The University of the State of New York

The State Education Department
State Review Officer
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No. 14-047

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

Susan Luger Associates, Inc., attorneys for respondents, Lawrence D. Weinberg, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their daughter's tuition costs at the Rebecca School (Rebecca) for the 2012-13 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

I was appointed to decide this appeal on December 1, 2014. I have conducted an impartial review of the hearing record and offer the following independent decision (see 20 U.S.C. § 1415[g]; Educ. Law 4404(2); 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

On June 21, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. G at pp. 1, 11).[1] Finding the student eligible for special education as a student with autism, the June 2012 CSE recommended placement in a 6:1+1

[1] At the time of the June 2012 CSE meeting, the student attended Rebecca (see, e.g., Dist. Ex. 4 at p. 1). The Commissioner of Education has not approved Rebecca as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

special class as well as the following related services to be delivered in 30-minute sessions on a weekly basis: four individual speech-language therapy sessions; one speech-language therapy session in a group of two; four individual occupational therapy (OT) sessions; one OT session in a group of two; and one individual counseling session (id. at p. 8). The CSE also recommended supports for the student's management needs and 12 annual goals with corresponding short-term objectives (id. at pp. 2, 3-7).

By final notice of recommendation (FNR) dated June 28, 2012, the district summarized the recommendations of the June 2012 CSE and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. L).

In a letter to the district dated July 17, 2012, the parents relayed their observations of a visit to the assigned public school site and explained why they believed it could not implement the June 2012 IEP and was otherwise inappropriate for the student (Parent Ex. P at pp. 1-2). The parents further indicated that, if the district did not provide an appropriate "program/placement" in a timely manner, they would place the student at Rebecca for the 2012-13 school year and seek the costs of the student's education from the district (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated September 4, 2012, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year, that Rebecca was an appropriate unilateral placement, and that equitable considerations supported an award of tuition reimbursement (Parent Ex. C at pp. 1-8). The parents also invoked the student's right to remain in his then-current placement during the pendency of the administrative proceedings (Parent Ex. C at pp. 6, 7; see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).[2]

With regard to the process by which the June 2012 IEP was developed, the parents contended that the CSE did not possess sufficient evaluative information or data on the student (Parent Ex. C at pp. 3-4). Specifically, the parents contended that the district should have conducted a classroom observation (id. at p. 4). The parents further averred that their ability to participate in the meeting was impeded because they were not given "reports" prior to the commencement of the meeting and the CSE failed to consider potential placements on New York's continuum of special education services (id. at pp. 3, 4). The parents additionally contended that the CSE was improperly composed and predetermined its recommendations (id. at pp. 3, 4). Further, the parents averred that the CSE improperly ignored evidence before it by failing to consider the views of professionals personally familiar with the student (id. at p. 4). Also, following the conclusion of the CSE meeting, the parent alleged that the district failed to provide the student with prior written notice (id. at p. 4).

As for the June 2012 IEP, the parents contended that its description of the student's present levels of performance, including the student's behavioral needs, was inaccurate (Parent Ex. C at p. 3). The parents further posited that the IEP's annual goals were inappropriate because they were developed without the parent's participation, idiomatic to the methodology employed by Rebecca, and based upon outdated information (id. at pp. 2-3). The parents also contended that the IEP did

[2] The parents' original due process complaint notice was dated July 9, 2012 (see Parent Ex. A at p. 1).

not provide a sufficient amount of 1:1 instruction and attention and did not prescribe parent counseling and training (id. at pp. 3, 4). With regard to the IEP's placement recommendation, the parents averred that the class size and student to teacher ratio were too large and that it was identical to a previous, inappropriate placement recommendation (id. at pp. 2, 4).

With regard to the assigned public school site, the parents presented myriad reasons why the school could not implement the June 2012 IEP and would otherwise have been inappropriate for the student (see Parent Ex. C at pp. 4-6). The parents further argued that the district denied the student a FAPE by failing to identify the location where it would implement the June 2012 IEP in a "timely" manner (id. at p. 4).

The parents also alleged that Rebecca was an appropriate unilateral placement for the student during the 2012-13 school year because it met his needs and, further, that the student made educational progress in this setting (Parent Ex. C at p. 6). As for equitable considerations, the parents averred that no equitable factors would diminish or preclude an award of tuition reimbursement to the student (id.). Therefore, the parents requested that the district provide the costs of the student's education for the 2012-13 school year, transportation to Rebecca, the "[c]ost[s] of evaluations," and compensatory education and/or related service authorizations for related services from July 1, 2012 through June 20, 2013 (id. at p. 7).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 3, 2012 and concluded on October 17, 2013 after four days of proceedings (Tr. pp. 1-185 [Vol. I], 1-225 [Vol. II]).[3] In a decision dated March 4, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Rebecca was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 8-11).

First, regarding the sufficiency of the evaluative material before the June 2012 CSE, the IHO found that the information considered by the CSE, "albeit minimal," was sufficient to ascertain the student's present levels of performance (IHO Decision at p. 8). With respect to a July 2009 neuropsychological evaluation, the IHO found that this evaluation remained timely and was properly considered by the CSE (id. at pp. 7-8; see Dist. Ex. 8).

Next, the IHO found that the June 2012 CSE did not consider a more restrictive placement for the student in contravention of the parents' wishes (IHO Decision at p. 11). The IHO further found that the CSE's failure to do so was a procedural violation that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (id.).

The IHO also found that the June 2012 IEP's annual goals were inappropriate for the student (IHO Decision at pp. 9-10). The IHO found that it was inappropriate to copy these goals into the June 2012 IEP because were idiomatic to the methodology employed at Rebecca and could

[3] The pagination in the hearing transcript began anew on the third day of the impartial hearing (see Tr. p. 1 [Vol. II]). The fourth and final day continued this new pagination (see Tr. p. 211 [Vol. II]). For purposes of clarity, the first two hearing dates shall be referred to as "Vol. I" and the final two hearing dates as "Vol. II" throughout this decision.

not be "implemented across different methodologies and environments" (id. at p. 9). The IHO additionally found that the June 2012 CSE improperly relied upon a December 2011 Rebecca progress report because an updated June 2012 progress report was available at the time of the meeting (id. at pp. 9-10). As a result, the CSE "failed to take into account [the student's] progress between December 2011 and June 2012," an omission that further rendered the annual goals inappropriate (id. at p. 10).

As for special factors, the IHO found that a June 2012 behavior intervention plan (BIP) "fail[ed] to adequately describe [the student's] behaviors" (IHO Decision at p. 10). Specifically, the IHO found that the BIP did not describe the student's "frustration arising from his communication deficits" nor did it present a "full description of [the student's] aggressive behaviors" (id.). Moreover, the IHO found that the district failed to provide the BIP to the parents (id.).

The IHO further found that the district did not communicate information pertaining to the assigned public school site in a timely manner (IHO Decision at pp. 11-12). The IHO based this finding upon the district's convening of a CSE meeting "after the date upon which [assigned public school] notifications should have been sent to the parent," a date established by a consent decree in Jose P. v. Ambach (id. at p. 12; see 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). Addressing the parents' contentions regarding the assigned public school site, the IHO found no evidence in the hearing record that the district could not implement the June 2012 IEP (IHO Decision at p. 13). Specifically, the IHO found that a methodology and token economy system employed in the assigned public school classroom were appropriate to meet the student's needs (id.).

The IHO next found that Rebecca was an appropriate unilateral placement for the student (IHO Decision at pp. 14-16). The IHO found that Rebecca offered specially designed instruction to meet the student's academic, dysregulation, speech, and OT needs (id.). Specifically, Rebecca offered instruction utilizing the "DIR methodology"; "1:1 adult support" for "25-35" percent of classroom instruction, speech-language therapy, and OT (id. at pp. 14-16).[4] The IHO further found that the student made progress during the 2012-13 school year, citing academic, social, and behavioral gains (see id.). The IHO also found that, although Rebecca did not offer any access to mainstream peers, it remained appropriate for the student (id. at p. 16).[5] The IHO did not make any finding regarding equitable considerations but impliedly resolved this issue in the parents' favor (id. at p. 17). Accordingly, the IHO ordered the district to "fund" the costs of the student's

[4] DIR is an acronym for Developmental, Individual Difference, Relationship-based and was a methodology used with the student at Rebecca (Tr. p. 10 [Vol. II]; see Dist. Ex. 6 at p. 1).

[5] The IHO intimated that the restrictiveness of a self-contained special class at Rebecca was irrelevant because the June 2012 IEP also recommended a self-contained special class (IHO Decision at p. 16; accord C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 837 [2d Cir. 2014] [holding that "while the restrictiveness of a private placement is a factor [in assessing the appropriateness of a unilateral placement], by no means is it dispositive" and that "where the public school system denied the child a FAPE, the restrictiveness of the private placement cannot be measured against the restrictiveness of the public school option"]).

education at Rebecca for the 2012-13 school year to the extent it had not already done so pursuant to pendency (id.).[6]

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the district denied the student a FAPE for the 2012-13 school year. The district further contends that the IHO erred in finding that Rebecca was an appropriate unilateral placement and that equitable considerations supported the parents' requested relief.

First, the district contends that the IHO erred by finding that the parents were denied participation because the June 2012 CSE did not consider placement in a more restrictive environment. The district contends that the parents were allowed to participate in the June 2012 CSE meeting and, further, that the CSE considered several placements on New York State's continuum of special education services.

The district also contends that the IHO erred in finding that the June 2012 IEP's annual goals were inappropriate for the student. The district argues that the goals were not idiomatic to DIR methodology. The district also avers that the CSE properly relied on a December 2011 Rebecca progress report because the student's teacher at Rebecca represented to the CSE that it was the most current document available.

As for the June 2012 CSE's consideration of special factors, the district argues that the IHO erred by finding that the June 2012 BIP was not conveyed to the parents in a timely manner and was substantively inappropriate. The district argues that no claim regarding the conveyance of the BIP was included in the parents' due process complaint notice and, as such, the IHO was prohibited from making a finding on this issue. With regard to the substantive validity of the BIP, the district contends that the June 2012 functional behavioral assessment (FBA) and BIP, considered together, described and offered strategies to address the student's behavioral needs.

Regarding the timeliness of the June 2012 IEP and FNR, the district argues that it satisfied its legal obligations by having an IEP in effect before the beginning of the 2012-13 school year. With regard to the district's provision of the FNR, the district argues that its mailing of this document a few days after the beginning of the 2012-13 school year did not result in a denial of FAPE to the student. Further, the district argues that the consent decree reached in Jose P. is inapposite to this case as the SRO does not have jurisdiction to enforce compliance with its terms. And, in any event, the district argues that the student could not be placed at Rebecca under the terms of this decree.

The district also appeals the IHO's finding that Rebecca was an appropriate unilateral placement, contending that Rebecca did not offer a sufficient amount of related service sessions to the student. The district further asserts that equitable considerations do not support an award of tuition reimbursement because the parents' written rejection of the June 2012 IEP failed to identify

[6] The IHO also ordered the district "to perform and complete a full triennial evaluation . . . to the extent it [had] not already done so . . . within sixty (60) days of this decision" (IHO Decision at p. 17). The district has not appealed this portion of the IHO's order.

any concerns with the June 2012 IEP.[7] The district also notes that the IHO failed to issue any findings regarding equitable considerations. Accordingly, the district requests that the IHO's decision be overturned.

In an answer, the parents deny the district's material assertions and argue that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year for the reasons set forth in his decision.[8] The parents also aver that, because the 2012-13 school year has passed and the student's tuition at Rebecca has been paid for by the district under pendency, the instant appeal is moot and must be dismissed.

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.,

[7] The district admits, however, that it received written concerns with the June 2012 IEP a week after the student began the 2012-13 school year at Rebecca.

[8] While the parents argue that the IHO erred by finding that a July 2009 neuropsychological evaluation remained timely and was properly considered by the June 2012 CSE, they expressly disclaim any intent to cross-appeal this issue in their answer (see Ans. at p. 13, n.3). Accordingly, this finding—which was adverse to the parents—has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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

A. Mootness

First, I address the parents' contention that this appeal is moot and should be dismissed. As the parents correctly assert, the 2012-13 school has concluded and the district was responsible for the costs of the student's education for this school year under pendency. Therefore, the parents received "all of the relief to which [they were] entitled" (Matter of Loper v. Fischer, 118 A.D.3d 1234 [3d Dep't 2014]) and it is unclear what utility a discussion of the June 2012 CSE's recommendations would have under these circumstances (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84-91 [2d Cir. 2005]).

Nevertheless, I decline to dismiss this appeal on mootness grounds based upon the conflicting decisions federal and State courts have reached under similar circumstances (compare V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-20 [N.D.N.Y. 2013] and M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271 [E.D.N.Y. 2010], with New York City Dep't of Educ. v. S.A., 2012 WL 6028938 [S.D.N.Y. Dec. 4, 2012], V.S. v. New York City Dep't of Educ., 2011 WL 3273922, at *3, *4 [E.D.N.Y Jul. 29, 2011] and Pawling Cent. Sch. Dist. v. New York State Educ. Dep't, 3 A.D.3d 821, 824 [3d Dep't 2004]). Moreover, there is no indication in the hearing record that a CSE, in fact, reconvened after June 2012 to develop a superseding IEP for the student. Therefore, a discussion on the merits of the district's appeal follows.

B. Parental Participation

The district argues that the IHO erred in finding that the June 2012 CSE failed to consider the parents' desired classroom configuration. The evidence in the hearing record supports the district's argument.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's

IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language & Communc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

The evidence in the hearing record shows that the parents attended and participated in the June 2012 CSE meeting (Dist. Ex. 4 at p. 1; Parent Ex. G at p. 13; see Tr. pp. 80, 85-86 [Vol. I]). Nevertheless, the IHO found that "the CSE should have considered increased levels of support" for the student and that its failure to do so contributed to a denial of FAPE (IHO Decision at p. 11). It appears that the IHO meant that the CSE should have considered a placement with more adults in the classroom (see id. [two Rebecca employees "testified that [the student] need[ed] a very small student-teacher ratio, i.e. 2:1 adult support, to make progress."]).

The IEP reflects that the June 2012 CSE considered other options on New York State's continuum of special education services before recommending placement in a 6:1+1 special class (Parent Ex. G at p. 12).[9] While the parents may have preferred the student's then-current staffing ratio, the CSE was not obligated to replicate the services currently received by the student at Rebecca, a nonpublic school (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 307 [4th Cir. 2003]).[10] Accordingly, this portion of the IHO's decision is reversed.[11]

C. Annual Goals

Next, the district avers that the IHO erred by finding that the June 2012 IEP's annual goals were based upon outdated information and could not have been implemented in an environment and with a methodology different from the one utilized at Rebecca. The evidence in the hearing record supports the district's contentions.

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[9] It is unclear based on the evidence in the hearing record whether the parents expressed this specific concern at the June 2012 CSE meeting (see Tr. pp. 177-78 [Vol. II]).

[10] To the extent the IHO's finding could be interpreted to mean that the CSE should have considered a nonpublic school placement—a more restrictive placement than a 6:1+1 special class—this would also be without merit (see, e.g., B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. Mar. 31, 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).

[11] Similarly, the fact that the district did not provide the parents with a copy of the BIP did not affect the parents' ability to participate in the June 2012 CSE meeting (D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 333 [S.D.N.Y. 2013] [finding that "whether or not the [parents] only received a copy of the BIP at the [h]earing, there [wa]s no indication that this denied the [s]tudent a FAPE"]). Because this claim lacks merit, I need not determine whether it was contained in the amended due process complaint notice (see Parent Ex. C at p. 3).

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, the IHO's conclusion that the CSE erroneously relied upon an outdated progress report from December 2011 is not supported by the evidence in the hearing record. While the IHO is correct that the hearing record contains an updated progress report dated June 2012, both the district representative and the student's then-current teacher at Rebecca testified that this updated progress report was not available at the time of the June 2012 CSE meeting (Tr. pp. 115-16 [Vol. I]; 154-55 [Vol. II]; see Parent Ex. H at p. 1). Therefore, the June 2012 CSE did not err by relying on the December 2011 progress report.

Turning to the substance of the June 2012 IEP's annual goals, the IEP contains 12 annual goals with corresponding short-term objectives that address the student's needs in the areas of communication, attention, reading, math, activities of daily living, OT, language, and counseling (see Parent Ex. G at pp. 3-7). These goals were developed based upon the information contained in the December 2011 Rebecca progress report as well as a discussion among the members of the CSE (Tr. p. 101 [Vol. I]; compare Dist. Ex. 6 at pp. 7-14, with Parent Ex. G at pp. 2-7).[12] According to the student's then-current teacher at Rebecca, each goal was read aloud at the CSE meeting (Tr. p. 132 [Vol. II]).

On appeal, the parents contend that these goals were inappropriate because they were idiomatic to the DIR methodology and could not be implemented by providers unfamiliar with its teachings. The parents are correct that four of the goals contain nomenclature associated with DIR (see Parent Ex. G at pp. 3, 6-7). However, the mere presence of these phrases within four annual goals does not render these goals—or any of the IEP's other goals—inappropriate. A determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology, 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]). Moreover, the DIR phraseology notwithstanding, a review of the annual goals reveals no impediment to their implementation in a classroom that, or by a related service provider whom, used a methodology other than DIR (id.; cf. A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]).

Therefore, the evidence in the hearing record supports a finding that the annual goals in the June 2012 IEP targeted and addressed the student's identified areas of need (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting courts' reluctance "to find a

[12] The parents do not contend that it was improper for the June 2012 CSE to rely upon this progress report (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013] [noting that the parent cited "no authority for the proposition that drawing goals from a teacher's progress report is a violation of the [IDEA] or regulations"]).

denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress"], aff'd, 526 Fed. App'x 135, 2013 WL 2158587 [2d Cir. May 21, 2013]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]).

D. Special Factors—Interfering Behaviors

The district also appeals the IHO's determination that the June 2012 BIP failed to prescribe strategies to manage the student's behaviors. While the IHO correctly determined that the June 2012 BIP was inadequate to address the student's behavioral needs, a holistic review of the June 2012 IEP, FBA, and BIP supports the district's argument.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals" (8 NYCRR 200.22[b][4]).

Here, the June 2012 IEP and FBA described the student's behavioral needs and offered strategies to address them (Dist. Ex. 5 at p. 1; Parent Ex. G at pp. 1-2). The June 2012 IEP indicated that it could be "tough for [the student] to understand what is being asked of him" and that this could result in dysregulation (Parent Ex. G at p. 1). Therefore, the IEP offered several strategies to address this dysregulation including sensory input, movement breaks, motivating activities, modeling, and breaks from the classroom (id. at p. 2). The IEP also offered 1:1 paraprofessional services within a 6:1+1 special class, a class designed for "students whose management needs are . . . highly intensive[] and [who] requir[e] a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]; see Parent Ex. G at p. 8).

The June 2012 FBA similarly described and addressed the student's behavioral needs. The FBA was developed based upon a Rebecca progress report, a "psychological evaluation," information from the parents, and input from the student's then-current teacher at Rebecca (Dist. Ex. 5 at p. 1). The FBA identified the student's interfering behaviors as biting, scratching, hitting, and spitting (id.). The FBA explained that the student engaged in these behaviors when transitioning or when he misunderstood directions or expectations (id.). Additionally, the FBA noted that the student had difficulty processing auditory information and could become dysregulated in response to limitations set by adults (id.). The FBA theorized that the student engaged in these behaviors to communicate his wants and needs or to express his miscomprehension of what was being asked (id.).

The FBA listed three previously attempted interventions that had proven successful: a break from the environment where the behavior began, a walk in a hallway or quiet space, and a "switching out" of an adult with whom the student became upset (Dist. Ex. 5 at p. 1). The FBA prescribed each of these strategies to address the student's behaviors (id.). The FBA also identified "preferred activities and items" as positive reinforcers for the student (id.). The June 2012 IEP identified several preferred activities and items, including books, animals, sensory play, and puzzles (Parent Ex. G at p. 1). Finally, the FBA stated that the student would "demonstrate a decrease in frequency, duration, and intensity of the above mentioned behaviors" and that progress would be assessed by "[t]eacher and staff observation reports" (Dist. Ex. 5 at pp. 1-2). The parents correctly argue that the FBA failed to identify the frequency, duration, and intensity of the student's interfering behaviors (see 8 NYCRR 200.22[a][3] ["[t]he FBA shall provide a baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency . . ."]).

The June 2012 CSE also developed a BIP that identified the aforementioned behaviors, indicated that the "duration, frequency, and intensity" of the behaviors would decrease and identified teacher and staff observation as the "methods/criteria for outcome measurement" (Dist. Ex. 5 at p. 3). The BIP contains no further information and, thus, falls far short of the standards for BIPs set forth in State regulations (id.; see 8 NYCRR 200.22[b][4]). While the district representative testified that the assigned public school site would develop a sufficient BIP if and when the student enrolled in the public school, the Second Circuit has found such testimony irrelevant for purposes of a FAPE analysis (Tr. p. 145 [Vol. I]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; R.E., 694 F.3d at 194 [finding that "retrospective testimony that [an assigned public school teacher] would have created a BIP once [the student] was in her class was not appropriate and must be disregarded."]). Therefore, I agree with the parents and the IHO that the district's failure to develop an adequate BIP constituted a procedural violation of the IDEA.

Despite these deficiencies, the hearing record does not support a finding that the district failed to offer the student a FAPE for the 2012-13 school year. Given the overall description of the student's behavioral needs in the June 2012 IEP, the supports and services recommended in the IEP, and the substantive information provided by the June 2012 FBA, I find that the June 2012 CSE described and addressed the student's interfering behaviors (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *8 [S.D.N.Y. June 16, 2014]; A.C., 553 F.3d at 172). Therefore, this portion of the IHO's decision is reversed.

E. Access to Special Education Services

Finally, the district contends that the IHO erred in finding that the district failed to provide the parents with timely notice of the assigned public school site through the issuance of an FNR. A review of the evidence in the hearing record and pertinent legal authority requires a reversal of the IHO's conclusion.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]).[13]

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location where the student's IEP will be implemented, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents of the physical location of the special education program and related services in a student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir 2009]; Tarlowe, 2008 WL 2736027, at *6 [stating that a district's delay does not violate the IDEA so long as an public school site is found before the beginning of the school year]; Application of the Bd. of Educ., Appeal No. 96-014). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by an FNR which is the mechanism adopted by the district in this case—it nonetheless must be shared with the parent before the student's IEP may be implemented.

In this case, by FNR dated June 28, 2012, prior to the beginning of the 2012-13 school year, the district notified the parents of the particular public school site to which it assigned the student to attend for the 2012-13 school year (see Dist. Ex. 9). Although this did not provide a significant amount of time for the parents to consider the public school option prior to the start of the 2012-13 school year, it is not a basis for finding a denial of FAPE (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [finding that " . . . even if the FNR

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

were untimely, it did not interfere with the provision of a FAPE or the [p]arents' opportunity to participate because . . . [p]arents have no right to visit a proposed school or classroom before the recommendation is finalized or prior to the school year."]).[14]

The IHO nevertheless found that the timing of the FNR's submission resulted in a denial of FAPE because it violated a consent decree reached in Jose P. (IHO Decision at pp. 11-12; see R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 37 [S.D.N.Y. 2011], rev'd, 694 F.3d 167 [2d Cir. 2012]). This was improper. As the district correctly argues, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd, R.E., 694 F.3d 167; M.S., 734 F. Supp. 2d at 279). No provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal.

Consequently—and contrary to the IHO's conclusion—neither an IHO nor an SRO has jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Aug. 5, 2011], adopted at 2011 WL 1131522 [Mar. 28, 2011], aff'd sub nom., R.E., 694 F.3d 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289–90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. 2014]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]; Levine v. Greece Cent. School Dist., 2009 WL 261470, *7-*9 [W.D.N.Y. Feb. 4, 2009] [noting that the Second Circuit has consistently distinguished systemic violations such as those in Handberry v. Thompson, 436 F.3d 52 [2d Cir. 2006] and Jose P. to be addressed by the federal courts, from technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators]; see also E.Z-L., 763 F. Supp. 2d at 594; Dean v. Sch.

[14] For the reasons set forth in other State-level administrative decisions resolving similar disputes (see e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' arguments as to how the June 2012 IEP would or would not have been implemented at the assigned public school site are irrelevant. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. P), the parents cannot prevail on these speculative claims (see, e.g., F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; R.E., 694 F.3d at 186-88; see also C.F., 746 F.3d at 79).

Dist. of City of Niagara Falls, 615 F. Supp. 2d 63, 70 [W.D.N.Y. 2009]). Therefore, the IHO's findings are hereby reversed.[15]

VII. Conclusion

A review of the evidence in the hearing record reveals that the June 2012 IEP offered the student a FAPE for the 2012-13 school year. Therefore, it is not necessary to reach the issue of whether Rebecca was an appropriate unilateral placement or whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED.

Dated: **Albany, New York**
January 16, 2015

DANIEL W. MORTON-BENTLEY
STATE REVIEW OFFICER

[15] I note that in circumstances such as the present case, a district's failure to provide notice of the assigned public school site more than 10 days prior to the commencement of a school year could excuse a parent's delay in providing the 10 business-day notice for purposes of equitable considerations (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 247 [S.D.N.Y. 2010]; 20 U.S.C. § 1412[a][10][C][iv][I][aa]-[bb]; 34 CFR 300.148[e][1][i]-[ii]).