The University of the State of New York

The State Education Department
State Review Officer
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No. 14-037

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Lisa Isaacs, PC, attorneys for petitioner, Lisa Isaacs, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the Seton Foundation School (Seton) for the 2013-14 school year. The appeal must be dismissed.

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

For the 2009-10 school year, while the student was in kindergarten, she attended Seton (Tr. pp. 120-21, 130-31).[1] In 2010, for approximately five weeks, the student attended an 8:1+1 special class in a district public school (Tr. pp. 120, 130-31). According to the parent, the student did "terribly" in the public school class (Tr. p. 120). Subsequently, the student again attended Seton (Tr. pp. 120-21, 131; see Dist. Ex. 4 at p. 2).

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

On May 17, 2013, the CSE convened to conduct the student's annual review and develop an IEP for the 2013-14 school year (Parent Ex. B at pp. 1, 15). Finding the student eligible for special education as a student with autism, the May 2013 CSE recommended, among other things, a 12-month school year program in a 6:1+1 special class placement in a specialized school and related services of individual counseling, parent counseling and training, individual and small group occupational therapy (OT), individual physical therapy (PT), and individual and small group speech-language therapy (id. at pp. 12-13, 15).[2]

In a final notice of recommendation (FNR) dated June 10, 2013, the district assigned the student to attend pa articular public school site for the 2013-14 school year (see Parent Ex. C). The hearing record shows that this district sent the June 10, 2013 FNR in error and that the district informed the parent of such (see Parent Ex. D at p. 1).

Subsequently, in a second FNR dated June 13, 2013, the district summarized the special class and some of the related services recommended in the May 2013 IEP and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Parent Ex. F).[3]

By letter dated June 17, 2013, the parent notified the district that she had an appointment to visit that assigned public school site on June 21, 2013 but that, because the student required a 12-month program and "the summer session [wa]s only a few weeks away," she intended to continue the student at Seton (Parent Ex. D at p. 1). Therefore, she requested that, until she had the opportunity to assess the appropriateness of the assigned public school site, that the district advise how she could ensure that the student's "services continue[d] unchanged" (id.). By letter dated June 15, 2013, the district notified the parent that the student was assigned to the same public school site identified on the June 13, 2013 FNR for services during the summer session (see Parent Ex. E at p. 2). The parent responded by letter dated June 19, 2013 and informed the district that she wished "to accept the services, but not the school at this time" (id. at p. 1). She elaborated that, until she had an opportunity to "determine the appropriateness" of the assigned public school site, she wanted the district to provide the student with related services "through RSAs, as [it had] in the past," along with transportation (id.).

The parent visited the assigned public school site on June 21, 2013 and, by letter dated June 24, 2013, the parent rejected the assigned school as not appropriate for the student (Parent Ex. G at p. 1). Specifically, the parent stated that: the school was "cramped, crowded and distracting"; the cafeteria was "loud, disorganized and chaotic"; she did not have an opportunity to view the proposed classroom or the profile of the other students; the parent was told that the student would not receive all her related services during the course of the school day; the student would have no opportunity to interact with nondisabled peers; and the paraprofessionals in the class acted as teacher assistants (id.). The parent also asserted that the assistant principal agreed that the school

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] The FNR June 13, 2013 did not summarize the related services of parent counseling and training or individual or group speech language therapy that were included on the May 2013 IEP (compare Dist. Ex. 2, with Parent Ex. B at p. 12).

was not appropriate for the student (id. at p. 2). Based on the foregoing, the parent notified the district of her intention to continue the student's enrollment at Seton for the 2013-14 school year and seek public funding for the costs of the student's tuition (id.). The parent also stated that she "expect[ed] all related services and transportation to continue uninterrupted" (id.).

The parent signed an enrollment contract with Seton on June 28, 2013 for the 2013-14 school year (Parent Ex. L at pp. 1, 3). The hearing record shows that the student began attending Seton in a 6:1+1 class during the 2013-14 school year (see Parent Ex. I at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 12, 2013, the parent alleged that, based upon her visit, the assigned public school site was not appropriate for the student (see Parent Ex. A at pp. 1-2). Specifically, the parent asserted that: (1) the assigned public school site was too "chaotic, cramped, . . . distracting," and over-stimulating for the student; (2) the cafeteria at the assigned public school site was too "loud, disorganized and chaotic" and the student could not cope in such an environment given her sensory and social issues; (3) the assistant principal at the assigned public school site could not guarantee to which actual classroom the student would be assigned, so the parent could not determine if the classroom would have been appropriate; (4) the assigned public school site could not provide the student with all of her mandated related services during the school day, which would necessitate that the district issue related services authorizations (RSAs) and the student would have to receive the related services outside of the school day; (5) the assigned public school site was too restrictive, providing the student with "virtually no opportunity to interact with non-disabled peers"; (6) the parent was told by "people at the school" that the paraprofessionals employed at the assigned school were being trained as teacher assistants, and the parent disapproved of paraprofessionals taking on this role; and (7) the assistant principal told the parent that the program at the assigned public school site was not an appropriate match for the student and recommended alternative sites (id. at p. 2).

In addition, the parent alleged that the student's unilateral placement was appropriate because the student previously made progress at Seton (IHO Decision at p. 3). The parent also asserted that Seton provided the "least restrictive placement" for the student, offered a "small, highly structured setting with teachers specifically trained to address [the student's] needs," and coordinated delivery of the student's related services on site during the school day (id.). Finally, the parent alleged that equitable considerations weighed in favor of her request for relief (id.). As relief, the parent requested that the IHO order the district to pay for the costs of the student's tuition at Seton for the 2013-14 school year (id. at p. 3). The parent also requested that the IHO order the district to provide related services and transportation (id.). The parent invoked a right to a pendency placement at Seton, along with "transportation and related services at the frequency listed in [the student's] current IEP" (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 25, 2013 and concluded on January 10, 2013 after two days of proceedings (Tr. pp. 1-139). In a decision dated January 23, 2014, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2013-14 school year (IHO Decision at p. 13).

Initially, the IHO noted that the parent did not allege any defects relative to the May 2013 IEP (IHO Decision at p. 9). With respect to the assistant principal's alleged inability to assure the parent as to which actual classroom the student would be assigned, the IHO found that, "[w]hile it would be optimal" for any parent "to review the exact setting" a student would be attending the following year, to require the district to facilitate such would be impracticable, as rosters, class sizes, and staff could change (id. at pp. 9-10). Therefore, the IHO found that the district could not be deemed to have failed to offer a student an appropriate placement, where, as here, it allowed the parent to view a comparable classroom that reflected its best approximation of the program offered on the IEP (id. at p. 10).

Turning to the parent's assertion that the assigned public school site was not the student's least restrictive environment (LRE), the IHO found that, since the parent agreed with the May 2013 CSE's recommendation that the student attend a special class in a specialized school, the issue raised by the parent was "whether the setting offered by the district permit[ted] an adequate amount of contact with typically developing peers, recognizing that none of those children w[ould] be in the same class, or even the same school, as [the student]" (IHO Decision at p. 10). The IHO observed that the hearing record did not reveal that such a program existed and that, therefore, the issue was whether the assigned public school offered "extra-curricular or co-curricular opportunities" sufficient to provide the student access to typically developing peers (id.). Concluding that the district could not "predict the future at the level of detail" the IHO determined that the parent's allegation was too speculative (id. at pp. 10-11).

With respect to the parent's claims relating to the environment at the assigned public school site, including in the cafeteria, the district's ability to implement the student's mandated related services, and the training of the paraprofessionals at the assigned public school site as teacher assistants, the IHO first noted that, given the speculative nature of such claims, "even if they were proven by the record," [they did not] amount to any sort of substantive harm for which the reimbursement remedy [was] available" (IHO Decision at p. 11). As to the alleged distractibility of the environment, the IHO noted that, while it was possible that the assigned public school site could not address the student's needs, it was "far more reasonable to assume that two competent, adult staff could deliver meaningful academic benefit in a [6:1+1 special class] notwithstanding even the amount of building-level distraction described in the record (id. at pp. 11-12). Similarly, as to the cafeteria, the IHO determined that, if the student was over-stimulated by the environment in the cafeteria, such a concern "could be addressed if identified and tackled once the [student] arrived at the school" (id. at p. 12). The IHO also found that, if the district was given the opportunity to deliver the student's related services and failed, that might amount to a denial of a FAPE, but that, first, the district had to be given the opportunity to fulfill its commitment (id.). As to the parent's allegations challenging the assigned public school's training of paraprofessionals as teacher assistants, the IHO found that the assertion was "not simply a judgment of dubious merit, it [was] a matter of methodology and pedagogy that [was] at the heart of the school's responsibility and discretion" (id.).

Based on the foregoing, the IHO concluded: that the district demonstrated that it had a seat available in the recommended 6:1+1 special class program; that the assigned public school site could implement the student's May 2013 IEP; and that the parent had not raised, much less demonstrated, any objections to the assigned public school site that rose to the level of a

recognizable legal harm (IHO Decision at p. 13). Accordingly, the IHO denied the parent's requested relief (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking to overturn the IHO's determination that the district offered the student a FAPE for the 2013-14 school year. Initially, the parent acknowledges that she did not challenge the appropriateness of the May 2013 IEP. Next, the parent reiterates her claims regarding the student's sensory needs in contrast to the environment at the assigned public site and the inability of the assigned public school to implement the student's related services mandates. The parent also asserts that the district failed to respond to her 10-day notice letter or address her concerns during the resolution period and should "be held accountable" for such failure. The parent asserts that the IHO erred in his determination that all of the issues concerning the assigned public school site were speculative and, instead, argues that the analysis should have focused on what information the parent had in front of her when she made her decision to reject the public school site and unilaterally place the student at Seton. In particular, the parent emphasizes her alleged conversation with the assistant principal of the assigned public school site, wherein the assistant principal informed the parent that the assigned school was not appropriate for the student. However, the parent asserts that the testimony of the assistant principal, to the extent that it was contrary to the parent's account of the conversation, constituted impermissible retrospective testimony. The parent also asserts that the IHO erred by using an improper legal standard in his analysis concerning the parent's contention that the assigned public school site was not the student's LRE. Specifically, the parent asserts that the IHO should have made his determination based on the student's capability to have interaction with nondisabled peers at the assigned public school site, rather than concluding that a 6:1+1 special class in a specialized school automatically precluded access to nondisabled peers. The parent also alleges that Seton was an appropriate unilateral placement for the student for the 2013-14 school year, that equitable considerations weighed in favor of the parent's request for relief, and that relief in the form of direct payment to Seton was appropriate.

In an answer, the district responds to the parent's petition by denying certain of the allegations raised and asserting that the IHO correctly determined that the district offered the student a FAPE for the 2013-14 school year. The district also asserts that Seton was not an appropriate unilateral placement for the student, that equitable considerations did not weigh in favor of the parent's request for relief, and that she was not entitled to an award of direct payment of the student's tuition.

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 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—Challenges to the Assigned Public School Site

The parent contends that the IHO's analysis of the parent's claims concerning the assigned public school site was legally flawed and that the district could not have properly implemented the student's May 2013 IEP. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second

Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; 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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; 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]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. 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]). However, I continue to find it necessary to depart from those cases. Since a number of 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 [2d Cir. May 21, 2013]) and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [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]).[4]

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't 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 was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parent cannot prevail on her claim that the district would have failed to implement the May 2013 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's May 2013 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Ex. G). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time

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

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"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claim that the assigned public school site would not have properly implemented the May 2013 IEP.

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, as further explained below, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, deviation from the student's IEP in a material or substantial way that would have resulted in a failure to offer the student a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

1. Related Services

With respect to the parent's contention that the student would not receive all her related services during the course of the school day and that RSAs would have to be issued, a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

> [S]chool districts . . . have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority . . . to enter into contracts with qualified individuals as employees or independent contractors to provide those related services . . . .

("Questions and Answers Related to Contracts for Instruction," Office of Special Ed. [June 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Moreover, case law supports a finding that it is permissible for the district to offer parents vouchers to obtain related services outside of school in response to a recognized shortage of service

providers (see A.L., 812 F. Supp. 2d at 503). Therefore, even if the district had needed to provide the student with an RSA for related services, this would not have denied the student a FAPE.

In this case, the assistant principal of the assigned public school testified that the student's related services of OT, counseling, and adaptive physical education would have been provided to her in school (Tr. p. 25).[5] However, the assistant principal testified that, due to the student's "extensive" speech-language therapy services required by the May 2013 IEP, the possibility existed that the assigned school would not be able to deliver all of the student's services within the school day and that RSAs may have to be issued for the parent to obtain the services outside of school (Tr. p. 24). She further stated that, if the parent had objected to the provision of RSAs for related services, then the school would "have to accommodate" the student in school (Tr. pp. 24-25). However, the parent testified that the assistant principal did not inform her at the time of her visit that the school would provide the student's related services at the school if the parent objected to the RSAs (Tr. p. 116). In turn, highlighting the speculative nature of claims regarding future events, the assistant principal testified that, since the parent's visit, the assigned public school site had hired additional providers and, therefore, was better able to fulfill related service mandates (Tr. pp. 36-37).

Based on the foregoing, the evidence in the hearing record supports the conclusion that, had the student attended the assigned public school site, the district would have been able to deliver her the related services mandated on the May 2013 IEP and that, if there was inadequate in-house staff, the district could have permissibly ensured that the IEP services would be implemented through the use of RSAs (see e.g., A.L., 812 F. Supp. 2d at 503).

2. Sensory Needs

The parent also contends that, in light of the student's sensory deficits, the loud, disorganized and chaotic environment of the assigned public school site, including the cafeteria, would not have been appropriate.

As to the student's sensory needs, the April 2013 psychoeducational evaluation report included a summary of the student's OT progress report, which indicated that the student was overly responsive to visual stimuli (Dist. Ex. 3 at p. 2; see Parent Ex. B at p. 4). In addition, the May 2013 IEP stated that the student was a multi-sensory learner and benefited from visual supports (Parent Ex. B at p. 2). The May 2013 IEP further stated that the student displayed sensory processing difficulties, as well as sensory cravings, as evidenced by her desire for fast linear and rotational movements, and that she exhibited positive responsiveness to therapeutic, sensory-based strategies and interventions (id. at pp. 4-5). Finally, the May 2013 IEP included a goal for the student to improve her ability to process sensory information by displaying more efficient planning, execution of motor behavior and response, and regulation of level of arousal (id. at p. 10).

The parent testified that, upon visiting the assigned public school site, she found it to be "loud and chaotic," as well as "narrow and small" (Tr. p. 112). She elaborated that the noisy area

[5] The assistant principal did not specifically testify as to whether the school could accommodate the student's PT services.

in the school was near the entrance (Tr. pp. 128-29). The parent also testified that the smells in the school, of food and cleaning products, would cause the student problems due to her sensitivity to smell (Tr. pp. 112-13). She further indicated her impression that the "related service room seemed small, not organized" (Tr. p. 115).[6]

The assistant principal testified that the assigned public school site consisted of 13 classes of six students each, totaling approximately 78 students (Tr. pp. 19, 38). As to the lunch period, the assistant principal testified that a group of six classes ate lunch together and that the students sat at a table with their particular class (Tr. p. 30). After lunch, the students went to recess outside or in their classrooms (id.). The assistant principal further described the PT/OT room at the assigned public school site as a large room in which four or five providers might work at a time, with partitions that could serve as "privacy barriers" (Tr. p. 39). Similarly, the speech-language therapy room accommodated five providers and consisted of a table and a partition for each (Tr. p. 41).

3. LRE Considerations

The parent asserts that the assigned public school site was not appropriate because it afforded the student no opportunity to interact with nondisabled peers. The IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d at 108; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure

[6] The district objected to the parent's cross-examination on the subject of the therapy room at the assigned public school site as outside the scope of the impartial hearing (Tr. pp. 39-40). Although I agree with the district that the parent did not raise the issue in her due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][b], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents "state all of the alleged deficiencies in the IEP in their . . . due process complaint"]), to the extent that the issue is marginally related to the parent's allegations about the environment at the assigned public school site, it is duly addressed.

that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see M.W., 725 F.3d at 143-44; North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see M.W., 725 F.3d at 144; North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[7]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

The parent does not challenge the first prong of the Newington test, in that she does not challenge the recommendation in the May 2013 IEP that the student attend a special class in a specialized school, removed from the general education classroom (see Newington, 546 F.3d at 120). As to the second prong, the parent does not argue that the district failed to recommend inclusion of the student with nondisabled student to the maximum extent possible; on the contrary, the parent essentially argues that, if she enrolled the student at the assigned public school site, the district would have deviated from such recommendations in a material or substantial way.

[7] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

The assistant principal testified that the students who attended the assigned public school site did not have opportunities to interact with nondisabled peers at the school (Tr. p. 30-31). The district asserts that "specialized schools," such as that recommended in the student's May 2013 IEP, "are, by definition, schools that are self-contained and exclusively special education students." The district argues, therefore, that, in order for the student to have access to nondisabled peers, the parent should have requested that the CSE recommend a community school. Contrary to the district's assertions, the May 2013 CSE actually recommended the sort of setting for which the parent now advocates. The May 2013 IEP states that the student's "[c]ognitive, academic and language delays precluded [her] participation in general education"; therefore, warranting the recommendation of a special class in a specialized school (Parent Ex. B at pp. 5, 12). However, the May 2013 IEP also states that, with adult supervision, the student was "able to participate in extracurricular and other non-academic activities with typically developing peers" (id. at p. 14). Thus, the May 2013 IEP contains a dual mandate which is inconsistent with the district's inflexible description of a "specialized school".

However, the hearing record reveals that a setting consistent with the student's May 2013 IEP did exist within the district (see Tr. pp. 30-33). The assistant principal could not recall a specific discussion with the parent regarding the available opportunities for the student to interact with nondisabled peers at the assigned public school site (Tr. pp. 31, 45).[8] However, the she testified that, if a parent expressed to her concern that a student required access to non-disabled peers, she would have recommended that the parent consider a "co-located" public school site within the district and she would have contacted the placement office to inquire about availability of such a setting (id. at pp. 31-33). This testimony from the assistant principal reveals that, if the student enrolled in the assigned public school site and the staff had an opportunity to review the May 2013 IEP, then it was possible that the staff could recommend that the student attend such a setting.[9] Alternatively, had the student enrolled and the staff reviewed the May 2013 IEP, there is no saying that accommodations would not have been made at the assigned public school site in order to ensure that the student had access to nondisabled peers in a manner consistent with the May 2013 IEP. However, the parent rejected the assigned public school site before the district had such an opportunity (see Parent Ex. G) and, as such, this discussion epitomizes the speculative nature of the parent's claims (see R.E., 694 F.3d at 186-88). In this sense, the IHO properly

[8] Even if, as the parent testified, the assistant principal expressed to her during her visit to the assigned public school site that the school was not appropriate for the student (see Tr. pp. 116-17), the assistant principal did not have a copy of the student's May 2013 IEP and had not met the student or attended a CSE meeting for the student. Therefore, it was not reasonable for the parent to rely on such an assessment over that of the individuals who participated in the development of the student's special education program for the 2013-14 school year. Furthermore, to the extent that the parent argues that the assistant principal's testimony relating to the parent's visit to the assigned public school was retrospective testimony, the principles articulated by the Second Circuit in R.E. do not apply; to wit, that retrospective testimony that materially alters an IEP may not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). Furthermore, although the Second Circuit in F.L. explicitly declined to decide whether testimony contradictory to what a parent was told "at the time of the placement decision" could also be deemed retrospective (F.L., 2014 WL 53264, at *2), in any event, the assistant principal did not contradict what the parent was told but rather explained her recollection of the parent's visit, as well as how the program and services set forth in the student's IEP would be provided at the assigned public school site (see generally Tr. pp. 18-52).

[9] A future change in a school building does not amount to an actionable claim pursuant to the IDEA (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *16 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 F. App'x 81).

characterized the mental exercise necessitated by the parent's claim as a request for a prediction of the future (see IHO Decision at p. 11). In view of the foregoing evidence which was examined in the alternative, there is no basis to conclude that, if the student had enrolled in the assigned public school site and the district been required to implement his IEP, that the district would have deviated from the May 2013 IEP in a material or substantial way and thereby denied the student a FAPE (A.P., 370 Fed. App'x at 205; Van Duyn, 502 F.3d at 822; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S., 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 503; see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]).

VII. Conclusion

The parent acknowledged in this proceeding that the student's program as designed in the IEP was not challenged, and the student did not attend the public school site and take services under the IEP. As described above the parent cannot prevail on claims that the student services would have been inappropriate at the assigned public school site (F.L., 2014 WL 53264, at *6). In the alternative, even if such claims were cognizable in this instance, the facts in the hearing record do not ultimately support them. That said, I can understand and sympathize that the parent would want to take every step possible to ensure that her daughter would have the most successful experience possible if placed in the public school, but such success is not guaranteed under the IDEA.

Having determined that the parent's challenges that the district denied the FAPE for the 2013-14 school year are unavailing, the necessary inquiry is at an end and there is no need to reach the issue of whether Seton was an appropriate unilateral placement for the student or whether equitable considerations support the parents' requested relief and the necessary inquiry is at an end (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 18, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER