The University of the State of New York

The State Education Department
State Review Officer
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No. 13-223

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,

Lisa R. Khandhar, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Henry Viscardi School (Viscardi) for a portion of the 2013-14 school year. The appeal must be sustained.

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 May 2, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Dist. Ex. 10 at pp. 1, 13-14).[1] Finding that the student remained eligible for special education and related services as a student with an other health impairment, the May 2013 CSE recommended integrated co-teaching (ICT) services in a general

[1] At the time of the May 2013 CSE meeting, an April 26, 2013 letter indicated that the student had been accepted to attend Viscardi during the 2013-14 school year (see Parent Ex. F). At that time, the student had been accepted to attend the following program at Viscardi: a 10-month school year program; a two-month summer school program; a class with an 8:1+1 ratio; and related services consisting of three 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy (see id.). The letter indicated that the student could begin attending Viscardi when her placement was "agreed upon with the school district" (id.).

education setting at a community school for the student's instruction in English language arts (ELA), mathematics, science, and social studies (id. at pp. 1, 10-14).[2] The May 2013 CSE also recommended the following related services: one 30-minute session per week of counseling in a small group, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group, two 40-minute sessions per week of physical therapy (PT) in a small group, one 10-minute individual PT consultation per month, and two 30-minute sessions per week of speech-language therapy in a small group (id. at pp. 11, 14). In addition, the May 2013 CSE recommended the services of a full-time, 1:1 health paraprofessional to assist the student with toileting needs, and further recommended that the student participate in adapted physical education (id. at pp. 11, 13). The May 2013 IEP included annual goals in the areas of counseling, reading comprehension, writing, mathematics, speech-language development, PT, OT, and adapted physical education (id. at pp. 3-10). The May 2013 CSE recommended strategies to address the student's management needs, including assistance with transfers and school activities, and the use of adaptive seating in both the classroom and the cafeteria (id. at p. 2). The May 2013 CSE also recommended special transportation accommodations and services (id. at p. 13). Finally, the May 2013 CSE documented the parents' concerns throughout the May 2013 IEP, noting specifically their concern regarding the amount of time the student spent "out of the classroom" and their preference for the student to receive "push in services" for related services (id. at p. 1). In addition, the May 2013 CSE noted the parents' concern about the student's "desire to walk and be able to do what other[s] do" as a recent "focus" of the student, and their concern that the student "continue to make progress in toilet training with assistance" (id. at pp. 1-2).[3]

In a letter dated May 2, 2013, the parents requested an updated evaluation of the student because she was "not making progress, she [was] below grade level across all subjects," and she made "little progress this past year" (Dist. Ex. 13). The parents also requested that the CSE "consider another placement" and provided consent to evaluate the student (id.; see Dist. Ex. 15). Accordingly, over three dates in May 2013, the district conducted an updated psychoeducational evaluation (May 2013 evaluation) of the student through the administration of both formal and informal assessments, as well as a review of records from the student's "recent" annual review (see Dist. Ex. 14 at pp. 1-8).[4]

On June 20, 2013, the CSE reconvened to review and discuss the results of the May 2013 evaluation report (see Dist. Ex. 11 at pp. 1, 8-9; see also Dist. Ex. 12 at pp. 1-2).[5] As a result, the June 2013 CSE modified the May 2013 IEP, and recommended a 12:1+1 special class placement in a community school for the 2013-14 school year; the June 2013 CSE modified the strategies listed within the management needs section of the May 2013 IEP; and the June 2013 CSE modified

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

[3] The parents' attorney attended the May 2013 CSE meeting (compare Dist. Ex. 10 at p. 16, with Tr. pp. 1, 6).

[4] According to the May 2013 evaluation report, the district school psychologist who conducted the student's evaluation reviewed related services' reports, as well as a "cognitive and academic screening" of the student performed at Viscardi in November 2012 (Dist. Ex. 14 at pp. 1-2; see Parent Ex. H; see also Tr. pp. 35). Viscardi conducted a speech-language screening, a cognitive screening, and an OT and PT screening of the student in November 2012 as part of the "evaluation process for admissions" to the school (see Parent Exs. G at p. 1; H at p. 1; I at p. 1).

[5] The parents' attorney attended the June 2013 CSE meeting (compare Dist. Ex. 11 at p. 14, with Tr. pp. 1, 6).

the recommendation in the May 2013 IEP regarding the services of the full-time, 1:1 health paraprofessional to include assisting the student with her mobility needs (compare Dist. Ex. 11 at pp. 3, 8-9, with Dist. Ex. 10 at pp. 2, 10-11) In addition, the June 2013 CSE modified the present levels of performance and individual needs in the May 2013 IEP pertaining to: the student's academic achievement, functional performance, and learning characteristics; the student's social development; the student's physical development; and the effect of the student's needs on her involvement and progress in the general education curriculum (compare Dist. Ex. 11 at pp. 1-3, with Dist. Ex. 10 at pp. 1-2). The June 2013 CSE also modified the supplementary aids and services and program modifications or accommodations portion of the IEP to include special seating arrangements by recommending the full-time use of an adaptive seat in the classroom (compare Dist. Ex. 11 at p. 9, with Dist. Ex. 10 at p. 11). Finally, the June 2013 CSE modified that portion of the IEP describing the student's participation in activities with students without disabilities by recommending that the student receive "academic supports in a small class setting" (compare Dist. Ex. 11 at pp. 10-11, with Dist. Ex. 10 at p. 13). The June 2013 CSE, however, carried over the remaining recommendations from the May 2013 IEP into the June 2013 IEP, including the annual goals and related services (compare Dist. Ex. 11 at pp. 3-13, with Dist. Ex. 10 at pp. 2-15).

The June 2013 CSE also noted additional parental concerns in the June 2013 IEP (compare Dist. Ex. 11 at pp. 1-13, with Dist. Ex. 10 at pp. 1-15). More specifically, the June 2013 CSE noted the parents' concern that the student often left the classroom and missed instruction, as well as their concern about the student's ability to "reach grade-level standards" aligned with the "Common Core" (Dist. Ex. 11 at p. 2). In addition, the parents expressed concerns about the student attending a school with other students who did not have "similar physical disabilities," as well as their desire for the student to receive "more encouragement to use her walker during school" (id. at pp. 2-3). The June 2013 IEP further documented the parents' concern that the student's "current school building" and current "services" were not sufficient to provide supports with regard to the student's "physical disability," and the parents' belief that the student required a "full time special education school to address her needs" (id. at p. 3). Finally, the June 2013 IEP documented the parents' concern that the student would not receive "adequate supports at her current school in order to do well on standardized tests" (id. at pp. 12-13).

A. Due Process Complaint Notice

By due process complaint notice dated July 10, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Dist. Ex. 1 at p. 1). Initially, the parents asserted that the May 2013 IEP contained "multiple procedural and substantive errors," and thus, failed to offer the student a FAPE (id.). The parents contended that the May 2013 CSE was not properly composed, and the annual goals and short-term objectives in the May 2013 IEP did not appropriately address the student's special education needs and were "continued" from the student's previous IEP (id.). Next, the parents alleged that the student did not previously make progress in an ICT setting, and the May 2013 CSE did not explain how an "ICT class" would allow the student to make progress (id.). In addition, the parents asserted that the May 2013 CSE did not review "appropriate documentation in making its recommendation," and failed to "follow proper procedures" in holding the May 2013 CSE meeting (id.). The parents also indicated that the "reports" they provided to the CSE "strongly recommended a full time special education school to address both her physical and academic

needs," and that the CSE did not "consider these reports" in making its recommendations (id. at pp. 1-2).

Additionally, the parents asserted that the June 2013 IEP was "procedurally and substantively invalid," and thus, failed to offer the student a FAPE (Dist. Ex. 1 at p. 2). The parents contended that the annual goals and short-term objectives in the June 2013 IEP did not appropriately address the student's special education needs, and the June 2013 CSE "copied" the annual goals from the May 2013 IEP without "any discussion," which was not appropriate in light of the June 2013 CSE's decision to modify the student's placement recommendation from ICT services in a general education setting to a 12:1+1 special class placement (id.). The parents further contended that the June 2013 CSE did not review "appropriate documentation in making its recommendation," and failed to "follow proper procedures" in holding the June 2013 CSE meeting (id.). The parents also asserted that the June 2013 IEP failed to "reflect the reports" provided by the parents and that the "reports" explained the student's need to use her "walker to build her gross motor skills" (id.).

Next, the parents alleged that the June 2013 CSE failed to "explain" how a 12:1+1 special class placement would meet the student's needs and that their concern about the student's inability to "keep up with her peers not only academically but physically" remained a concern for the student's placement in the recommended 12:1+1 special class (Dist. Ex. 1 at p. 2). The parents also indicated that a class size of 12 students was too large and would not provide "sufficient support" to the student (id.). The parents asserted that they "again informed" the June 2013 CSE about the student's acceptance at Viscardi, but indicated that the district school psychologist "refused to consider this as an option" (id.). With respect to the 12:1+1 special class placement, the parents indicated that they requested an opportunity to observe a classroom, but were unable to do so because the school year ended "in the next couple of days and no classrooms were available for observation" (id.). The parents also indicated that they asked the June 2013 CSE to provide additional information about the classroom, such as a class profile, and they also "expressed concern" about the "functional and social grouping of a 12:1:1 class" (id.). However, the parents contended that the "only information" provided by the June 2013 CSE was that the student would be the only student in the 12:1+1 special class placement with a "physical disability" (id.). As relief, the parents requested that the district "fund" the student's placement at Viscardi, or alternatively, reconvene a CSE meeting to recommend deferral to the Central Based Support Team (CBST) for placement in a State-approved nonpublic school or to issue a Nickerson letter to the parents (id. at pp. 2-3). [6]

[6] At the impartial hearing the parents' attorney stated that the May 2013 IEP was "not in contest" (Tr. pp. 130-33; see Tr. pp. 162-63). However, regardless of this statement at the impartial hearing, the May 2013 IEP was superseded as a result of the June 2013 CSE meeting and the resulting June 2013 IEP—which modified the May 2013 IEP and recommended a 12:1+1 special class placement for the 2013-14 school year—and thus the June 2013 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-Level Review (Dist. Exs. 10-11; see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also Application of the Dep't of Educ., Appeal No. 12-215).

B. Impartial Hearing Officer Decision

On September 3, 2013, the parties proceeded to an impartial hearing, which concluded on October 7, 2013, after two days of proceedings (see Tr. pp. 1-167).[7] In a decision dated October 30, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year and ordered the district to fund the student's tuition at Viscardi for the "remainder" of the 2013-14 school year (see IHO Decision at pp. 7-10).

Initially, the IHO indicated that the June 2013 IEP offered the student a 12:1+1 special class placement and reduced the "direct PT services" to the student (id. at p. 9). The IHO noted that the student made "minimal progress" in PT during the 2012-13 school year, evidenced by a repetition of "several" annual goals in the June 2013 IEP related to PT from the previous school year or modifications to annual goals in the June 2013 IEP related to PT to reduce the "difficulty" of the annual goals (id. at pp. 9-10). In addition, the IHO indicated that although the parents presented "medical documentation" supporting the student's need for a "private school placement," the district "refused to consider placement at another school" (id. at p. 10).

Next, the IHO found that the district failed to establish that a 12:1+1 special class placement was appropriate, and failed to present any "teacher testimony" regarding "what the proposed class offered, [a] class profile or how it would specifically address the student's academic needs and provide her with a meaningful benefit" (IHO Decision at p. 10). In addition, the IHO indicated that regardless of "which class" the student attended at the public school site, "she would still be limited in her access to the cafeteria and recess activities," she would have been "denied access" to the swimming program, and she would have been "restricted to the sidelines while her classmates enjoyed unfettered access to all of the school's facilities and activities" (id.). The IHO further indicated that the parents presented "credible documentation" to support their claim that the student required a 12-month school year program to prevent regression, as well as "medical documentation" that the student required a "private school placement," which the district refused to consider (id.).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2013-14 school year. Contrary to the IHO's findings, the district alleges that the student made more than "minimal" progress in PT during the 2012-13 school year, the June 2013 CSE's recommendation to reduce the duration of the student's individual PT services by five minutes per session was appropriate, and the IHO did not consider the PT consultation service added to the student's IEP as part of the analysis. The district also argues that contrary to the IHO's finding, the hearing record sufficiently demonstrated why the 12:1+1 special class was appropriate to meet the student's needs in the least restrictive environment (LRE). Next, the district contends that any findings by the IHO related to the district's failure to present evidence from the student's "present teacher" about the "proposed class offered, class profile, or how the class would specifically address" the student's needs were speculative, as the student's June 2013 IEP was never implemented. To the extent that the IHO determined that the student would be limited in her

[7] At the time of the impartial hearing, the student was receiving ICT services in a third grade classroom—pursuant to the parents' request for a pendency placement determination—at the same public school site she had attended since kindergarten, and most recently, during the 2012-13 school year when she received ICT services in a second grade classroom (see Tr. pp. 32-33, 133-34, 149-50; Dist. Ex. 3 at pp. 9-10).

access to the "cafeteria, recess activities, and the swimming program" had she attended the public school, the district argues that the hearing record did not support these findings and moreover, the student's access to a swimming program was not required to offer the student a FAPE. The district also asserts that the IHO erred in finding that the student required a 12-month school year program because the hearing record did not contain evidence establishing that the student experienced substantial regression. Additionally, the district alleges that any remaining issues in the parents' due process complaint notice not addressed by the IHO must be dismissed, noting specifically the allegations with regard to copying the annual goals from the May 2013 IEP into the June 2013 IEP and whether the June 2013 reviewed the appropriate documentation in making its recommendation. Overall, the district asserts that contrary to the IHO's decision, the hearing record demonstrated that the June 2013 CSE review and the June 2013 IEP were appropriate, and the public school could have implemented the student's IEP. Alternatively, the district argues that the parents did not sustain their burden to establish that Viscardi was an appropriate placement for the student, equitable considerations precluded relief, and the parents were not entitled to a Nickerson letter as relief.

In an answer, the parents respond to the district's allegations and argue to uphold the IHO's decision in its entirety. The parents assert that the June 2013 CSE failed to consider the student's placement at Viscardi as an option, notwithstanding documentation to support a transfer to Viscardi, and the failure to consider a nonpublic school placement deprived the parents of the opportunity to meaningfully participate in the decision-making process. The parents also allege that the June 2013 CSE failed to properly consider the available evaluative information about the student, and failed to adequately consider three letters submitted in support of the student's need for a barrier-free school setting and a 12-month school year program. Next, the parents contend that the June 2013 CSE failed to sufficiently describe the student's physical needs in the June 2013 IEP or how her physical needs impacted her in the classroom. The parents also argue that the district did not sustain its burden to establish the following: that the annual goals were appropriate, that the June 2013 CSE discussed the annual goals, that the annual goals in the June 2013 IEP could be implemented within a 12:1+1 special class as opposed to an ICT setting, that the recommendation of a 12:1+1 special class placement was appropriate, or that the public school site could properly implement the June 2013 IEP. The parents also contend that the June 2013 CSE failed to provide specific information about the recommended 12:1+1 special class placement—including the proposed curriculum, how the class would specifically address the student's needs, or the functional levels of the other students in the classroom—despite knowing that the student would attend a classroom at the same public school site. The parents assert that the hearing record did not support the June 2013 CSE's recommendation to reduce the student's recommended PT services. In addition, the parents assert that the hearing record demonstrated that the student was excluded from the district's swimming program at the public school site.

With respect to the student's placement at Viscardi, the parents assert that the hearing record contained sufficient evidence for the IHO to conclude that it was appropriate, regardless of LRE considerations, and that the IHO's decision directing the student's placement at Viscardi for the remainder of the 2013-14 school year was appropriate relief as compensatory education. In addition, the parents argue that the student was also entitled to an award of compensatory education for the district's failure to provide the student with a FAPE since the student began attending the public school in kindergarten, which the IHO properly considered in the decision. The parents also assert that equitable considerations did not preclude an award of tuition reimbursement in this case and seek to uphold the IHO's award of funding for the student's placement at Viscardi.

Alternatively, the parents indicate that if additional findings are required regarding the student's potential placement, the case should be remanded to the IHO who presided over this impartial hearing.[8]

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that

[8] The parents withdrew their request for the issuance of a Nickerson letter as a form of relief.

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, a review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing in the decision whether the student required a 12-month school year program and whether the public school site would be appropriate based upon the student's inability to access a swimming program, as well as "all of the school's facilities and activities,"—that is, a barrier-free setting—because the parents did not raise these as issues in dispute in the July 10, 2013 due process complaint notice (compare IHO Decision at p. 10, with Dist. Ex. 1 pp. 1-2). In this instance, although the parents' due process complaint notice alleged that neither the May 2013 CSE nor the June 2013 CSE adequately considered the "reports" provided by the parents, they did so without elaboration and they did not indicate in the due process complaint notice that the district failed to offer the student a FAPE because it failed to recommend a 12-month school year program or a barrier-free setting—information that appears specifically within the "reports" referenced in the due process complaint notice and which appear in the hearing record as three letters authored by two of the student's private providers (see Dist. Ex. 1 at pp. 1-2; Parent Exs. C-E). On appeal, the parents now specifically articulate in the answer that the May 2013 CSE and June 2013 CSE did not review or consider the three letters provided by the student's private orthopedic surgeon (dated April 23, 2013) and private physical therapist (dated April 19, and 20, 2013) (compare Dist. Ex. 1 at pp. 1-2, with Parent Exs. C-E and Answer ¶¶ 9, 12, 39).[9]

Initially, a review of the hearing record strongly suggests that the parents originally submitted these three letters to the May 2013 CSE in order to support their request that the district transfer the student to, or recommend the student's placement at, Viscardi, as opposed to submitting the letters to request specific programmatic recommendations—such as a 12-month school year program or a barrier-free setting for the student—as part of the student's 2013-14 IEP (see Tr. pp. 42-44, 151-55; Dist. Ex. 1 at pp. 1-2; Parent Exs. C-E; see also Answer ¶ 9). Moreover, given that the May 2013 CSE and June 2013 CSE documented a number of concerns expressed by the parents at both meetings, it is altogether unclear why the parents—if they wanted the district to consider either a 12-month school year program or a barrier-free setting—did not specifically raise these as additional concerns at both CSE meetings, especially since their attorney attended both CSE meetings and the parents fully participated in both CSE meetings to develop the student's June 2013 IEP (see compare Dist. Ex. 10 at p. 16 and Dist. Ex. 11 at p. 14, with Tr. pp. 1, 6). In this

[9] The April 19, 2013 letter drafted by the student's physical therapist indicated that the student currently received two 45-minute sessions of individual PT per week for "skills necessary for ambulation," and the student continued to require this level of PT on a 12-month basis to address the enumerated goals set forth in that letter (Parent Ex. C). The April 20, 2013 letter drafted by the same physical therapist indicated that the student required trained personnel with an "appropriate school setting" equipped with "standers, parallel bars, stairs and scooter boards" to develop her motor skills (Parent Ex. D). The April 23, 2013 letter from the student's orthopedic surgeon noted her need for an accessible program—based upon the parents' concerns—and that she would benefit from a 12-month school year program to prevent loss of skills during the summer months (see Parent Ex. E at pp. 1-2).

instance, this type of subsequent particularization or addition of arguments constitutes "sandbagging" the district, which the Second Circuit has deemed impermissible, and therefore the IHO's findings must be annulled and these issues will not be considered at this time as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 n.2 [S.D.N.Y. May 14, 2013] [noting that the "failure to raise an argument in a due process complaint precludes later review of that argument (whether jurisdictional or not)"]).[10]

Second, a review of the hearing record also reveals that the parents now raise the following issues in the answer—which the parents did not include in the July 10, 2013 due process complaint notice and upon which the IHO did not issue findings—as a basis upon which to now conclude on appeal that the district failed to offer the student a FAPE for the 2013-14 school year: (1) the June 2013 CSE's failure to consider a nonpublic school placement deprived the parents of the opportunity to meaningfully participate in the decision-making process, (2) the June 2013 CSE's failure to sufficiently describe the student's physical needs in the June 2013 IEP or how her physical needs impacted her in the classroom, and (3) the failure to provide the parents with information about the public school site's proposed curriculum, how the class would specifically address the student's needs, and how the June 2013 IEP would actually be implemented in the classroom (compare Answer ¶¶ 12-13, 16-19, 32-33, 35-36, 40, with Dist. Ex. 1 at pp. 1-2).

With respect to the issues raised and decided sua sponte by the IHO in the decision as well as the allegations now raised by the parents in the answer for the first time on appeal as enumerated above, 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. 13-151; 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][b]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M., 2013 WL 1972144, at *6; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 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 [S.D.N.Y. 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; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not

[10] As the Second Circuit has explained, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4).

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 those issues (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]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO or the challenges enumerated above and now raised in the parents' answer for the first time on appeal as a basis upon which to now conclude that the district failed to offer the student a FAPE for the 2013-14 school year (see Dist. Ex. 1 pp. 1-2). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend the due process complaint notice (see Tr. pp. 1-167; Dist. Exs. 1-17; Parent Exs. A-J).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the student required a 12-month school year program and whether the public school site would be appropriate based upon the student's alleged inability to access a swimming program, as well as "all of the school's facilities and activities,"—i.e., a barrier-free setting—and the IHO's findings relative to these issues must be annulled. In addition, the allegations as enumerated above and raised now, for the first time, on appeal are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611; M.P.G., 2010 WL 3398256, at *8; Snyder v. Montgomery Co. Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).[11]

[11] 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 217, at 250-51; see D.B.

B. June 2013 IEP

1. Evaluative Information and Present Levels of Performance

Although not addressed in the IHO's decision and addressed here out of an abundance of caution, the parents argue without elaboration that the June 2013 CSE's failure to consider the available evaluative information and the failure to adequately depict the student in the June 2013 IEP resulted in the district's failure to offer the student a FAPE for the 2013-14 school year.[12] As discussed more fully below, the parents' assertions are not supported by the hearing record.

In developing the recommendations for a student's IEP, a CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in

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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., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6), the issues raised and addressed sua sponte by the IHO in the decision and the allegations raised in the parents' answer for the first time on appeal were initially raised by counsel for the parents through testimony of witnesses for the parents or were restated by counsel in the closing statement (see Tr. pp. 145-46, 150-51, 154-56, 162, 164-65). In this case, the district did not initially elicit testimony relative to these issues, and therefore, the district did not "open the door" to these issues under the holding of M.H.

[12] Other than specifically asserting that the district failed to consider the information contained within the three letters drafted by the student's private providers in the development of the student's June 2013 IEP—which have been previously disposed of within the Scope of the Impartial Hearing and Review—the parents do not otherwise argue with any particularity how the district failed to consider all of the available evaluative information in the development of the student's June 2013 IEP. However, even if issues related to these three letters were to be addressed in this decision, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]). Thus, under the circumstances of this case, the district's alleged failure to consider the information within these three letters would not result in a finding that the district failed to offer the student a FAPE for the 2013-14 school year.

addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the hearing record indicates that immediately following the May 2013 CSE meeting the parents requested that the district reevaluate the student due to their belief that the student had not made progress and to "consider another placement" for the student because they did not think that the recommendation for ICT services at the May 2013 CSE meeting was appropriate (see Tr. pp. 15-16, 42-44, 51-52, 68-71, 151-53; Dist. Ex. 13). Accordingly, the June 2013 CSE reconvened to consider the May 2013 evaluation report, and as noted previously, modified the May 2013 IEP as a result (compare Dist. Ex. 11 at pp. 1-13, with Dist. Ex. 10 at pp. 1-15).[13] In addition to the May 2013 evaluation report, the May 2013 and June 2013 had an April 2013 PT annual review plan available for consideration (see Tr. pp. 84-85, 91-100, 111, 123-26; Dist. Ex. 17 at pp. 1-3). Furthermore, the following individuals attended the May 2013 CSE meeting: the student's then-current regular education teacher and then-current special education teacher, a district representative, a district guidance counselor, a district occupational therapist, a district "speech teacher," the student's mother, and the parents' attorney (see Dist. Ex. 10 at p. 16; Parent Ex. B at p. 1). The following individuals attended the June 2013 CSE meeting: the student's then-current regular education teacher, a district special education teacher (special education teacher support services [SETSS]), a district school psychologist (who also acted as district representative), a district guidance counselor, the student's then-current physical therapist, a district occupational therapist, the student's grandparent, and the parents' attorney (see Dist. Ex. 11 at p. 14; Parent Ex. B at p. 1; see also Tr. pp. 81-82).[14]

Based upon a review of the hearing record, the June 2013 CSE developed the student's June 2013 IEP by, in part, directly incorporating the results of the May 2013 evaluation into the June 2013 IEP (compare Dist. Ex. 11 at p. 1-2, with Dist. Ex. 14 at pp. 2-7). The May 2013 evaluation of the student included an administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV), the Wechsler Individual Achievement—Third Edition (WIAT-III), and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) (see Dist. Ex. 14 at pp. 2-7).

As noted in the June 2013 IEP, the administration of the WISC-IV to the student yielded a verbal comprehension standard score in the average range, a perceptual reasoning score within the

[13] The May 2013 evaluation report incorporated information obtained from the November 2012 Viscardi admissions' screenings—notably, the results from the administration of selected subtests from the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) and the Wechsler Individual Achievement Test—Second Edition (WIAT-II)—which indicated the student "possesse[d] High Average verbal abilities with weaknesses in decoding and math reasoning" (Dist. Ex. 14 at p. 2; see Parent Ex. H at pp. 1-3).

[14] The same individuals attended both the May 2013 CSE meeting and the June 2013 CSE meeting: the student's then-current regular education teacher, the guidance counselor, the district occupational therapist, the student's mother, and the parents' attorney (compare Dist. Ex. 10 at p. 16, with Dist. Ex. 11 at p. 14). In addition, the district school psychologist who attended the June 2013 CSE meeting also conducted the May 2013 evaluation of the student (compare Dist. Ex. 11 at p. 14, with Dist. Ex. 14 at pp. 1, 8).

borderline range, a working memory score within the low average, and a processing speed standard score within the extremely low range—indicating to the district school psychologist that the student's overall cognitive functioning was within the borderline range (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at pp. 2-4, 6-8). In addition, based on the student's performance on the WIAT-III—and as reflected in the June 2013 IEP—the student could identify letters and their corresponding sounds, and she inconsistently matched similar ending sound blends (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at p. 4). In addition, the student displayed weakness in decoding, which hindered her reading comprehension skills; the student struggled with math tasks, as she could not consistently add single-digit numbers up to 10; she could not subtract single-digit numbers; and she did not attempt problems with double-digits (id.). Based upon the WIAT-III, and as reported in the June 2013 IEP, the student's math problem solving skills included the ability to determine which number was more or less for digits up to 10, the ability to count by 10s, and the ability to solve one-step word problems with an accompanying picture (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at p. 5). In addition, the student struggled to: determine numerical order for a group of digits up to 15, determine days of the week on a calendar, complete a number pattern with or without a visual, determine the values of a dime, and interpret a concrete bar graph (id.). In the area of writing, the student could write the letters of the alphabet and spell high-frequency sight words as well as beginning sounds, but struggled with medial vowels and ending words (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at p. 5). According to the WIAT-III, and as indicated in the June 2013 IEP, the student displayed much difficulty writing sentences (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at pp. 5-6). Also as noted in the June 2013 IEP, the results of the Vineland-II revealed the student's overall adaptive behavior fell within the moderately low range when compared to her age group (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at p. 6). More specifically, the student's communication skills fell within the adequate range, her daily living skills fell within the moderately low range, her socialization skills fell within the adequate range, and the student's motor skills fell within the low range (id.). Finally, the June 2013 IEP indicated that the student's perceptual-reasoning deficits, based upon the administration of the WISC-IV, made it difficult for her to process information presented visually or tasks that relied upon visual processing (compare Dist. Ex. 11 at p. 1, with Dist. Ex. 14 at pp. 3-4, 6-8).

With respect to the student's social development, the June 2013 IEP described the student as "wheelchair bound," "usually energetic and cheerful," and making progress in coping with delays in gratification and accepting consequences (Dist. Ex. 11 at p. 2). In addition, the June 2013 CSE noted in the IEP a "concern about academic productivity," indicating further that at times the student made a "strong effort" and displayed a "positive attitude," and at times, the student presented as "more resistant and emotional," which appeared to be triggered by "certain subject matters" (id.).

Turning to the student's physical development, the June 2013 IEP reported the results of the student's overall motor functioning based upon her performance on the Vineland-II and on level III of the Gross Motor Function Classification System (GMFCS) (see Dist. Ex. 11 at p. 2; 17 at pp. 1-3). The June 2013 IEP indicated that at that time, the student negotiated the school environment using a posterior rolling walker and a manual wheelchair (see Dist. Exs. 11 at p. 2; 17 at p. 1). In addition, the June 2013 IEP noted that the student had been evaluated for the use of adaptive seating in the classroom because she could not adequately maintain an upright seated position in a classroom chair for long periods of time without external support (for example, an arm chair that provided the student with some trunk stability, enabling her to complete tabletop assignments) (id.). The June 2013 IEP also reported the student's progress with transfers, but noted

that she continued to require assistance moving in and out of her chair (see Dist. Exs. 11 at p. 2; 17 at p. 2). At that time, the student could catch various soft objects thrown from a close distance using both hands and body (see Dist. Exs. 11 at p. 2; 17 at pp. 2-3). In addition, the June 2013 IEP included specific details about the student's OT-related motor and ocular abilities pertaining to classroom performance of skills involving pencil control, the motor act of writing, and visual-perceptual and motor coordination skills (see Dist. Ex. 11 at pp. 2-3). With regard to sensory development, overall, the student presented with no major sensory concerns (id. at p. 3).

In addition to the above, the June 2013 IEP further noted that the student displayed strength in her verbal reasoning skills and had strong listening comprehension skills in the classroom (see Dist. Ex. 11 at p. 1). To address the student's perceptual-reasoning deficits and incorporate her verbal reasoning strengths, the June 2013 IEP indicated the student required that verbal information be paired with visually presented material (id.). The June 2013 IEP also indicated that the student benefitted from additional repetition and prompting, as well as breaking down multistep information (id.). In addition, the June 2013 IEP included that the student's performance improved when she was allowed to verbalize her responses, rather than respond in writing (id.). The June 2013 IEP also indicated the student required mobility support from a 1:1 paraprofessional throughout the school day (id. at p. 3). Furthermore, the June 2013 IEP indicated the student needed support in school in order to participate and progress in the general education curriculum (id.). Recommended physical development supports included PT and OT to build her fine motor and gross motor development, an adaptive seat in the classroom so she could use a regular desk, and adapted physical education (id.). Furthermore, as noted previously, the June 2013 IEP included various classroom management strategies to address the student's specific needs (id.).

Based upon the foregoing, the hearing record supports a finding that the district met its obligation to consider the results of the student's most recent evaluation—completed at the parents' request in May 2013 in order to reconsider the student's placement for the 2013-14 school year—as well as the parents' concerns expressed at the May 2013 and June 2013 CSE meetings in the development of the student's June 2013 IEP (compare Dist. Ex. 11 at pp. 1-13, with Dist. Ex. 10 at pp. 1-15). In addition, the hearing record supports a finding that the June 2013 CSE modified the May 2013 IEP based upon the newly acquired evaluative information, and consequently, the parents' assertion that the district failed to consider all of the available information must be dismissed.

2. Annual Goals

Next, the parents argue that the district failed to offer the student a FAPE for the 2013-14 school year because the annual goals were not appropriate, the June 2013 CSE did not discuss the annual goals, and the annual goals in the June 2013 IEP could be not implemented in a 12:1+1 special class. As discussed below, the parents' assertions are not supported by the hearing record and must be dismissed.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and

ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

First, addressing the parents' contention that the June 2013 IEP was not appropriate because the annual goals could not be implemented in a 12: 1+1 special class as opposed to within an ICT setting, 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]).

With regard to whether the annual goals in the June 2013 IEP were appropriate to meet the student's needs, the June 2013 IEP included approximately 18 annual goals, which targeted the student's needs in the areas of reading comprehension (use of context cues to determine meaning, identify main idea with supporting details), writing (self-correction of sentences using correct spelling, punctuation, and grammar), mathematics (place value for two and three digit numbers, addition and subtraction computation, telling time), speech-language communication (overall communication skills, pragmatic language), PT (skills related to successful transferring from wheelchair to walker, ball play skills for participation in play with peers during recess, safety, maintenance of pace, alongside peers during negotiation of hallways during transition time), adapted physical education (fitness skills, eye-hand coordination skills), OT (writing, physical transfer, self-care, dressing), and counseling (identification of feelings) (see Dist. Ex. 11 at pp. 4-8).

Upon review, the annual goals in the June 2013 IEP were aligned with the student's needs as described in the present levels of performance and individual needs section in the IEP (compare Dist. Ex. 11 at pp. 1-3, with Dist. Ex. 11 at pp. 4-8). In particular, the student's annual goals were aligned with the student's needs for supports related to reading, sentence writing, mathematic operations including addition and subtraction, fine motor and gross motor skills, self-help skills, speech-language and social communication skills, and social/emotional development (see Dist. Ex. 1l at pp. 1-3). Further, the annual goals and short term-objectives enumerated in the June 2013 IEP contained sufficient specificity by which to guide instruction and intervention, to evaluate the student's progress or gauge the need for continuation or revision, and contained adequate evaluative criteria (see id. at pp. 4-8). Additionally, a review of the June 2013 IEP shows that each annual goal identified the specific skill the student was to achieve, the criteria by which the student's success toward achieving the skill was to be measured, the procedures that would be utilized by the special education teacher or counselor to evaluate the student's success, and how

frequently the special education teacher or provider was to measure the student's progress toward meeting the particular annual goal (id.).

In addition, the hearing record does not support the parents' contentions that the district failed to offer the student a FAPE for the 2013-14 school year because the June 2013 CSE did not discuss the annual goals included in the student's June 2013 IEP or repeated annual goals from the previous school year. First, a brief comparison of the annual goals in the student's May 2012 IEP with the annual goals in the June 2013 reveal that, except for an annual goal that targeted the student's ability to safely "negotiate school hallways with minimal assistance," the remaining 17 annual goals in the June 2013 IEP were different than the remaining 16 annual goals in the May 2012 IEP (compare Dist. Ex. 10 at pp. 3-7, with Dist. Ex. 11 at pp. 3-8). With respect to the annual PT-related goal that remained the same, the district school psychologist testified that it had been continued in the June 2013 IEP because the student had not achieved that annual goal (see Tr. pp. 54-55). With respect to whether the June 2013 CSE discussed the annual goals included in the June 2013 IEP, the hearing record offers little, if any, evidence on this issue, other than the parents' testimony that the June 2013 CSE did discuss the student's progress with respect to annual goals, and the district school psychologist's testimony regarding the rationale for continuing the annual PT-related goal into the June 2013 IEP (see Tr. pp. 27, 54-55, 153). To the extent that the failure to discuss the annual goals at the June 2013 CSE meeting may have constituted a procedural violation, however, the hearing record does not contain sufficient evidence upon which to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

Thus, overall, the hearing record supports a finding that the annual goals in the June 2013 IEP targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring her progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

3. 12:1+1 Special Class Placement and PT Services

The district argues that contrary to the IHO's findings, the hearing record demonstrated that the 12:1+1 special class placement was appropriate to meet the student's needs in the LRE and that the June 2013 CSE's recommendation for PT services, albeit reduced by five minutes per session for the 2013-14 school year, was also appropriate to meet the student's needs. The parents reject the district's allegations, and assert that the 12:1+1 special class placement was not appropriate and the hearing record did not support the June 2013 CSE's recommendation to reduce the student's

recommended PT services. A review of the hearing record supports the district's contentions, and therefore, the IHO's findings must be reversed.

According to State regulations, a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). According to the district school psychologist who attended the June 2013 CSE meeting, the June 2013 CSE reached the decision to modify the recommendation for ICT services in the May 2013 IEP to, instead, recommend a 12:1+1 special class placement as a result of the information received from the "testing" from Viscardi, as well as the "new testing" she conducted in May 2013, which shed "new light" on the student's situation (see Tr. pp. 34-36). The school psychologist further testified that in consideration of the above noted evaluative information, the June 2013 CSE determined that ICT services—as recommended in the May 2013 IEP—were not sufficient to address the student's needs (see Tr. pp. 36-37). In addition, the school psychologist testified that the June 2013 CSE believed that the student required a smaller class setting in order to receive "more individualized attention" and in which the teacher had "more flexibility" (Tr. p. 36). The school psychologist further testified that given the student's recent testing results, the student functioned, academically, at least one grade level behind her then-current second grade peers (see Tr. pp. 20-23). However, based upon consideration of the State's recent implementation of the "common core [curriculum] standards," the student's then-current teacher at the June 2013 CSE meeting estimated that the student functioned, academically, at approximately a "kindergarten level," because the common core was more demanding and more was expected of students academically when compared to the expectations of standardized tests (see id.).

With regard to the June 2013 CSE's recommendation of a 12:1+1 special class in a community school—as opposed to a 12:1+1 in a specialized school—the district school psychologist testified that the student did not require the level of "intensive instruction" or "intensive support" offered at a specialized school (Tr. pp. 23-24). In addition, the school psychologist testified that the June 2013 CSE considered other options along the continuum of services, including ICT services combined with SETSS—but determined that this would result in the student being pulled out of class, and the parents had expressed concerns with excessive pull-out services (see Tr. pp. 24-25; see also Dist. Ex. 11 at pp. 2, 8, 13). The June 2013 CSE also considered the larger size of an "ICT classroom," and the student's tendency to "lose focus" or become "easily distracted" (Tr. pp. 24-25). Therefore, in terms of LRE, the school psychologist testified that in light of "research" indicating that students were "most successful when they [were] around typically developing peers," the June 2013 CSE determined that the student would "benefit from being in a community school" in a small class setting with more individualized support to assist the student with refocusing and repetition, and with the ability to interact with her nondisabled peers (Tr. pp. 24, 26; see Dist. Ex. 11 at p. 13).

Additionally, the June 2013 CSE recommended related services of counseling to support the student's social/emotional needs, speech-language therapy to support her language-based concerns, and PT and OT to address the student's physical development needs (see Dist. Ex. 11 at pp. 2, 8). In reaching the determination to recommend two 40-minute sessions per week of PT in a small group and one 10-minute individual PT consultation per month, the physical therapist who attended the June 2013 CSE meeting testified that although the student demonstrated "less progress" during the 2012-13 school year than she had previously experienced, the five-minute per

session reduction in PT services was directly correlated to the student's improved ability and "efficiency" in navigating between her classroom and the therapy room (see Tr. pp. 85, 91-92, 99-102). The physical therapist explained that because the student could more quickly traverse between the classroom and the therapy room, the student had "more time to work on other things" (Tr. pp. 99-100). In addition, the physical therapist testified that the addition of the 10-minute per month PT consultation was recommended to "facilitate the communication" with the student's teachers and 1:1 health paraprofessional regarding the additional recommendation for the use of adaptive seating, as well as the student's use of her wheelchair and walker (Tr. pp. 100-01). According to her testimony, the 10-minute monthly consultation would allow individuals working with the student with the opportunity to discuss "how things were working out, and how we were doing as far as having [the student] integrated as best as possible" (id.).

Thus, given the June 2013 CSE's awareness of the student's average to borderline cognitive scores and average to low academic skills, combined with her need for a multiple classroom strategies and additional adult support, the hearing record supports a conclusion that the June 2013 CSE's recommendation of a 12:1+1 special class placement in a community school, along with the recommended levels and frequency of PT services, was reasonably calculated to enable the student to receive educational benefits. Furthermore, although the parents assert that the June 2013 CSE failed to consider other placement options, a review of the hearing record does not support the parents' assertion. Here, the district was not required to consider placing the student in a nonpublic school if it believed that the student could be satisfactorily educated in the public schools (W.S., 454 F.Supp.2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; A.D., 2013 WL 1155570, at *7-*8; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]; Patskin, 583 F.Supp.2d at 430-31). (13-231) Thus, although the parents might have preferred otherwise, as determined above, given the availability of an appropriate placement and program for the student within the public school, in this instance, the district was not required to consider a nonpublic school placement.

C. Challenges to the Assigned Public School Site

Finally, for the reasons explained below, the district properly asserts that any findings by the IHO related to the failure to present evidence from the student's "present teacher" about the "proposed class offered, class profile, or how the class would specifically address" the student's needs were speculative, as the student's June 2013 IEP was never implemented, and the IHO's findings must be reversed.

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 at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L., 530 Fed. App'x at 87, 2013 WL 3814669; 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 a student would be placed in 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. 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. (Region 4), 526 Fed. App'x 135, 141, 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]).

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., 2013 WL 5438605, at *17; E.F., 2013 WL 4495676, at *26; M.R. v. New York City Dep't 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 also 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'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

In view of the forgoing, the parents cannot prevail on claims that the district would have failed to implement the June 2013 IEP at the public school site because a retrospective analysis of how the district would have executed the student's June 2013 IEP at the public school is 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 June 2013 IEP containing the recommendations of the June 2013 CSE or the programs offered by the district (see Dist. Ex. 1 at pp. 1-3). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP—or as in this case, although the parents did not withdraw the student from the public school, but rather, requested that the student be educated through the implementation of a pendency (stay-put) placement consisting of ICT services in a third-grade public school classroom—it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parents to challenge the June 2013 IEP through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's June 2013 IEP at the public school site when the parents rejected the June 2013 IEP.

VII. Conclusion

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 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Viscardi would have been an appropriate unilateral placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 30, 2013, is modified by reversing the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year; and,

IT IS FURTHER ORDERED that the IHO's decision, dated October 30, 2013, is modified by reversing the IHO's order directing the district to fund the student's placement at Viscardi for the remainder of the 2013-14 school year.

Dated: **Albany, New York**
February 12, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER