The University of the State of New York

The State Education Department
State Review Officer
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No. 14-078

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

Appearances:
Law Office of Deborah Ezbitski, attorneys for petitioners, Deborah Ezbitski, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Rebecca School for the 2012-13 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

On April 18, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (first grade) (see Dist. Ex. 1 at pp. 1, 8-9, 12-13). Finding that the student remained eligible for special education and related services as a student with autism, the April 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school, as well as the following related services: one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 8-9, 12).[1] The April 2012 CSE also developed annual goals with corresponding short-term objectives to address the student's needs and recommended that the student participate in alternate

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 200.8[c][1]; 8 NYCRR 200.1[zz][1]).

assessments; the April 2012 CSE also recommended that the student participate in adapted physical education (id. at pp. 3-8, 11).

On May 18, 2012, the parents executed an enrollment contract with the Rebecca School for the student's attendance during the 2012-13 school year beginning July 2, 2012 (see Parent Ex. J at pp. 1, 4).

In a final notice of recommendation (FNR) dated June 6, 2012, the district summarized the special education and related services recommended in the April 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 7).

On June 15, 2012, the parents visited the assigned public school site (see Dist. Ex. 9 at p. 1). In a letter dated June 25, 2012, the parents described their observations during the visit, noting that the "classroom size was relatively small for [a] 6:1:1" and the assigned public school site did not have a "designated area for sensory breaks or sensory activities" (id.). The parents also indicated that the "behavior specialist" at the assigned public school site did not appear to understand the term "'sensory diet'" (id.). Next, the parents described the lunchroom as "very loud and rowdy" and noted that students used "inappropriate language" and that they did not observe "any effective crowd management control techniques being used" (id.). The parents indicated that the lunchroom would not be appropriate for the student, who required a "small structured quiet learning environment" (id.). In addition, the parents were told that they could not speak with the OT, PT, or speech-language therapy providers because the providers were "busy" (id. at p. 2). The parents were also told that students received related services in the classroom unless a student's IEP required removal from the classroom (id.). The parents also learned that the assigned public school site did not have a "sensory gym" (id.). The parents expressed concern about the location of "power tools" near the computer room, which appeared "easy to access" (id.). Finally, the parents indicated that personnel at the assigned school could not explain "how they would address [the student's] language, sensory, and motor deficits" (id.). Due to the lack of "sensory equipment, a sensory gym, the inability to effectively address [the student's] sensory issues," and the inability to explain how the assigned public school site would handle some of the student's "other deficits," the parents rejected the assigned public school site (id.). The parents notified the district of their intentions to "continue" the student's attendance at the Rebecca School for the 2012-13 school year and to seek funding for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

By due process complaint notice dated May 20, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at pp. 1-7). In particular, the parents asserted that the April 2012 CSE ignored concerns expressed at the meeting, which deprived them of the opportunity to meaningfully participate in the review (id. at p. 2). The parents further asserted that the April 2012 CSE was not properly composed because neither the special education teacher nor the district representative met the applicable criteria, and the student's then-current Rebecca School teacher (Rebecca School teacher) did not attend the entire CSE meeting (id. at p. 4). The parents alleged that the April 2012 CSE failed to conduct adequate and appropriate evaluations of the student, and failed to collect adequate and appropriate information about the student's academic and social/emotional needs in order to recommend an appropriate program (id.). The parents also alleged that the April 2012

CSE failed to conduct a classroom observation of the student (id.). In addition, the parents alleged that the April 2012 CSE failed to consider a privately obtained neurodevelopmental evaluation, dated September 2011, in the development of the IEP, and instead, "completely relied" upon information provided by the Rebecca School staff and annual goals from the "2011 IEP" (id. at pp. 3-4). Generally, the parents asserted that the "evaluations and data" relied upon by the April 2012 CSE failed to support the "proposed recommendation" (id. at p. 4).

With respect to the April 2012 IEP, the parents asserted that the annual goals were not "reasonably calculated to confer educational benefit" upon the student (Parent Ex. A at p. 3). Next, the parents alleged that the April 2012 IEP failed to sufficiently identify or describe the student's present levels of functional performance and did not include annual goals to address the student's identified needs (id.). More specifically, the parents indicated that while the April 2012 CSE identified needs in the areas of (1) identifying and assigning values to coins, (2) adding quantities up to 10, and (3) regaining a state of regulation within approximately 5 minutes within the present levels of performance, the April 2012 CSE did not create annual goals to address these needs (id.). In addition, the parents indicated that although the April 2012 CSE noted in the present levels of performance that the student could "'pick[] up sight words and demonstrate[d] good comprehension skills"—skills that were not described areas of weakness for the student—the April 2012 CSE, nonetheless, created an annual goal related to these areas (id.). Further, the parents asserted that the present levels of performance failed to indicate the student's reading level, and therefore, the annual goal addressing this need was "vague and not measurable" (id. at p. 4). The parents also alleged that the April 2012 IEP—including the "statement of goals, academic performance, and management needs"—did not meet all of the student's unique needs (id.). In addition, the parents indicated that the April 2012 IEP—including the statement of annual goals, social/emotional performance, and management needs—did not address all of the student's unique social/emotional needs (id.). The parents further indicated that the April 2012 IEP—and in particular, the management needs—did not adequately address the student's sensory needs (id. at p. 3).

In addition, the parents asserted that the April 2012 CSE failed to recommend an "appropriate program," the April 2012 CSE predetermined the recommendation and "told the family why they rejected other recommendations," the recommendation was not consistent with "opinions" of individuals with direct knowledge of the student, and the April 2012 CSE had "no other options" to present and were "unwilling to tailor the IEP" to the student's specific needs (Parent Ex. A at pp. 4-5). In addition, the parents contended that the April 2012 CSE could not provide "information" about the program, the "class size and the student to teacher ratio" were "too large" for the student, and the student would not have sufficient opportunity for "1:1 instruction or attention" (id. at p. 5). The parents also alleged that the recommended "program" did not offer "adequate or appropriate instruction, supports, supervision or services" to meet the student's needs (id.). The parents also indicated that the April 2012 CSE failed to recommend parent counseling and training (id. at p. 4). Finally, the parents asserted that the district failed to provide them with a copy of the April 2012 IEP until requesting a copy in writing, and the district failed to provide prior written notice in accordance with applicable regulations (id. at pp. 2, 5).

As to the assigned school, the parents reasserted many concerns expressed in the June 25, 2012 letter in which they rejected the assigned public school site (compare Parent Ex. A at p. 6, with Dist. Ex. 9 at pp. 1-2). In addition, the parents alleged that the student-to-teacher ratio was not appropriate for the student, the assigned public school site could not provide the student with

sufficient opportunity for "1:1 instruction or attention," the student would not be functionally grouped in the "proposed classroom," and the assigned public school site could not implement the IEP, including the recommended related services (Parent Ex. A at p. 6). The parents also indicated that the assigned public school site did not use teaching methodologies or techniques appropriate for the student or proven to be "successful" with the student (id. at p. 7).

Turning to the unilateral placement, the parents alleged that the Rebecca School provided the student with "instruction, supports, methodologies, supervision and services" designed to meet the student's unique needs (Parent Ex. A at p. 7). With regard to equitable considerations, the parents asserted that they cooperated with the CSE, they did not impede the CSE from offering the student a FAPE, and they timely notified the district of their intention to seek reimbursement for the costs of the student's tuition (id.). As relief, the parents requested payment of the costs of the student's tuition at the Rebecca School for the 2012-13 school year; the provision of door-to-door special education transportation or suitable transportation services; reimbursement for transportation costs; payment, reimbursement, or compensatory educational services for related services or the provision of related services' authorizations (RSAs); and reimbursement for the costs of a privately obtained September 2011 neurodevelopmental evaluation of the student (id. at pp. 7-8).

B. Impartial Hearing Officer Decision

On June 27, 2013, the IHO conducted a prehearing conference, and on July 23, 2013, the parties proceeded to an impartial hearing, which concluded on March 14, 2014, after nine days of proceedings (see Tr. at pp. 1-1339). In a decision dated April 28, 2014, the IHO found that the district offered the student a FAPE for the 2012-13 school year (see IHO decision at pp. 10-18). Initially, the IHO found that the April 2012 CSE was properly composed, noting that the parents "failed to identify which member was absent" (id. at pp. 11-12). More specifically, the IHO found that the April 2012 CSE included a special education teacher, and the April 2012 CSE was not required to include the attendance of a regular education teacher since the student was "not going to receive general education services of any kind" (id. at p. 12). The IHO also found no violation due to the failure of the student's Rebecca School teacher to attend the entire April 2012 CSE meeting (id.). Contrary to the parents' allegation, the IHO determined that the evidence in the hearing record demonstrated that the CSE followed its practice of mailing the IEP to the parents "before the start of the school year" (id.). Moreover, the IHO indicated that the parents could not "now complain" about failing to receive a copy of the IEP "when they waited so long to inform the CSE that they did not receive it" (id.).

Next, the IHO found that the April 2012 CSE relied on "multiple documentary sources and current information from the [student's] teacher and parents" in the development of the April 2012 IEP (IHO Decision at p. 12). As a result, the IHO also determined that the April 2012 CSE had "sufficient information regarding the student's present levels of performance from his teacher and related service providers' descriptions of the student's current skill levels" to develop an IEP that "accurately reflected the student's special education needs" (id. at pp. 12-13). The IHO noted that the April 2012 CSE relied upon "recent evaluations" of the student as well as a "very comprehensive" Rebecca School report provided to the CSE, which the Rebecca School teacher "confirmed" as presenting an "accurate picture" of the student in "all areas" (id. at p. 13). Moreover, although the parents alleged that the April 2012 CSE failed to conduct a classroom

observation of the student, the IHO indicated that the April 2012 CSE was not "required to conduct a classroom observation as part of this annual review" (id.).

Turning to the parents' contentions that the April 2012 CSE deprived them of the opportunity to participate at the CSE meeting, the IHO concluded that the evidence in the hearing record belied these contentions, noting that the parents expressed their "belief regarding [the student's] educational needs" and that the Rebecca School report "accurately reflected" the student's "educational progress and needs" (IHO Decision at pp. 13-14). According to the April 2012 CSE meeting minutes, the parents expressed "concerns" about the student's ability to "recognize other people's emotions, his issues with regulation," and "his ability to express his frustrations" (id.). In addition, the meeting minutes reflected the parents' concerns about the student's "sensory issues, issues with self-regulation, and the student's ability to consistently demonstrate socially appropriate methods of engaging peers," which the IHO noted were "addressed in the development of the goals" (id.). The IHO further noted that while school districts must provide parents with the opportunity to participate in the development of an IEP, "mere parental disagreement" with an IEP did not constitute a "denial of meaningful participation" (id.). Accordingly, the IHO indicated that the "mere fact that the CSE did not recommend a private school placement as the parent[s'] wished, d[id] not mean that their opinions were not considered" (id.).

Next, the IHO concluded that the April 2012 CSE did not impermissibly engage in predetermination with regard to the student's "program recommendation" of a 6:1+1 special class placement (IHO Decision at pp. 14-15). Based upon the evidence, the IHO indicated that the April 2012 CSE discussed the "services" to offer to the student, "including the services that were within the [district's] continuum of special education services" (id.). In addition, the IHO noted that the April 2012 CSE discussed "minimum staffing ratios and recommended programs that they considered tailored to work" with this particular student's "types of needs" (id. at p. 15). According to the evidence, the IHO further noted that although the district had "assigned specific staffing ratios to different types of programs," the April 2012 CSE recommended a "program that would be supportive of a student . . . manifesting needs in academic skill development, social skill development, communication development, cognitive skill development and so forth" (id.). The IHO indicated that for a student presenting with these needs, the district school psychologist who attended the April 2012 CSE meeting and his "colleagues" believed that a 6:1+1 special class placement was appropriate (id.).

Next, the IHO determined that contrary to the parents' assertions, the April 2012 CSE developed annual goals and short-term objectives that were "directly responsive to [the student's] academic needs and designed to provide him with educational benefits" (IHO Decision at pp. 15-16). Furthermore, the IHO noted that the absence of a "baseline description of the student's present abilities d[id] not invalidate" the annual goals, provided that "they were 'measurable' going forward" (id. at p. 15). The IHO further noted that State regulations did not require a CSE to "include a 'baseline' functional level in the goals" (id. at pp. 15-16). The IHO also rejected the parents' assertion that the annual goals "could only be implemented [in] the small class instruction and methodology" used at the Rebecca School, indicating that the various student-to-teacher classroom ratios at the Rebecca School—"from 8:1+3 to 9:1+4'—did not "affect the implementation" of the student's annual goals at the Rebecca School (id. at p. 16). In addition, the IHO found that the district school psychologist persuasively testified that the annual goals could be "implemented as written" in the 6:1+1 special class placement and that the student would

receive an "equivalent ratio of support" when compared to the support he received at the Rebecca School (id.). Next, the IHO determined that the short-term objectives in the April 2012 IEP included "sufficiently detailed information regarding the conditions under which each objective was to be performed, the frequency, duration, and percentage of accuracy required to establish progress and remedied any deficiencies in the annual goals" (id.). Finally, the IHO found that while the April 2012 IEP did not include an annual goal related to PT, this "omission" did not result in a finding that the district failed to offer the student a FAPE because the student's IEP, "as a whole contain[ed] strategies to enable a physical therapist to address the student's needs" (id.).

With respect to the parents' allegations regarding the assigned public school site, the IHO found that the evidence supported a conclusion that the assigned public school site "would have provided the [student] with meaningful educational benefit in the least restrictive environment" (IHO Decision at p. 16). In addition, the IHO indicated that the sufficiency of the district's "proposed program must be determined on the basis of the IEP itself as well as any explanations that might be offered as to how the IEP would be implemented at the proposed placement" (id.). The IHO indicated that while the parents did not have an opportunity to speak with the related services' providers during their visit, they could have done so if the student had attended the assigned public school site (id.). Moreover, the IHO noted that neither the IDEA nor State regulations provided the parents with a "right to speak to them at all" (id.).

As a final matter, the IHO declined to order the district to reimburse the parents for the costs of a privately obtained September 2011 evaluation of the student because the hearing record failed to contain evidence that the parents disagreed with any of the district's evaluations of the student, as required by State and federal regulations (see IHO Decision at p. 17). Moreover, the IHO noted that the hearing record also failed to contain sufficient evidence indicating that the parents shared the evaluation with the district at the April 2012 CSE meeting (id.).

Finding that the district offered the student a FAPE, the IHO concluded that it was not necessary to determine whether the Rebecca School was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at p. 18).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in concluding that the district offered the student a FAPE for the 2012-13 school year. Generally, the parents challenge the IHO's findings and conclusions that the annual goals in the April 2012 IEP sufficiently addressed the student's needs, were measurable, and included sufficiently detailed short-term objectives to otherwise cure any deficiencies in the annual goals; the assigned public school site could meet the student's sensory needs; the 6:1+1 special class placement would provide the student with the intensive support—or an equivalent ratio of support—as he received at the Rebecca School in either an 8:1+3 or a 9:1+4 student-to-teacher ratio setting; and the annual goals could be implemented in the recommended 6:1+1 special class placement. In addition, the parents argue that the April 2012 IEP did not sufficiently address the student's needs for "sensory equipment in the classroom and to avoid loud noises." The parents further assert that the April 2012 IEP failed to provide the student with a sufficient level of support to enable him to make progress. Next, the parents argue that the April 2012 IEP failed to include a recommendation for parent counseling and training. Additionally, the parents argue that the district's failure to include short-term objectives or

benchmarks, objective methods of measurement, and evaluation schedules in the annual goals—as procedural violations—impeded the student's right to a FAPE. The parents also argue that the April 2012 IEP failed to include or address the student's need for '"brushing throughout the day'" and his '"sensitivity to loud noises,'" and further, that the April 2012 IEP omitted information about the student's sensory needs or sensory diet. The parents contend that the April 2012 IEP failed to identify any equipment used to provide the student's sensory diet. The parents argue that the April 2012 IEP failed to include annual goals related to PT. Finally, the parents contend that the assigned public school site was not appropriate because it did not have a sensory gym, a designated area for sensory breaks or sensory activities, or a sensory integration program; no one advised the parents that the assigned public school site offered an alternative cafeteria setting for students with sensory issues; and the behavior specialist at the assigned public school site did not appear to understand the term "sensory diet."

In an answer, the district responds to the parents' allegations, and generally argues to uphold the IHO's decision in its entirety. [2]

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

[2] As correctly noted by the district in its answer, the parents did not appeal the IHO's determinations that the April 2012 CSE was properly composed; the April 2012 CSE provided the parents with a copy of the IEP; the April 2012 CSE relied upon sufficient evaluative information to develop the IEP; the April 2012 CSE was not required to conduct a classroom observation of the student; the April 2012 CSE did not deprive the parents of the opportunity to participate in the development of the IEP; the April 2012 CSE did not impermissibly engage in predetermination of the 6:1+1 special class placement; and the district was not required to reimburse the parents for the costs of a privately obtained September 2011 evaluation of the student (compare IHO Decision at pp. 12-15, 17, and Answer ¶ 11 n.2, with Pet. ¶¶ 1-36). Accordingly, the IHO's findings with respect to the aforesaid issues have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6–*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 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 parents 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. April 2012 IEP

1. Present Levels of Performance

The parents contend that the April 2012 IEP failed to accurately reflect or address the student's sensory needs, such as the student's need for "'brushing throughout the day'" and his "'sensitivity to loud noises.'" The parents also contend that the April 2012 IEP omitted information about the student's sensory activities—and specifically, his sensory diet—which he required in order to function throughout the day. In addition, the parents assert that the April 2012 IEP failed to identify any equipment used to provide the student with his sensory diet within either the management needs or supplemental aids sections of the IEP. However, as discussed below, a review of the evidence in the hearing record does not support the parents' contentions.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the

student's performance on any general State or district-wide assessments, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Here, the evidence in the hearing record indicates that the April 2012 CSE considered and relied upon the following evaluative information to develop the April 2012 IEP: a December 2011 Initial Interdisciplinary Report of Progress from the Rebecca School (December 2011 Rebecca School report) (see Dist. Ex. 6 at pp. 1-13 [providing information about the student's education and functional emotional developmental levels; the curriculum, including the student's skills in word recognition, comprehension, fluency, mathematics (number sense, money, measurement, and time and space concepts); social studies; and activities of daily living (ADL); progress reports from the student's related service providers; and "long term" and "short term" goals]); and input from the parents, the student's Rebecca School teacher, and the Rebecca School social worker in attendance (see Tr. pp. 159-66, 172-73; see also Tr. p. 987).[3]

In developing the present levels of performance and individual needs section of the April 2012 IEP, the April 2012 CSE primarily relied upon information in the December 2011 Rebecca School report, which reported the student's "cognitive, physical, and developmental abilities" (Tr. pp. 158-59, 162; see Dist. Ex. 6 at pp. 1-9).[4] In addition, the Rebecca School teacher provided the April 2012 CSE with a "very extensive and detailed discussion of how [the student] was performing in school," and at the impartial hearing, the district school psychologist described the Rebecca School teacher as a "major contributor to all discussions at the meeting" (Tr. pp. 160-63).[5] Generally, a comparison of the information in the December 2011 Rebecca School report with the information in the present levels of performance and individual needs section of the April 2012 IEP reflects the CSE's reliance upon this report (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at pp. 1-9). In addition, the April 2012 CSE meeting minutes reflect a discussion about the student's present levels of performance, and in particular, a discussion about the student's "strengths," "challenges," "[d]aily [l]iving [s]kills," his academic skills, and his "sensory" needs (Dist. Ex. 3 at pp. 1-2). According to the meeting minutes, the student was "very sensory-seeking," and included the following notations: "brushing throughout [the] day" and "sensitive to loud noises" (id. at p. 2).[6] The April 2012 CSE meeting minutes also reflected input from the Rebecca School social worker, who believed that the student "should have a sensory environment [and] access to sensory tools [and] materials" (id. at p. 4).[7]

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[3] At the impartial hearing, the district school psychologist testified that he reviewed the student's "file" prior to the April 2012 CSE meeting (Tr. p. 156). The district school psychologist further testified that the April 2012 CSE also had the student's 2011-12 IEP available at the meeting, and the April 2012 CSE relied upon the previous IEP as a "starting point" for a discussion about "what services might be appropriate to recommend going forward" for the student (Tr. pp. 227-28).

[4] The Rebecca School teacher who attended the April 2012 CSE meeting confirmed that the December 2011 Rebecca School report accurately represented the student's abilities "at the time of the meeting" (Tr. pp. 156-57, 159-60; see Dist. Ex. 3 at p. 1).

[5] The Rebecca School teacher who attended the April 2012 CSE meeting did not testify at the impartial hearing (see generally Tr. pp. 1-1339).

[6] After the handwritten notes regarding the student's strengths, challenges, daily living skills, and academic skills, the April 2012 CSE meeting minutes also included the following notation: "Parents agree that this sounds like [the student]" (Dist. Ex. 3 at p. 2).

[7] At the impartial hearing, the Rebecca School social worker testified that during the visit to the assigned public

With respect to the student's sensory needs—and consistent with the December 2011 Rebecca School report—the April 2012 IEP described the student as "generally calm and regulated throughout the school day," but also as "very sensory seeking" (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at p. 1). Also consistent with the December 2011 Rebecca School report, the April 2012 IEP noted that when "sensorily dysregulated," the student would "run around" and "seek out sensory input from running, jumping on a trampoline and crashing on a foof chair" (id.). To assist the student when dysregulated or seeking sensory input, the April 2012 IEP indicated that "[t]ypically" the student responded to verbal reminders to "stop and take a break" (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 6 at p. 1). In addition, the April 2012 IEP indicated that when dysregulated the student responded to an adult "sitting with him and taking deep breaths and giving him reminders to slow down" in order to "re-regulate," and "usually" the student could "regain a state of regulation" within approximately five minutes when using this strategy (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at p. 1). Also consistent with the OT information in the December 2011 Rebecca School report, the April 2012 IEP reflected that the student continued to need to work on "sensory integration, fine and gross motor skills, body awareness, [and] visual spatial thinking" (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at pp. 5-6). The April 2012 IEP further noted that the student's interests included "sensory play and playing physical anticipation games such as chase;" the student used his "eyes as pathfinders to guide him through the day;" and when not distracted, the student could "safely navigate the school environment" (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 6 at pp. 1, 7). In addition, to "help increase [the student's] body awareness and improve his ability to attend to classroom tasks throughout the day," the April 2012 IEP reflected—as noted in the December 2011 Rebecca School report—that the student wore a "compression vest" on a "30 minutes on and 30 minutes off" schedule (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at p. 6).

In light of the foregoing, a review of the present levels of performance and individual needs section of the April 2012 IEP supports the parents' assertions that while noted in the CSE meeting minutes, the April 2012 CSE did not make reference to brushing throughout the day or sensitivity to loud noises in this section of the IEP (see generally Dist. Ex. 1 at pp. 1-2). In the December 2011 Rebecca School report, however, the only mention of brushing or the student's need for brushing throughout the day appeared in relation to the student's OT needs (see Dist. Ex. 6 at pp. 5-6). More specifically, the December 2011 Rebecca School report indicated that the student participated in a "cool down sensory group with the peers in his class four afternoons per week," and during that time, "each" student in the class received "brushing and joint compressions" (id. at p. 6). Notably, however, the December 2011 Rebecca School report did not describe brushing as a particular need for this student or that the student required this particular sensory technique or strategy in order to address his sensory needs or to "re-regulate" himself or to "regain a state of regulation" (id. at pp. 1-12). Moreover, neither the "long term" goals nor the "short term" goals for the student's OT services at the Rebecca School incorporated brushing to address the student's sensory needs (id. at p. 11). With regard to the notation in the April 2012 CSE meeting minutes regarding a sensitivity to loud noises, the December 2011 Rebecca School report makes no reference whatsoever to such sensitivity (see generally Dist. Ex. 6 at pp. 1-13). Therefore, while these sensory needs were noted in the April 2012 CSE meeting minutes, it is unclear how the April

school site, the "sensory supports that [he was] looking for in the classroom" for the student included a "trampoline, a padded floor, [and] a Foof chair"—as well as "space to move around" (Tr. pp. 822-23; see Tr. pp. 772-72). During the visit, he was told that "those materials were not to be found in the classroom," but rather, "it was available" in the "OT/PT room" (Tr. p. 823; see Tr. pp. 805-06).

2012 CSE's failure to refer to brushing or the student's sensitivity to loud noises in the April 2012 IEP resulted in an inaccurate or incomplete description of the student's sensory needs or otherwise deprived the student of a FAPE.

Next, as noted above, the parents also assert that the April 2012 CSE omitted information about the student's sensory diet and failed to identify any equipment used to provide the student with the sensory diet within either the management needs section or supplemental aids section of the April 2012 IEP.[8] According to the December 2011 Rebecca School report, the student received "regular sensory input throughout his day by an individualized sensory diet" (Dist. Ex. 6 at p. 6). The report further indicated that the occupational therapists used "interventions to assist the students in order to modulate and regulate sensory input and behavior," formulated "individualized sensory profiles," and generated a "sensory diet specific to the student's sensory needs" (id.). As further noted in the report, the "aim of these suggested sensory based strategies [was] to enhance sensory integration, self-regulation, overall organization, body awareness, attention, intention, social skills, and communication" (id.). In addition, the "classroom staff" at the Rebecca School received training to provide this particular student the "sensory input he need[ed] on a schedule to be more successful in the classroom environment," noting specifically that the student wore a "compression vest" on a "30 minutes on 30 minutes off" schedule during the day (id.). The compression vest provided the student with "deep pressure and proprioceptive input to help increase body awareness and improve [the student's] ability to attend to classroom tasks throughout the day" (id.).

In this respect, a review of the April 2012 IEP confirms the parents' assertions that the April 2012 CSE did not include the term "sensory diet" in the April 2012 IEP or identify any equipment used to provide the student with the sensory diet within either the management needs section or supplemental aids section of the April 2012 IEP (see Dist. Exs. 1 at pp. 1-3). However, the December 2011 Rebecca School report—other than indicating that the student received an individualized sensory diet developed by an occupational therapist and implemented in the classroom through the use of the scheduled use of a compression vest—provided no further particularized information about the sensory diet the student received at the Rebecca School (see Dist. Ex. 6 at p. 6). Rather, the December 2011 Rebecca School report generally explained the purpose of a sensory diet and how the Rebecca School developed a sensory diet for students (id.). Thus, while the April 2012 CSE did not specifically use the term sensory diet in the IEP, the CSE did incorporate the most relevant information about the student's sensory needs into the IEP by reflecting that the student continued to need to work on "sensory integration, fine and gross motor skills, body awareness, [and] visual spatial thinking," and further, that he wore a "compression vest" on a "30 minutes on and 30 minutes off" schedule (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 6 at pp. 5-6).

With regard to the parents' assertion that the April 2012 CSE did not identify any equipment used to provide the student with the sensory diet within either the management needs section or supplemental aids section of the April 2012 IEP, a review of the IEP reveals that the strategies or

[8] At the impartial hearing, the program director of the Rebecca School (director) described a "sensory diet" as "sensory input" provided to this student preventatively throughout the school day so he could "stay regulated longer" (Tr. pp. 362-63, 376-77, 481-82). According to the director, the student received a "sensory diet," a "brushing protocol," and "deep pressure;" the director also testified that the student used a "scooter board" (Tr. pp. 376-77).

resources necessary to address the student's sensory needs were otherwise embedded within the IEP (see Dist. Ex. 1 at p. 2). At the impartial hearing, the district school psychologist testified that management needs referred to "techniques, strategies, or things that need to be in place in the academic or educational setting in order to promote the [student's] ability to participate in an instructional program and work towards their goals" (Tr. pp. 166-67). In this case, the district school psychologist testified that the management needs recommended by the April 2012 CSE appeared in a "couple of different ways" (Tr. p. 167). Within the "management needs" section of the April 2012 IEP, the district school psychologist testified that the April 2012 CSE described "some programmatic recommendations that were made by the team for the program and the specific related services" (Tr. pp. 167-68). In addition, the April 2012 CSE incorporated strategies throughout the present level of functional performance and individual needs sections of the IEP (id.). For example, the district school psychologist pointed out that the present levels of performance included that the student continued to need "reminders from adults to use the bathroom" and "multiple reminders from adults in order to remain on task" (Tr. p. 168; see Dist. Ex. 1 at p. 1). The district school psychologist also pointed to the social development section in the April 2012 IEP, which indicated that when the student became "dysregulated," he would "run around" and that the student responded to reminders to "stop, [and] take a break" or to an adult "sitting with him and taking deep breaths" (Tr. pp. 168-70; see Dist. Ex. 1 at p. 1). Also within the social development section of the IEP, the April 2012 CSE indicated that the student needed "adult support when he fe[lt] uncomfortable, frustrated or upset in order to expand on why he [was] upset and what he or an adult c[ould] do to help him feel better" (Dist. Ex. 1 at pp. 1-2; see Tr. pp. 169-70). In the physical development section of the IEP, the district school psychologist testified that the April 2012 CSE incorporated information about the student's continued needs in the areas of "sensory integration," "fine motor skills," "body awareness," and "visual thinking" (Tr. pp. 169-70; see Dist. Ex. 1 at p. 2). Moreover, the April 2012 IEP included annual goals and short-term objectives related to the student's OT needs and in particular, to improve his use of sensory information, which recommended the use of "deep pressure" and "proprioceptive input to his hands by a vibrating pen" (Dist. Ex. 1 at p. 6). In addition, the April 2012 IEP included annual goals and short-term objectives targeting the student's ability to maintain regulation and shared attention throughout the school day, as well as his ability to use sensory information to understand and effectively interact with people and objects (id. at pp. 3, 6).

In sum, given the evaluative information considered and relied upon by the April 2012 CSE, the April 2012 IEP accurately and adequately described the student's sensory needs, as well as the supports and strategies needed to appropriately address those needs. Under the circumstances, the April 2012 CSE's failure to include or adopt specific language in the IEP or to include techniques and strategies to address the student's management needs within particular sections of the IEP did not constitute a failure to offer the student a FAPE (see D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

2. Annual Goals

Turning next to the annual goals, the parents argue that the IHO erred in finding that the April 2012 CSE developed appropriate annual goals and short-term objectives. Specifically, the parents assert that the annual goals did not include "objective" methods of measurement or an

evaluation schedule and that the April 2012 IEP did not contain short-term instructional objectives or benchmarks for any of the annual goals. Moreover, the parents contend that some of the needs identified in the present levels of performance had no corresponding annual goals, some of the annual goals in the IEP did not correspond to an identified need, and the April 2012 IEP failed to include any annual goals related to PT. Finally, the parents argue that the annual goals in the April 2012 IEP could not be implemented in the recommended 6:1+1 special class placement. As discussed more fully below, the evidence in the hearing record does not support the parents' contentions.

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]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). In this case, the annual goals and short-term objectives in the April 2012 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from his disability, enabled him to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from his disability.

A review of the April 2012 IEP reveals that the April 2012 CSE developed approximately 11 annual goals with approximately 24 corresponding short-term objectives to address the student's needs in the areas of word recognition, reading fluency, reading comprehension, mathematics skills, science and cooking, OT, speech-language skills, and social/emotional skills (see Dist. Ex. 1 at pp. 3-8). A review of the annual goals also reveals that each annual goal included an evaluative criteria (albeit embedded within the short-term objectives or benchmarks) (i.e., 1 out of 4 opportunities, 80 percent accuracy), an evaluation schedule (i.e., 2 times per marking period), and a procedure to evaluate the goal (i.e., teacher or provider observations) (id.). Thus, contrary to the parents' assertions, all of the annual goals included evaluation criteria, and all of the annual goals in the April 2012 IEP included short-term objectives or benchmarks (id.).[9] Furthermore, although

[9] Alternatively, the parents asserted—without explanation—that the first annual goal in the April 2012 IEP included only a "single 'benchmark'" and that the sixth and eighth annual goals contained "multiple unrelated benchmarks." This argument is also unavailing. First, neither the IDEA nor State regulations require that a CSE create annual goals with a particular number of short-term objectives or benchmarks (see 34 CFR 300.320[a][2]-[3]; 8 NYCRR 200.4[d][2][iii][b]). Second, the short-term objectives or benchmarks listed for both the sixth and eighth annual goal are related to those particular annual goals. The sixth annual goal targeting the student's mathematics skills included the following short-term objectives or benchmarks to improve the student's ability to estimate the number of objects in groups of less than 20, demonstrate an understanding of the concept of capacity with large and small containers, and demonstrate an understanding of the concept of time required for simple tasks (see Dist. Ex. 1 at p. 5). Similarly, the eighth annual goal targeting the student's ability to use sensory information to understand and effectively interact with people and objects included the following short-term objectives or benchmarks to improve the student's ability to sustain circles of communication during periods of frustration, color for 5 to 10 minutes with moderate verbal support after receiving deep pressure and

the parents complain that all of the annual goals failed to use an "objective" method of measurement and all of the annual goals used the same evaluation schedule, neither the IDEA nor State regulations require that a CSE create annual goals or short-term objectives or benchmarks using an "objective" method of measurement to assess the student's progress or more than one evaluation schedule (see 34 CFR 300.320[a][2]-[3]; 8 NYCRR 200.4[d][2][iii][b]).

Next, a review of the April 2012 IEP and the evidence in the hearing record does not generally support the parents' contentions that the IEP identified needs but failed to include corresponding annual goals or included annual goals with no corresponding need identified in the IEP—however, to the extent that deficiencies exist in this case, such deficiencies do not support a conclusion that the district failed to offer the student a FAPE for the 2012-13 school year. In developing the annual goals, the district school psychologist testified that after the April 2012 CSE discussed the student's present levels of performance and how the student functioned at school, the CSE turned its "attention to some specific goals that were being reported to us in the progress report" (Tr. pp. 174-75).[10] The district school psychologist testified that he "read the goals out loud to the group," and the CSE "would ask school staff to comment and also the parents to comment on how they see [the student's] progress towards those goals" (id.). The district school psychologist further testified that the CSE discussed "whether or not these goals had objectives," and if the student was "working on them, if he had met [the goals]" (id.). In addition, the April 2012 CSE determined whether the student "should continue" to work on some of the annual goals that he was currently working on, and "[i]f not, what types of areas would be appropriate for goals going forward" (id.). During the April 2012 CSE meeting, the district school psychologist made "various notations" regarding the annual goals in the December 2011 Rebecca School report (Tr. pp. 175-76; see Dist. Ex. 5 at pp. 1-4; compare Dist. Ex. 5 at pp. 1-4, with Dist. Ex. 6 at pp. 10-13). The district school psychologist explained that a handwritten "checkmark" next to an annual goal indicated that he "read the goal," and at times, he wrote "will meet" next to an annual goal to indicate that the student was expected to meet that particular goal by the "end of the year" (Tr. pp. 433-37; see Dist. Ex. 5 at pp. 1-3). Upon discussions, if the student was expected to meet a goal by the end of the year, the April 2012 CSE did not generate an annual goal in the 2012-13 IEP (see Tr. p. 434). In addition, the district school psychologist testified that in developing the annual goals, the parents and the Rebecca School teacher contributed to the discussions and did not voice any concerns (see Tr. pp. 177-93).[11]

With regard to the parents' allegation that the April 2012 CSE identified mathematics needs in the IEP—such as identifying and assigning value to coins and adding quantities up to 10—but failed to include annual goals to address these needs, the district school psychologist testified that because the student was expected to meet these same annual goals by the end of the year at the

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proprioceptive input, and asking for help during sensorimotor play when he was frustrated (id.at p. 6).

[10] A review of the April 2012 CSE meeting minutes reflects the CSE's discussion regarding the annual goals in the December 2011 Rebecca School report and whether the student was expected to meet a goal or whether the student required "more time" on a particular goal (compare Dist. Ex. 3 at pp. 3-4, with Dist. Ex. 5 at pp. 1-4, and Dist. Ex. 6 at pp. 10-13).

[11] The district school psychologist further testified that the "purpose" of the April 2012 CSE's discussion in developing the annual goals was not to "decide" whether the "goals in the Rebecca report should be in the public IEP for the following year," but rather, to discuss what the student was "working on currently, and based upon that information, "what would be appropriate to be put into the IEP for the next year" (Tr. pp. 444-45).

Rebecca School, it was unnecessary to continue these annual goals in the 2012-13 IEP (see Tr. pp. 242-43, 433-35; Dist. Exs. 5 at pp. 1-2; 6 at p. 3). Next, the parents alleged that the April 2012 CSE identified the student's ability to recognize others' emotions as a need within the social development section of the IEP, but did not develop an annual goal to address this need. At the impartial hearing, the district school psychologist testified that the April 2012 IEP did not include a "specific goal for that," and later explained that this particular need would be addressed in the "context of the classroom and the program" (Tr. pp. 243, 396-97). More specifically, the district school psychologist testified that the 6:1+1 special class at a specialized school—which the April 2012 CSE recommended for this student—was "structured to in part work with students in developing their social skills and social functioning" (Tr. pp. 396-97).

Next, a review of the April 2012 IEP does not support the parents' contentions that the April 2012 CSE identified additional social/emotional needs—such as (1) the student's ability to consistently demonstrate socially appropriate methods of engaging peers in games and not bump into them and (2) his ability to expand on why he was upset when he felt uncomfortable, frustrated, or upset—in the IEP, but did not develop annual goals to address these needs. Notably, the April 2012 IEP addressed these two areas of need through annual goals that targeted the student's use of sensory information to understand and effectively interact with people, to improve his engagement and pragmatic language skills in support of increasing his ability to sustain interactions, to improve his receptive language skills in support of improving his ability to comprehend language in a variety of contexts, and to improve his expressive language skills in a variety of contexts (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 1 at pp. 6-8). Finally, a review of the April 2012 IEP does not support the parents' allegation that the April 2012 CSE failed to develop annual goals to address the student's identified need to improve his sensory integration, fine and gross motor skills, body awareness, visual spatial thinking, and the efficiency of his eyes and vision integrated with the rest of his senses and overall movement in the IEP. Here, the April 2012 IEP included an annual goal targeting the student's ability to use sensory information to understand and effectively interact with people and objects in school and home environments (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 1 at p. 6).

To the extent that the parents assert that the April 2012 CSE included annual goals in the IEP—in this instance, relating to the student's academic skills and his receptive, expressive, and pragmatic language skills—that did not directly correspond to an identified need, the evidence in the hearing record does not support these assertions. First, as explained above, the annual goals pertaining to the student's receptive, expressive, and pragmatic language skills (i.e., to improve his engagement and pragmatic language skills in support of increasing his ability to sustain interactions, to improve his receptive language skills in support of improving his ability to comprehend language in a variety of contexts, and to improve his expressive language skills in a variety of contexts) supported the student's identified social/emotional needs (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 1 at pp. 6-8). With regard to the annual goals pertaining to the student's academic skills—such as increasing the his ability to make logical connections; and increasing or improving his word recognition skills, his reading comprehension skills, his reading fluency skills, and his understanding of science—the April 2012 CSE properly included these annual goals in the April 2012 IEP. In this case, the district school psychologist acknowledged that the April 2012 CSE did not "really phrase these things as specific needs" in the IEP, but instead, the CSE described the student's "current level of functioning" (Tr. pp. 239-40; see Dist. Ex. 1 at pp. 1-8). Here, even assuming for the sake of argument that the April 2012 CSE did not identify needs in these academic areas with any degree of specificity, federal and State regulations contemplate the development of

annual goals, including academic and functional goals, to meet the student's needs that result from his disability and that enable the student to be involved in and make progress in the general education curriculum (see 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]).[12]

Moreover, while the parents correctly assert that the April 2012 CSE failed to develop annual goals related to the PT services recommended in the April 2012 IEP, a September 2011 Rebecca School PT discharge report indicated that the student did not present with a "significant delay in his gross motor skills at this time" and recommended that the student continue to participate in "adaptive physical education, obstacle course play with classroom staff and peers, and ball play as well as negotiat[ing] outdoor playground equipment to continue to advance his gross motor abilities" (Parent Ex. V). At the impartial hearing, the district school psychologist testified that he believed the absence of annual goals related to PT services was a "clerical omission" (Tr. p. 204). However, the district school psychologist further explained that the April 2012 IEP contained "specific service mandates in terms of the frequency and duration of the service" and described the student's present levels of performance with regard to "gross motor skills and body awareness" that would appropriately assist a physical therapist in addressing the student's needs (id.; see Dist. Ex. 1 pp. 1-2). Thus, when viewed as a whole, the April 2012 IEP addressed the student's PT needs such that the omission of an annual goal related to the recommended PT services does not result in a failure to offer the student a FAPE (J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [finding that the failure to address each of a student's needs by way of an annual goal did not necessarily constitute a failure to offer the student a FAPE]).

Finally, a review of the evidence in the hearing record does not support the parents' assertion that the annual goals could not be implemented in the recommended 6:1+1 special class placement. Significantly, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should preselect an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the least restrictive environment] [emphasis added]).

Thus, overall the evidence in the hearing record supports a finding that the annual goals and short-term objectives or benchmarks in the April 2012 IEP targeted and appropriately addressed the student's areas of need (see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d

[12] In addition, the parents do not articulate any harm to the student by the April 2012 CSE's decision to incorporate annual goals related to academics in the IEP, nor could they when the Rebecca School worked on annual goals with the student in the same areas (see Dist. Ex. 6 at pp. 10-13; Parent Exs. D at pp. 5-9; E at pp. 1-5).

343, 359-62 [E.D.N.Y. 2014]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *13; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]).

3. 6:1+1 Special Class Placement

Next, the parents argue that the IHO erred in finding that the 6:1+1 special class placement would provide the student with the intensive support—or an equivalent ratio of support—as he received at the Rebecca School in either an 8:1+3 or a 9:1+4 student-to-teacher ratio setting. The parents further assert that the student required a more intense level of support—as provided in either an 8:1+3 or a 9:1+4 setting—in order for the student to make progress. As described more fully below, a review of the evidence in the hearing record does not support the parents' contentions.

As previously noted, the April 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school—together with related services of both individual and small group speech-language therapy, individual PT, and individual OT; strategies to address the student's management needs; and annual goals—to address the student's needs (see generally Dist. Ex. 1 at pp. 1-14). State regulations provide that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, . . . , with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). In reaching the decision to recommend a 6:1+1 special class, the April 2012 CSE considered other placement options for the student (see Dist. Exs. 1 at p. 14; 3 at pp. 4-5). In order to provide the student with a 12-month school year program, the April 2012 CSE recommended a specialized school, and thereafter, considered the special class program options available to the student at a specialized school (see Tr. pp. 194-96; Dist. Exs. 1 at p. 14; 3 at p. 5). The April 2012 CSE considered but rejected an 8:1+1 special class placement and a 12:1+1 special class placement with related services at a specialized school because the student required more support to meet his academic and social/emotional needs (see Dist. Ex. 3 at p. 5). Similarly, the April 2012 CSE considered but rejected a 12:1+4 special class placement with related services at a specialized school because it was too restrictive to meet the student's academic, social/emotional, and language needs (see Dist. Exs. 1 at p. 14; 3 at p. 5).

At the impartial hearing, the district school psychologist testified that a 6:1+1 special class placement was appropriate to meet the student's needs as it supported students in "developing their academic skills, their cognitive skills, the[ir] socialization skills, [and] their language communication skills in a very supportive and intensive staffing ratio," which would enable the student to make progress (Tr. pp. 194-95; see Tr. pp. 423-24). While neither the parents nor the Rebecca School staff attending the April 2012 CSE meeting disagreed with the recommendation for a 12-month school year program, they all expressed disagreement with the "specific staffing ratio" of the recommended 6:1+1 special class placement (Tr. pp. 195-96, 198-99, 417; see Dist. Ex. 3 at p. 5). In particular, the district school psychologist testified that the Rebecca School

teacher initially objected to the 6:1+1 special class placement by stating that the student required an 8:1+3 "staffing ratio," but upon further questioning, she "revised her statement" to indicate that either an 8:1+3 or a 9:1+4 staffing ratio would be "appropriate" (Tr. pp. 196-97; see Dist. Ex. 3 at p. 5).[13] Regardless, the district school psychologist believed that the Rebecca School teacher ultimately wanted the student to "remain in her school" (Tr. p. 197). Based upon the discussions of the student as well as recognizing that the student attended a classroom with a 9:1+4 staffing ratio, the April 2012 CSE concluded that a 6:1+1 special class placement was appropriate for the student (see Tr. pp. 415-16). The district school psychologist testified that all of those attending the April 2012 CSE agreed upon the "portrayal of [the student's] functional levels and present levels of performance," and as explained to the parents at the CSE meeting, while the CSE need not "recreate the staffing ratio of an independent private school," it was the CSE's "goal to interpret the information that's presented and to make a determination of what would be the most appropriate public school education option" for the student (Tr. pp. 418-19). In addition, the district school psychologist testified that "in practice" and in his "experience"—"having spent a lot of time in different classrooms"—that the difference between a classroom with an 8:1+3 or a 9:1+4 staffing ratio and a 6:1+1 staffing ratio was "negligible" (id.; see Tr. pp. 452-53).

At the impartial hearing, the student's mother testified that the April 2012 CSE discussed the student-to-teacher staffing ratios and that the student's father wanted the student to remain in a "small classroom setting" because the student would "get that individualized attention" (Tr. pp. 285-86). While the student's mother agreed that the April 2012 CSE recommended a "small setting" for the student, she could not recall the specific number of students or teachers for that recommendation (Tr. p. 286). The student's father further testified at the impartial hearing that in response to the April 2012 CSE's recommendation for a 6:1+1 special class placement, they told the CSE that the student needed "additional supervision" and "more supervision" (Tr. pp. 897-98). In addition, the Rebecca School social worker testified that he did not know if the student would only receive educational benefits in a classroom with an 8:1+3 staffing ratio or if the student would receive educational benefits in the recommended 6:1+1 special class placement (see Tr. pp. 787-88). However, the Rebecca School social worker did believe that the student would have "significant challenges" in a 6:1+1 "environment" and would require "additional supports" in a 6:1+1 special class placement (id.).

Although the student's father testified that the student made progress during the 2011-12 school year with respect to his interactions with peers, his ability to engage more in conversation, his decreased aggressive behaviors and increased sociability, and his improved reading ability, the evidence in the hearing record does not demonstrate that the student's progress was solely attributable to the specific class ratio at the Rebecca School (see Tr. pp. 932-34). Rather, the student's father explained the student's progress in reading resulted from "reading in class" and "going to the library" (Tr. p. 934).

Therefore, based upon the foregoing, the evidence in the hearing record supports a finding that the April 2012 CSE's decision to recommend a 12-month school year program in a 6:1+1 special class at a specialized school with related services, strategies to address the student's management needs, and annual goals provided the student with sufficient support and was

[13] The Rebecca School social worker testified that during the 2011-12 school year, the student attended a classroom with an 8:1+3 student-to-teacher ratio, which later changed to a classroom with a 9:1+4 student-to-teacher ratio (see Tr. pp. 833-34).

reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

4. Related Services—Parent Counseling and Training

Next, the parents assert that the April 2012 CSE's failure to recommend parent training and counseling in the April 2012 IEP constituted a failure to offer the student a FAPE for the 2012-13 school year. State regulations require that an IEP indicate the extent to which parents training will be provided to parents when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parents training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parents counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parents counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

Here, while it is undisputed that the April 2012 CSE did not recommend parent counseling and training as a related service in the student's April 2012 IEP, the hearing record in this case does not contain any evidence upon which to conclude that the failure to recommend parent counseling and training in the April 2012 IEP resulted—in whole, or in part—in a failure to offer the student a FAPE for the 2012-13 school year. In addition, although the April 2012 CSE's failure to recommend parent counseling and training in the student's IEP violated State regulation, this violation alone does not support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; see also F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 2014 WL 53264, at *4 [2d Cir. Jan. 8, 2014]; M.W., 725 F.3d at 141-42).[14]

[14] The district is cautioned, however, that it cannot disregard its legal obligation to include parent counseling and training in a student's IEP. Therefore, upon reconvening this student's next CSE meeting, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction, and after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

B. Challenges to the Assigned Public School Site

Finally, the parents continue to argue that the assigned public school site was not appropriate and could not implement the April 2012 IEP because it lacked a sensory gym, a designated area for sensory breaks or sensory activities, or a sensory integration program. In addition, the parents contend that no one advised them that the assigned public school site offered an alternative cafeteria setting for students with sensory issues. The parents also assert that the behavior specialist at the assigned public school site did not appear to understand the term "sensory diet." For the reasons explained more fully below, such claims are speculative and cannot support a finding that the district failed to offer the student a FAPE for the 2012-13 school year.

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., 553 Fed. App'x 2, 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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 parents rejected an IEP before the student's classroom arrangements were even made"]).

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., 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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[15] When

[15] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

the Second Circuit spoke 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 parents 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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the April 2012 IEP because a retrospective analysis of how the district would have implemented the student's April 2012 IEP at the assigned public school site was 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 parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the April 2012 IEP (see Dist. Ex. 9 at pp. 1-2; Parent Ex. J at pp. 1-4). Therefore, the arguments asserted by the parents 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 parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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.

The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the April 2012 IEP.[16]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, 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, that the district would have deviated from the student's IEP in a material or substantial way (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]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Rebecca School was an appropriate placement or whether equitable considerations supported the parents' requested relief (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 22, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

[16] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K., 12 F. Supp. 3d at 370-72; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L., 2013 WL 625064, at *10; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S., 2014 WL 2722967, at *12-*14 [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).