonstrates that the parents actively and fully participated at both the May 2012 and the August 2012 CPSE meetings, and in the development of the student's IEP at both meetings (see Tr. pp. 41, 49-50, 241-43, 262, 264-68, 273-74, 276-80; Dist. Exs. 16 at pp. 1, 21; 26 at pp. 1, 23). In addition, the August 2012 CPSE agreed with the parents' request to recommend a full-time special education placement at a center-based preschool, consistent with the recommendations in the student's most recent May/June 2012 psychological evaluation (see Tr. pp. 54-55, 95-96, 268-69; Dist. Exs. 26 at pp. 1, 19; 27 at p. 6; 28 at p. 12; 29). Further, as explained below, a careful review of the parents' contentions reveals no reason to conclude that the August 2012 IEP caused a deprivation of educational benefits.

Accordingly, the hearing record indicates that the IHO erred in finding that the absence of an additional parent member and a regular education teacher at the August 2012 CPSE meeting contributed to finding that the district failed to offer the student a FAPE (see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; 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]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v.

[8] Contrary to the IHO's holding, familiarity with the process is a relevant consideration (see E.F. v, New York City Dep't of Educ., 2013 WL 4495676 at *7 [E.D.N.Y. Aug. 19, 2013]; W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at * 7 [S.D.N.Y. Mar. 30, 2011]).

Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042).

With respect to the parents' contention that the August 2012 CPSE was not properly composed because it did not include an individual qualified to interpret the results of the student's June 2012 psychological evaluation, a review of the hearing record reveals no basis upon which to reverse the IHO's conclusion.

Here, both State and federal regulations allow other required members of a CPSE—such as the district representative—to simultaneously function as the individual responsible for interpreting the instructional implications of evaluation results at a CPSE meeting (see 34 CFR 300.321[a] [5]; 8 NYCRR 200.3[a][2][vi]).[9] In this case, the hearing record shows that the CPSE administrator, who served as the district representative at both the May 2012 and August 2012 CPSE meetings, functioned in this role at the August 2012 CPSE (see Tr. pp. 28-29; Dist. Exs. 16 at p. 21; 26 at p. 23). At the impartial hearing, the CPSE administrator testified that her duties as a CPSE administrator included: receiving and reviewing evaluation reports, meeting with parents, drafting and modifying IEPs, guiding parents and answering questions, reviewing annual goals with parents, making recommendations for students, reviewing new documents for continued eligibility determinations, and conducting initial and annual reviews for students (Tr. pp. 30-34). Additionally, prior to her role as a CPSE administrator, she worked for approximately five years as a CSE assigned special education teacher who, along with a school psychologist and a social worker, functioned as a team that conferred and held initial conferences (Tr. pp. 34-35). The CPSE administrator also testified that she had worked at an elementary school with a school-based support team, and that this involved, among other things, reading evaluations, developing annual goals, and conducting initial conferences, requested reviews, and triennial reviews (Tr. pp. 35-36). Further, the CPSE administrator held multiple State certifications, including: supervision and administration; and certifications as a special education teacher, an elementary education teacher, and a reading teacher (Tr. pp. 35-37). Based upon the foregoing and contrary to the parents' assertion, the hearing record establishes that the CPSE administrator—who participated at the August 2012 CPSE meeting as the district representative—was capable of interpreting the instructional implications of the student's June 2012 evaluation results.

B. Evaluative Information and Present Levels of Performance

The district also argues that the IHO erred in finding that the failure to include a summary of the testing from the June 2012 evaluation in the August 2012 IEP resulted in a failure to offer the student a FAPE. In particular, the district contends that although the August 2012 CPSE was required to consider recent evaluative information to develop the student's IEP, it need not exhaustively describe the student's needs by incorporating every detail of the evaluative informative into the IEP as long as the IEP accurately reflects the student's needs. Opposing the district's contentions, the parents argue that the August 2012 IEP fails to accurately portray the student's present levels of performance and the student's needs, noting that the August 2012 IEP fails to mention needs identified solely within the June 2012 evaluation report. For reasons

[9] In its Official Analysis to Comments in the Federal Register, the United States Department of Education declined to require the presence of an individual on an IEP team who could "conduct diagnostic assessments" (IEP Team, 71 Fed. Reg. 46669-70 [Aug. 14, 2006]).

discussed more fully below, the hearing record supports the district's assertions, and the IHO's finding that the failure to include a summary of the testing from the June 2012 evaluation report contributed to the district's failure to offer the student a FAPE for the 2012-13 school year must be reversed.

As noted above, among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). An IEP's present levels of academic performance and functional levels provide the relevant baselines for projecting annual performance and for developing meaningful measurable annual goals and short-term objectives (Application of the Bd. of Educ., Appeal No. 04-026; see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *25–*26 [S.D.N.Y. Sept. 29, 2009]). Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come from.

In developing the recommendations for a student's IEP, the CPSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Moreover, while the CSE or CPSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE or CPSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

In this case, a review of the hearing record demonstrates that the August 2012 CPSE—with the exception of the handwritten notations on the August 2012 IEP—adopted, verbatim, the present levels of performance developed at the May 2012 CPSE meeting (compare Dist. Ex. 26 at pp. 1-8, with Dist. Ex. 16 at pp. 1-6).[10] Notably, the parents did not raise any allegations in the due process complaint notice with regard to any portions of the May 2012 IEP, and even stipulated at the impartial hearing and in the answer to the petition that the May 2012 IEP was not in dispute in this proceeding (see Parent Ex. B at pp. 1-6; see also Tr. pp. 44-46 [stipulating that the parents agreed with the May 2012 IEP]; Pet. ¶¶ 11-12 [maintaining that the May 2012 IEP was not at issue in this case]).

A review of the hearing record indicates that in developing the present levels of performance, the May 2012 IEP was based upon several sources of information: a February 2012 neurodevelopmental evaluation report, a January 2012 speech-language therapy progress report, a February 2012 OT progress report, a February 2012 PT progress report, and a January 2012 educational progress report prepared by the student's then-current SEIT provider (January 2012 SEIT report) (Tr. pp. 41-45; Dist. Exs. 17-19; 21). Based upon the January 2012 SEIT report, the

[10] The August 2012 IEP contains duplicative copies of certain pages to account for the handwritten notations (compare Dist. Ex. 26 at pp. 1-2, with Dist. Ex. 26 at pp. 7-8).

May 2012 IEP—and consequently, the August 2012 IEP—contained specific and detailed information with respect to the student's cognitive development (2.6 to 3.8 age range), language skills (2.6 to 3.6 age range), social/emotional skills (2.6 to 3.10 age range), gross motor skills (3.6 to 4.0 age range), fine motor skills (2.4 to 3.0 age range), and self-help/activities of daily living skills (ADLs) (3.0 to 3.6 age range) (compare Dist. Ex. 16 at p. 1, and Dist. Ex. 26 at p. 3, with Dist. Ex. 21 at pp. 3-5). Relying upon the January 2012 SEIT report, the May 2012—and therefore, the August 2012 IEP—reflected that the student demonstrated mild to moderate delays in all areas; sensory processing difficulties that presented challenges in focus, attention, and task completion, particularly during group situations; and his language skills were more age appropriate when talking and listening on an individual basis as opposed to a group setting (compare Dist. Ex. 16 at p. 1, and Dist. Ex. 26 at p. 3, with Dist. Ex. 21 at pp. 1-4, 6). Relying upon information provided by the parents and the SEIT, the May 2012 IEP—and therefore, the August 2012 IEP—described the student as a visual learner who was "drawn to that which affect[ed] his attention span," and reported that the student experienced success on "close[d]-ended" activities or games and had more difficulty with "open-ended' activities—such as block playing, playdoh, and problem solving (compare Dist. Ex. 26 at pp. 1, 7, with Dist. Ex. 16 at p. 5). According to the May 2012 IEP—and therefore, the August 2012 IEP—the student demonstrated "relative strengths" in cognitive and social skills when given adult support (compare Dist. Ex. 26 at p. 3, with Dist. Ex. 16 at p. 1).

With respect to social and physical development, the May 2012 IEP—and therefore, the August 2012 IEP—described the student as "open to and eager for social interaction;" he was "friendly and well liked for his creativity and ability to share;" he was active and playful on the playground and used most playground equipment safely; and in the classroom, the student enjoyed using chunky manipulatives in order to improve his bilateral coordination skills (compare Dist. Ex. 26 at p. 4, with Dist. Ex. 16 at p. 2). In addition, both the May and the August 2012 IEPs indicated that the student acted impulsively with his peers; he benefitted from maximizing opportunities for individual and small-group interactions; his inattention and lack of focus hampered his ability to demonstrate and develop his skills; the student would benefit from a classroom setting with a small student-teacher ratio and support for managing sensory stimulation to maximize focus and attention; he often needed help from an adult to work cooperatively with a group; and the student's significant sensory regulation difficulties caused him to become easily dysregulated, overwhelmed, impulsive, and inattentive (compare Dist. Ex. 26 at pp. 1, 3-4, with Dist. Ex. 16 at pp. 1-2, 5).

Further, as indicated above, the hearing record indicates that upon completion of the June 2012 evaluation report, the parents sent the district a copy and requested a "new meeting for a change of placement to a center-based pre-school for September" because, as noted in the enclosed report, the student required a "far more comprehensive full-time special education program" (Dist. Ex. 28). A CPSE or CSE must consider independent educational evaluations obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi], 200.16, 200.16[d][3]). However, consideration does not require substantive discussion (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Consideration of a privately obtained evaluation also does not require a CPSE to adopt the recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y.

Mar. 29, 2013]; C.H., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at *15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

According to the CPSE administrator's testimony, the August 2012 CPSE reconvened because she received the June 2012 evaluation report (Tr. pp. 48-49). The CPSE administrator testified that the August 2012 CPSE reviewed the June 2012 evaluation, discussed the evaluator's recommendations, reviewed the IEP with the parent, "notated the comments the parent wanted to give," and developed a "recommendation" (Tr. pp. 49-51; Dist. Exs. 26 at pp.1, 19, 22-23; 27 at pp. 1-10). As a result, the hearing record reveals that the August 2012 CPSE modified the May 2012 IEP to recommend a full-time, 12:1+2 special class in a center-based preschool program, which was consistent with the recommendation for the student to attend a program with a "smaller class ratio with a lot of structure" indicated in the June 2012 evaluation report, the "parents' comments," and the "SEIT's comments" in support of some of the findings in the June 2012 evaluation report (Tr. pp. 50, 54-56, 95; see Dist. Ex. 26 at pp. 1, 19; 27 at p. 6).[11] A review of the hearing record reveals that the August 2012 CPSE also made the following additional modifications to the student's IEP based upon the June 2012 evaluation report: a 12-month school year program to prevent regression and individual counseling as a related service to address the student's "mild anxiety and feelings of becoming overwhelmed" (compare Dist. Ex. 26 at pp. 19-20, with Dist. Ex. 27 at pp. 3, 6; see also Dist. Ex. 16 at pp. 17-18).

An independent review of the June 2012 evaluation report reveals that although the private evaluator administered different assessments to measure the student's language and pre-academic skills than those reflected in the August 2012 IEP, the student generally performed consistently when compared to his performance in previous evaluations reported on the August 2012 IEP (see Dist. Exs. 26 at p. 3; 27 at pp. 4-5, 9-10; see also Dist. Ex. 21 at pp. 2-5).[12] The June 2012 private evaluation indicated that, among other things, the student demonstrated "somewhat uneven language skills;" difficulties with attention, anxiety and feelings of becoming overwhelmed; inflexibility; and off-task behavior, which required support (Dist. Ex. 27 at pp. 5-6). This information is consistent with the information used to describe the student's present levels of performance in the August 2012 IEP (see Dist. Ex. 26 at pp. 1-6; see also Dist. Ex. 16 at pp. 1-6).

Notwithstanding the modifications noted above, the CPSE administrator also testified that she did not incorporate the "test results" from the June 2012 evaluation report into the "Evaluation Results" section of the August 2012 IEP (Tr. pp. 91-92; see Dist. Ex. 26 at p. 1 [noting that the [June 2012 evaluation] report dated May 1st, 10th, and June 12, 2012 was considered at this meeting"]). However, contrary to the IHO's finding and the parents' arguments, the district's failure

[11] In addition to the CPSE administrator, the student's father and the student's SEIT also attended the August 2012 CPSE meeting (see Dist. Ex. 26 at p. 23). At that time, the SEIT had provided services to the student for approximately one year, and she had also created the January 2012 educational progress report, which the May 2012 CPSE relied upon to develop the student's present levels of performance reflected in both the May and August 2012 IEPs (see Tr. pp. 50-51, 56; Dist. Exs. 16 at pp. 1- 2; 17 at pp. 1-2; 21 at pp. 1-6; 26 at pp. 3-4).

[12] The results of the June 2012 evaluation report were also generally consistent with the results reported in a June 2011 bilingual psychological evaluation, which revealed that the student performed within the average range of intelligence in cognitive functioning (compare Dist. Ex. 27 at pp. 1-2, 4-5, 9-10, with Dist. Ex. 5 at pp. 2-5).

to incorporate the test results into the August 2012 IEP does not constitute a failure to offer the student a FAPE, especially given the evidence in the hearing record that the August 2012 CPSE adequately considered the June 2012 evaluation, the August 2012 IEP adequately and accurately reflected the student's present levels of performance and the student's needs, and that the June 2012 evaluation contained results consistent with previously conducted evaluations or information otherwise presented through the SEIT's educational progress report reflected in the August 2012 IEP. In this instance the district was not required to accept the private expert's recommendations for different programing (see E.C. v. Board of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at* 25 [S.D.N.Y. Mar. 15, 2013]; E.W.K. v. Board of Educ. of Chappaqua Cent. Sch. Dist., 884 F.Supp.2d 39, 56 [S.D.N.Y. 2012]).

C. Annual Goals and Management Needs

Next, the district contends that the IHO erred in finding that the August 2012 CPSE failed to update or change the annual goals or management needs based upon the June 2012 evaluation or in light of the change in the student's placement. The parents reject the district's arguments, and argue that IHO properly found that the district failed to offer the student a FAPE on these grounds. For reasons discussed below, the IHO's findings must be reversed.

With respect to annual goals, an IEP must include a 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 (20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR § 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Additionally, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

A review of the annual goals included in the May 2012 IEP—which were wholly adopted in the August 2012 IEP—reveals that the annual goals were aligned with and targeted needs relating to the student's attention and task completion skills; his preschool/readiness behaviors and skills; his language and communication skills; his social/emotional skills; his receptive language and expressive language skills; his social-pragmatic and attention skills; his pretend play skills; his functional shoulder, arm, and hand control; his visual perception and perceptual motor skills; his motor planning and bilateral integration; his sensory processing and self-regulation skills; his dynamic standing balance; his muscle strength; his coordination and motor planning; and his ball

handling skills (see Tr. pp. 59-64, 66-70; Dist. Exs. 17 at pp. 1-6; 18 at p. 1; 19 at p. 1-2; 20 at p. 1; 21 at pp. 1-5; 26 at pp. 1-6, 9-18).[13] A review of the June 2012 evaluation does not reveal additional areas of need not already addressed by the annual goals in the August 2012 IEP, and the June 2012 evaluation report does not include recommendations for additional annual goals or short-term objectives (compare Dist. Ex. 27 at pp. 6-7, with Dist. Ex. 26 at pp. 9-18). Additionally, the CPSE administrator testified that the August 2012 CPSE reviewed the annual goals with the student's father and the student's SEIT at the August 2012 CPSE meeting, and the student's SEIT agreed that the annual goals in the May 2012 IEP should be retained in the August 2012 IEP because they remained appropriate for the student's needs (Tr. pp. 59, 89-90, 96-97). Moreover, the hearing record reveals that the annual goals in the August 2012 IEP reflected the opinions of the student's SEIT and his related services providers, who had created the annual goals that were incorporated into the student's IEP (see Tr. pp. 55, 56-57, 68, 70, 89-90, 96-97, 101; Dist. Exs. 16 at pp. 7-17; 18 at p. 2; 19 at p. 2; 20 at pp. 1-2; 26 at pp. 9-18).

Turning to the parties' contentions that the August 2012 CPSE's failure to modify the student's management needs in the August 2012 IEP based upon either the June 2012 evaluation or the change in the student's placement denied the student a FAPE, State regulation and guidance documents define management needs as the "means the nature and degree" to which "environmental modifications," "human resources" and "material resources" "are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [providing examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note taking), and material resources (i.e., instructional materials in alternative formats)]).[14] A student's management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]; see also "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/ IEPguideDec2010.pdf).

Here, the parents assert that the August 2012 IEP fails to address numerous techniques suggested in the June 2012 evaluation, including the following: explicit delivery style; redirection; prompting; scaffolding; visual examples; modeling; and preferential seating (see Dist. Ex. 27 at p. 7). A review of the August 2012 IEP reveals the following management needs recommended for the student within this particular section of the IEP: redirection in how the student sits; prompting the student's elbows to be in proper place; use of music (headphones) and preferred activities, such as puzzles; social praise; and sensory breaks in the classroom (see Dist. Ex. 26 at pp. 2, 8). However, a review of the entire August 2012 IEP indicates that the May and August 2012 CPSE's

[13] Each annual goal included multiple, specific, and measurable short-term objectives that clarified and supported each annual goal (see Dist. Ex. 26 at pp. 9-18).

[14] Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model IEP form," Office of Special Educ. Mem. [Revised Mar. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm).

incorporated other management needs to assist the student throughout the IEP, including: adult support, opportunities for individual and small group interactions, a classroom with a small student-teacher ratio with support for managing sensory stimulation and to maximize focus and attention, providing cues to actively engage in activities to work through to completion, adult support to work in a group, use of "chunky manipulatives," use of vestibular and proprioceptive input to help regulate his level of arousal, and frequent verbal cues to complete more complicated gross motor tasks (Dist. Ex. 26 at pp. 3-6). Therefore, while the August 2012 IEP did not incorporate the particular techniques suggested in the June 2012 evaluation report, the August CPSE's failure to do so—in light of the additional recommendations in the August 2012 IEP—cannot provide a basis upon which to conclude that the district failed to offer the student a FAPE.

D. Challenges to the Assigned Preschool Site

Finally, the district that the IHO erred with respect to her finding that the district did not offer the student a valid placement recommendation. For the reasons discussed below, the IHO's finding must be reversed.

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that 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 12, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement 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, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in

the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[15]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City 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"]; N.K., 2013 WL 4436528, at *9 [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the forgoing, the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273).

In this case, it is undisputed that the district offered the student an assigned preschool site at the August 6, 2012 CPSE meeting—prior to the anticipated date of the implementation of the August 2012 IEP—and the parents rejected it (Tr. pp. 72, 97, 106, 177, 244, 249-50, 255; see Dist. Exs. 22; 28 at p. 6; Parent Ex. G at pp. 1-4). Further, a review of the hearing record, and in particular, the continued exchange of e-mail communications between the CPSE administrator and

[15] 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

the parents from August 7 through August 20, 2013, indicates that while the parties continued to work together to identify an alternative preschool site, the district did not provide the parents with an FNR or otherwise assign the student to attend a different preschool site before the parents notified the district of their intentions to unilaterally place the student at Stephen Gaynor (see Dist. Ex. 28 at pp. 1-12; Parent Exs. A at pp. 1-2; C at pp. 1-3; see also Tr. pp. 77, 84, 99-102).

However, even if the IHO had properly concluded that district did not offer a valid assigned preschool site, the issues and arguments raised by the parents related to the functional levels of the student in the assigned preschool class, the preschool classroom environment, the inadequacy of the therapy room, the inability to provide the student's related services, and the concerns about the assigned preschool site sharing space with a day care center are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's August 2012 IEP at the assigned preschool site is not an appropriate inquiry (see K.L., 2013 WL 3814669 at * 6). Moreover, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' contentions (R.E., 694 F.3d at 186; K.L., 2013 WL 3814669 at *6; R.C., F. Supp. 2d at 273). Accordingly, the parents' claims that the student's assigned preschool site was not appropriate must be dismissed.

VII. Conclusion

As detailed above, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Stephen Gaynor was an appropriate placement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 26, 2013 is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year, and which ordered the district to reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2012-13 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER