The University of the State of New York

The State Education Department
State Review Officer
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No. 14-084

Application of the BOARD OF EDUCATION OF THE PELHAM UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Keane & Beane, PC, attorneys for petitioner, Stephanie M. Roebuck, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Lakshmi Singh Mergeche, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Robert Louis Stevenson School (RLS) for the 2011-12 and 2012-13 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student began attending RLS on April 5, 2011, and continued to attend RLS for both the 2011-12 and 2012-13 school years (see Dist. Ex. 44 at p. 51; see also Dist. Ex. 27; Parent Ex. P).[1] On May 22, 2011, the parents executed a registration contract enrolling the student at RLS for the 2011-12 school year (see Parent Ex. A).

On August 1, 2011, the parents contacted the district to refer the student for an evaluation and a "special education placement" (see Dist. Ex. 9). On August 17, 2011, the parents provided

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

the district with consent to evaluate the student (see Dist. Exs. 10 at pp. 1-2; 11 at pp. 1-2). Over the course of several dates in September and October 2011, the district completed an educational evaluation, a social and developmental history, and a psychological evaluation of the student (see Dist. Exs. 12 at pp. 1-5; 13 at pp. 1-5; 14 at pp. 1-10; 21).

On October 13, 2011, the CSE convened to conduct the student's "[p]rogram [r]eview" and to develop an IEP for the 2011-12 school year with a projected implementation date of November 8, 2011 (see Dist. Ex. 23 at p. 1; see also Dist. Ex. 22).[2] Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the October 2011 CSE recommended placement in the therapeutic support program (TSP) with daily, indirect consultant teacher services, daily resource room, and counseling services (Dist. Ex. 23 at pp. 1, 6-7).[3] The October 2011 CSE also recommended a positive reinforcement plan, as well as structure and routine, as supplementary aids and services and program modifications or accommodations (id. at p. 7). To further address the student's needs, the October 2011 CSE recommended testing accommodations, created annual goals related to study skills and the student's social/emotional and behavioral needs, and developed a post-secondary transition plan (id. at pp. 6-10).

By letter dated December 6, 2011, the parents informed the district that they had "serious concerns with this placement and the IEP upon which it [was] based" (Dist. Ex. 27). The parents indicated the IEP failed to reflect their input, as well as the input from RLS staff and the student's treating psychiatrist and psychologist (id.). In addition, the parents noted that the IEP failed to reflect that the student could not function in a "general education environment," the student's need for "counseling on social issues and special education supports," the student's need for "small classes, staffed by teachers capable of managing [students] with social developmental difficulties," and the need to coordinate between the student's counseling and classroom teachers (id.). As a result, the parents rejected the "proposed placement," and notified the district of their intentions to continue the student's placement at RLS and to seek tuition reimbursement (id.).

On May 7, 2012, the parents executed a registration contract enrolling the student at RLS for the 2012-13 school year (see Parent Ex. D).

On May 14 and June 11, 2012, subcommittees of the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Exs. 36 at p. 1; 39 at p. 1). At the May 2012 meeting, the CSE subcommittee "updated" the "entire IEP," but tabled further discussions of the "recommended program and related services" until June 11, 2012 (Dist. Ex. 36 at p. 1). At the June 2012 meeting, the CSE subcommittee reviewed additional evaluative information, as well as the draft IEP developed at the May 2012 CSE subcommittee meeting (see Dist. Ex. 39 at pp. 1-2). As a result, the June 2012 CSE subcommittee recommended placement in the TSP program with daily, indirect consultant teacher services, daily resource room, and counseling services (both individually and in a small group) (id.; see Dist. Ex. 39 at pp. 6-7). In

[2] The district initially planned to conduct an "initial referral" review of the student, but altered the meeting to a program review when it learned another school district had evaluated the student and found him eligible for special education programs and related services as a student with an emotional disturbance (see Dist. Exs. 16 at p. 1; 17; see also Tr. pp. 39-42, 46-51; Dist. Exs. 4, 6-8; Parent Ex. H at pp. 1-3).

[3] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

addition, the June 2012 CSE subcommittee recommended a positive reinforcement plan, structure and routine, and consultation services as supplementary aids and services and program modifications or accommodations (id. at p. 7). The June 2012 CSE subcommittee also recommended testing accommodations, created annual goals to address study skills and the student's social/emotional and behavioral needs, and developed a post-secondary transition plan (id. at pp. 6-10).

By a letter dated September 21, 2012, the parents indicated that while they "voiced" their concerns at both the May 2012 and June 2012 CSE subcommittee meetings about the "recommended program and placement" in the district, the IEP failed to reflect their input, as well as the input of RLS staff and the letter submitted by the student's treating psychologist (id.). In addition, the parents indicated that the IEP failed to reflect that the student could not function in a "large general education environment," the student's need for "small classes, staffed by teachers capable of managing students with social developmental difficulties," and the need to coordinate between the student's counseling and classroom teachers (id.). As a result, the parents rejected the "proposed program and placement" and notified the district of their intentions to continue the student's placement at RLS for the 2012-13 school year and to seek tuition reimbursement (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 24, 2013, the parents' alleged that the district failed to offer the student a free appropriate public education, (FAPE) for the 2011-12 and 2012-13 school years (see Dist. Ex. 1 at pp. 1-3, 8-11). With respect to the 2011-12 school year, the parents alleged that district's delay in finding the student eligible for special education programs and related services between July 2011 and October 2011 violated its child find obligations (id. at pp. 2, 8). In addition, the parents alleged that the district's failure to have an IEP in place at the start of the 2011-12 school year resulted in a failure to offer the student a FAPE for the 2011-12 school year, and moreover, the October 2011 IEP did not describe how the consultant teacher services would be used or describe the consultant teacher's qualifications or training; similarly, the October 2011 IEP did not describe the purpose of the recommended resource room services (id. at pp. 9-10). Next, the parents asserted that the October 2011 CSE failed to conduct a classroom observation of the student (id. at p. 6).

With respect to both the 2011-12 and 2012-13 school years, the parents asserted that the district failed to recommend a "full-time special education program and placement" (Dist. Ex. 1 at p. 3). More specifically, the parents alleged that the recommended "programming and placement"—namely, a '"therapeutic support program in an integrated setting"' at a district public school with counseling services, resource room, and consultant teacher services—were not appropriate, and further, that neither the October 2011 IEP nor the June 2012 IEP provided the student with the "necessary level of service and support" he required (id. at p. 8). The parents contended that returning the student to a district public school would be "detrimental," and thus, they had no alternative options other than continuing the student's placement at RLS for the 2011-12 and 2012-13 school years (id. at p. 6). The parents further asserted that the "student population and class size [was] wholly inappropriate" for the student and he could not make progress in a "large mainstream classroom" (id. at pp. 8-9). Next, the parents alleged that the "proposed program" did not provide an appropriate "level or type of social/emotional support" the student required, and neither the October 2011 CSE nor the June 2012 CSE subcommittee conducted a

functional behavioral assessment (FBA) of the student or developed a behavioral intervention plan (BIP) for the student (id. at pp. 9-10). In addition, neither the October 2011 CSE nor the June 2012 CSE subcommittee developed a crisis management plan to address the student's "depression and low frustration level" should either "surface" during the school day (id. at p. 10). Next, the parents asserted that the annual goals were "generic, vague, incomplete, and repetitive;" and the annual goals did not address the student's "failing grades from the previous year," his need to improve "organization, self correct or refocus," or his "impulsivity, depression or frustration;" and the annual goals were not measureable (id.). Finally, the parents alleged that the student would not be appropriately grouped with "peers that struggle[d] with similar needs" (id.).

As relief, the parents requested findings that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years, that RLS was an appropriate unilateral placement for the student for the 2011-12 and 2012-13 school years, and that equitable considerations weighed in favor of their requested relief (see Dist. Ex. 1 at pp. 11-12).

B. Impartial Hearing Officer Decision

On October 2, 2013 the parties proceeded to an impartial hearing, which concluded on December 18, 2013 after four days of proceedings (see Tr. pp. 1-726). By decision dated May 5, 2014, the IHO concluded that the district failed to offer the student a FAPE for both the 2011-12 and 2012-13 school years, that RLS was an appropriate unilateral placement for the student, and equitable considerations did not otherwise preclude relief in this matter; thus, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at RLS for the 2011-12 and 2012-13 school years upon proper proof of payment (see IHO Decision at pp. 38-50). Initially, although the IHO indicated in a footnote that the parents' due process complaint notice did not address the 2010-11 school year (see id. at p. 40 n.2), the IHO nonetheless found that the district violated its child find obligation for the 2010-11 school year (see id. at pp. 39-43).

With respect to the 2011-12 and 2012-13 school years, the IHO concluded that the "proposed program" placed the student in "general education classes" in the district where he "failed" the previous school year (IHO Decision at pp. 43-44). In particular, the IHO found that neither the October 2011 CSE nor the June 2012 CSE subcommittee adequately considered the input of the parents, the student's treating psychiatrist and psychologist, or RLS staff regarding his need for a "small therapeutic environment (id. at pp. 44-46). In addition, the IHO noted that the evidence in the hearing record indicated that the student's "setting played a role in his depression which caus[ed] him not to be able to access his learning," and therefore, the decision to place the student in a district public school was "contraindicated" (id. at pp. 45-46). The IHO found that the present levels of performance in the October 2011 IEP did not "accurately reflect" how the student's "behaviors" and "social/emotional issues" negatively affected his ability to "access learning," and the October 2011 CSE failed to conduct a classroom observation of the student (id. at p. 45). Next, the IHO concluded that neither the October 2011 IEP nor the June 2012 IEP included sufficient annual goals, and moreover, neither IEP included annual goals or management needs to address the student's "impulsivity, depression, anxiety or frustration" (id. at pp. 45-46). Further, the IHO determined that the October 2011 IEP and June 2012 IEP failed to include a crisis management plan for the student (id.). The IHO also found that neither IEP referenced the student's medication use (id.). As a result, the IHO concluded the neither the October 2011 IEP

nor the June 2012 IEP was designed to meet the student's "individualized needs and provide him with sufficient support to benefit educationally from the instruction" (id.).

Turning to the parents' unilateral placement of the student at RLS for the 2011-12 and 2012-13 school years, the IHO concluded that RLS provided the student with an educational program that enabled him to receive educational benefits (see IHO Decision at pp. 46-48). The IHO found that according to the evidence, RLS offered the student a "therapeutic" setting, which "cater[ed] to students with high intellect" and at RLS, the student "'was able to have the behaviors, socially and emotionally tempered and also controlled and managed, so that his academics and social-emotional functioning could thrive'" (id. at p. 48). In addition, the IHO noted that during his time at RLS, the student had "grown tremendously" and developed his self-esteem and his self-confidence, and had developed as a "learner," which manifested in higher grades (id.). Finally, the IHO noted that the student's "move from [the district] to [RLS] and the small classroom setting and therapeutic and supportive environment" was the "most important criteria in his improvement" (id).

With respect to equitable considerations, the IHO found no evidence to reduce or deny the parents' of their requested relief (see IHO Decision at pp. 48-50).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 and 2012-13 school years. Specifically, the district asserts that the IHO exceeded her jurisdiction in finding that the district failed to meet its child find obligation during the 2010-11 school year because the parents did not challenge the 2010-11 school year in the due process complaint notice. Alternatively, the district argues that the student was not eligible for special education programs and related services as a student with an emotional disturbance during the 2010-11 school year. Next, the district asserts that the IHO ignored testimonial and documentary evidence in concluding that the TSP program was not appropriate for the student because it offered the student appropriate peers, along with additional support to meet his needs. Also, the district alleges that the IHO erred in finding that the present levels of performance did not accurately reflect the student's then-current academic achievement and functional performance. In addition, the district asserts that contrary to the IHO's determination, the June 2012 IEP reflects that the CSE subcommittee reviewed and considered school reports from RLS, as well as input from RLS staff and the student's treating psychologist. Also contrary to the IHO's decision, the district argues that the annual goals in the October 2011 and June 2012 IEPs were appropriate to meet the student's needs, and were measureable. Finally, the district asserts that the parents' unilateral placement of the student at RLS for the 2011-12 and 2012-13 school years was not appropriate, and equitable considerations did not weigh in favor of the parents' requested relief because they did not timely provide the district with a 10-day notice of unilateral placement.

In an answer, the parents respond to the district's allegations and otherwise argue to uphold the IHO's decision in its entirety. In addition, the parents assert that both the October 2011 IEP and the June 2012 IEP failed to accurately reflect the evaluative information available, and as a result, the IEPs did not adequately identify the student's needs, accurately reflect the student's present levels of performance, or establish appropriate annual goals. The parents also assert that

neither the October 2011 IEP nor the June 2012 IEP discussed the student's behaviors that interfered with his academics and lacked crisis management plans. In addition, the parents argue that the October 2011 failed to include any details regarding the qualifications or training of the consultant teacher or how the consultant teacher services would be used. The IEP also failed to include any explanation of the resource room services recommended. Next, the parents allege that the district improperly attempted to use retrospective testimony to discuss the implementation of the IEP and to repair any deficiencies.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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 parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. A review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte addressing in the decision whether the district violated its child find obligations for the 2010-11 school year, and whether the October 2011 IEP and the June 2012 IEP were not appropriate due to the absence of management needs and the failure to note the student's medication use in the IEPs (compare IHO Decision at pp. 39-40, 45, with Dist. Ex. 1 at pp. 1-12).

With respect to the issues raised and decided sua sponte by the IHO, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. July 24, 2013]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR

200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include the issues raised and decided sua sponte by the IHO (compare Dist. Ex. 1 pp. 1-12, with IHO Decision at p. 40 n.2).[4] Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend the due process complaint notice (see Tr. pp. 1-762; Dist. Exs. 1-44; Parent Exs. A-H; J-Y; IHO Exs. I-III).[5]

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, these issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 841 F. Supp. 2d at 611 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R., 2011 WL 6307563, at *13). "By requiring parties to raise all issues at the lowest administrative level, IDEA "affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children"' (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Accordingly, the IHO exceeded her jurisdiction by addressing in the decision whether the district violated its child find obligations for the 2010-11 school year, and whether the October 2011 IEP and the June 2012 IEP were not

[4] This is particularly true with regard to whether the district violated its child find obligations for the 2010-11 school year since the due process complaint notice specifically indicates that only the 2011-12 and 2012-13 school years were in dispute (see Dist. Ex. 1 at pp. 2, 6, 8-11). Moreover, even if the parents' due process complaint notice could be reasonably read to raise the district's child find obligations during the 2010-11 school year, it appears that such claim accrued no later than April 5, 2011—when the parents removed the student from the district and placed him at RLS—and as a result, the parents' right to pursue such claim expired on or about April 5, 2013, two months prior to the due process complaint notice in this case, dated June 24, 2013.

[5] The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, at 250-51; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. Aug. 19, 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-83 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *5-*6). To the extent that the issues raised and addressed sua sponte by the IHO in the decision were initially discussed by district witnesses, such testimonial evidence merely provided the same background information already set forth in the parents' due process complaint and thus, the district did not "open the door" to these issues under the holding of M.H.

appropriate due to the absence of management needs and the failure to note the student's medication use in the IEPs, and those particular findings must be annulled.

B. October 2011 CSE Process

1. Evaluative Information and Present Levels of Performance

Turning to the issues properly before me, the district alleges that the IHO erred in finding that the present levels of performance in the October 2011 IEP did not accurately reflect the student's then-current academic achievement and functional performance. The parents argue that the October 2011 IEP did not reflect the evaluative information available to the CSE, which resulted in an IEP that did not accurately identify the student's needs or accurately reflect the student's present levels of performance. In addition, the parents assert that the October 2011 CSE failed to conduct a classroom observation of the student. Contrary to the IHO's findings, a review of the evidence in the hearing record reveals that the October 2011 IEP accurately reflected the evaluative information available to the CSE, and accurately identified the student's needs and present levels of academic achievement and functional performance. In addition, a review of the evidence in the hearing record indicates that the lack of a classroom observation did not result in a failure to offer the student a FAPE for the 2011-12 school year. As such, the IHO's findings must be reversed.

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]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional

evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

In this instance, the evidence in the hearing record reveals that the October 2011 CSE considered several sources of evaluative information in the development of the student's October 2011 IEP, including a January 2011 health report, a June 2011 psychoeducational evaluation, a June 2011 RLS educational evaluation, a June 2011 social history, the student's July 2011 individualized education services program (IESP), a September 2011 psychological evaluation, a September 2011 educational evaluation, an October 2011 letter from the student's psychologist, and an October 2011 social and developmental history (see Tr. pp. 39-60; Dist. Exs. 2; 4; 6-8; 12-14; 20; 23 at pp. 1-5; see also Dist. Ex. 24 at p. 1 [providing the parents with prior written notice related to the October 2011 CSE meeting and resulting IEP]).

According to the January 2011 immunization report—and as reflected in the October 2011 IEP—the student's significant medical history included depression and hypothyroidism, which his physician treated with daily medication (compare Dist. Ex. 2, with Dist. Ex. 23 at pp. 2, 5). The October 2011 IEP also noted that the student wore corrective lenses and had no "school based needs in regard to physical development" (compare Dist. Ex. 2, with Dist. Ex. 23 at p. 5).

As part of the June 2011 psychoeducational evaluation of the student—and as reflected in the October 2011 IEP—the evaluator administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student, which yielded a verbal comprehension index of 119 (high average range), a perceptual reasoning index of 125 (superior range), a working memory index of 129 (superior range), a processing speed index of 123 (superior range), and a full-scale IQ of 130 (very superior range) (compare Dist. Ex. 7 at p. 3, with Dist. Ex. 23 at pp. 2-3). Similarly, an administration of the Woodcock Johnson-Third Edition Achievement (WJ-III ACH) to the student revealed the following standard scores: letter-word identification, 123 (above average for grade level); passage comprehension, 120 (above average for grade level); spelling, 113 (above average for grade level); calculation, 97 (below average for grade level); and applied problems, 121 (above average for grade level) (see Dist. Ex. 7 at pp. 4-5). The evaluation also noted that based upon projective data, the student experienced considerable anxiety and depression (id. at p. 6).

A June 2011 RLS educational evaluation reviewed by the October 2011 CSE described the student's academic and social/emotional functioning in chemistry, modern history, geometry, and modern literature (see Dist. Exs. 4 at pp. 1-6; 23 at p. 2). According to the report, the student achieved grades ranging from B+ to A+ in all of his classes (see Dist. Ex. 4 at pp. 1-6). The report indicated the student demonstrated excellent to superior progress and worked well with peers in all classes (id. at pp. 2-5). The report also indicated the student was adequately to highly motivated and demonstrated good to outstanding participation (id.). In addition, the report noted the student exhibited satisfactory to excellent attendance as well as cooperative behavior (id. at p. 2). In all classes, the student completed assignments and exhibited good study habits (id. at pp. 2-5). The teachers described the student as hard working, respectful, a great friend to all classmates, and that he demonstrated a "remarkable effort" (id.).

In the June 2011 social history reviewed by the October 2011 CSE, the parents provided information regarding the student's educational, familial, and medical background (see Dist. Exs.

6 at pp. 1-4; 23 at p. 2). The report noted the student attended 10th grade at RLS and showed improvement in both his grades and in the completion of his work (see Dist. ex. 6 at pp. 1-4). The report also noted that previously the student attended the district where the student demonstrated problems with truancy and failing grades and was overwhelmed with social/emotional difficulties (id. at p. 3).

Next, a July 2011 IESP reviewed by the October 2011 CSE revealed that the student had been found eligible for special education programs and related services as a student with an emotional disturbance (see Dist. Exs. 8 at p. 1; 23 at p. 2). The July 2011 IESP included annual goals, testing accommodations, and a post-secondary transition plan to address the student's needs (see Dist. Ex. 8 at pp. 3-7).

A September 2011 educational evaluation—and as reflected in the October 2011 IEP—provided information about the student's academic functioning (compare Dist. Ex. 12 at pp. 1-5, with Dist. Ex. 23 at pp. 2-4). An administration of the WJ-III ACH to the student yielded the following standard scores: letter-word identification, 121 (superior range); passage comprehension, 113 (high average range); reading fluency, 134 (superior range); reading vocabulary, 111 (high average range); reading comprehension, 114 (high average range); spelling, 113 (high average range); calculation, 98 (average range); applied problems, 117 (high average range); and math fluency, 118 (high average range) (compare Dist. Ex. 12 at pp. 1-2, with Dist. Ex. 23 at pp. 3-4). The student also demonstrated decoding and sight word vocabulary skills—as well as a reading rate and accuracy—that fell within the superior range, which was reflected in the October 2011 IEP (compare Dist. Ex. 12 at pp. 1-2, with Dist. Ex. 23 at p. 4). The student's ability to comprehend brief passages and reading vocabulary knowledge also fell within the high average range (see Dist. Ex. 12 at pp. 1-2). The September 2011 educational evaluation also indicated—as reflected in the October 2011 IEP—that the student's math reasoning skills were in the high average range and his ability to solve math calculation problems was in the average range (compare Dist. Ex. 12 at p. 2, with Dist. Ex. 23 at p. 4). With respect to the Test of Written Language-Third Edition (TOWL-3), the student achieved an overall writing quotient of 128 and demonstrated writing mechanics that fell within the superior range, which was noted in the October 2011 IEP (compare Dist. Ex. 12 at p. 3, with Dist. Ex. 23 at p. 4). The report indicated the student demonstrated high average to superior academic abilities with several areas of strength and no significant weaknesses (see Dist. Ex. 12 at p. 4).

In September 2011, the district conducted a psychological evaluation of the student; in the evaluation report, the district school psychologist described the student's familial and educational history, academic skills, and social/emotional functioning (see Dist. Ex. 14 at pp. 1-10). At that time, the student lived with his parents and twin sister and attended 11th grade at RLS (id. at p. 1). According to the report, the student's depression and suicidality became prominent in eighth grade and resulted in a hospitalization for approximately 1.5 weeks; however, upon his release, he returned to the district school, but was readmitted to the hospital shortly thereafter for suicidality (id. at p. 2). After his release from the second hospitalization, the student began outpatient care with a private psychologist and psychiatrist, who prescribed medication for the student (id.). Attending ninth grade in a district school, the student achieved grades ranging from Cs to As, and although he performed well on tests, he performed poorly on homework (id. at p. 3). During 10th grade in a district school, the student felt more "socially isolated and his depression increased," which resulted in the student's hospitalization on two occasions for suicidality (id.). After

discharge, the student began to undergo dialectical behavioral therapy (DBT) with another psychologist, who adjusted the student's medications as needed (id.). Upon his return to a district school, the student's attendance and homework completion was poor, but he continued to perform well on tests (id.).

As part of the September 2011 psychological evaluation—and as reflected in the October 2011 IEP—an administration of the Woodcock Johnson-Third Edition Cognitive (WJ-III COG) to the student yielded the following standard scores: general intellectual ability and verbal ability, 125 (superior range); thinking ability, 121 (superior range); and cognitive efficiency, 119 (high average range) (compare Dist. Ex. 14 at p. 4, with Dist. Ex. 23 at pp. 2-4). According to the report—and as reflected in the October 2011 IEP—the student demonstrated a superior range performance on subtests related to lexical knowledge, language development, processing speed, and visual spatial thinking, as well as a high average performance in long-term retrieval, auditory processing, and fluid reasoning (compare Dist. Ex. 14 at pp. 4, 7, with Dist. Ex. 23 at pp. 2-4). An administration of the Behavior Assessment System for Children-Second Edition (BASC-2) to the student yielded T-scores in the at-risk range in the areas of emotional symptoms, externalizing problems, hyperactivity, depression, behavioral symptoms, and within the clinically significant range in the areas of atypicality and withdrawal (see Dist. Ex. 14 at p. 6). According to the report, although the student exhibited a history of depression and suicidality, the student's pathology in these areas appeared "relatively low" at that time, except he continued to exhibit moderate levels of loneliness (id. at p. 9). At that time, the student reported that he continued to experience moments of sadness, but these moments were mild, short-lived, and specific to being lonely (id.). With respect to negative emotionality, the student reported he could reduce such feelings by using DBT coping skills (id.). In addition, the student reported "no current feelings of suicidal ideation, recent attempts, or non-suicidal physical self-damaging acts" (id.). The student also reported no "cognitive, sleep, psychomotor, or appetite disturbances" and stated that he felt "hopeful for the future" (id.). At that time, the student attributed his "positive change in mood" to his DBT and "current medication treatment" (id.).

In an October 2011 social and developmental history completed by the district with the student's mother serving as informant, the district school psychologist gathered information regarding the student's development, social skills, and educational and medical history, which the October 2011 CSE reviewed (compare Dist. Ex. 13 at pp. 1-5, with Dist. Ex. 23 at pp. 2, 4-5). The report noted the student's history of four hospitalizations due to suicidality as well as the student's participation in DBT with a psychologist (see Dist. Ex. 13 at p. 2). At that time, the student related well with both parents, but had a strained relationship with his twin sister (id. at p. 3). With respect to his educational history, the report documented the decline in the student's completion of homework assignments during sixth grade, and the decline in the student's academic performance during both seventh and eighth grade due to increased demands and increased depression (id.). According to the report, the student's depression stabilized during ninth grade, he performed well on tests, but his completion of homework was poor (id.). The report indicated that the student's poor homework and assignment completion continued into 10th grade, wherein his difficulties in Spanish, geometry, and global history classes resulted in the student dropping his Spanish course after the second quarter (id. at p. 4). In addition, during 10th grade the student's attendance declined, and he left school at times without notifying either his parents or staff (id.). According to the October 2011 social and developmental history, the student reportedly "loved school" until socialization problems ensued; currently, the student liked school, but he did not like the district

because of his social problems (id.). Additionally, the report noted that the student's psychiatrist prescribed medication for him (id.).

The October 2011 CSE reviewed an October 2011 letter drafted by the student's treating psychologist, which described the student's mental health status as it related to the "upcoming CSE meeting" (compare Dist. Ex. 20, with Dist. Ex. 23 at p. 2).[6] In the letter, the psychologist reported the student's history of major depression, suicidal ideation, two suicide attempts, and hospitalizations (see Dist. Ex. 20). The psychologist also indicated that the student's depression and suicidal ideation "diminished significantly" as a result of therapy and pharmacotherapy, but he continued to exhibit social anxiety and depression related to school (id.). The psychologist further indicated the transfer to RLS "appeared to have a powerful effect on his mood and behavior," in part, because RLS offered the student a "'new beginning'" and smaller classes with new peers and because the transfer "induced [the student] with hope and optimism" (id.). In addition, the psychologist noted that smaller classes offered the student the opportunity "to learn again without carrying the psychological baggage he had at [the district]" (id.).

Next, the hearing record indicates that the district assistant superintendent of pupil personnel services (assistant superintendent) testified that the parents and the RLS educational director (RLS director) provided input into the development of the IEP regarding the student's social/emotional functioning and academics during the October 2011 CSE meeting (Tr. pp. 66, 68; Dist. Ex. 23 at pp. 2-5). According to the October 2011 IEP, RLS staff and the student's psychologist provided information to the CSE regarding current levels of functioning, which the October 2011 CSE included in the IEP (see Dist. Ex. 23 at pp. 1-5). In addition, the October 2011 IEP indicated that the parents expressed concern about returning the student to the district (id. at p. 1). Moreover, the October 2011 IEP reflected that the CSE included information in the IEP based upon input from the parents and the RLS director regarding the student's performance and functioning, as well as information about the student receiving a diagnosis of a major depressive disorder (id. at pp. 4-5).

At the impartial hearing, the assistant superintendent also testified that the October 2011 CSE discussed the student's present levels of social/emotional development (see Tr. p. 63). Specifically, the October 2011 CSE discussed the student's difficulties with depression, anxiety, and socialization, and his need to develop corresponding coping strategies (see Tr. pp. 63-64). The assistant superintendent further testified that the October 2011 CSE identified the student's present levels of performance in academics, and discussed the student's strengths in the areas of cognition, reading, writing, and mathematics, as well as his less well developed skills in organization and executive functions (see Tr. pp. 62-63). According to the October 2011 IEP, the RLS director and student's psychologist participated by telephone and provided information regarding the student's current levels of functioning, which were included in the present levels of performance (see Dist. Ex. 23 at pp. 1-5).

Turning to the parents' allegation regarding the lack of a classroom observation, a review of the evidence in the hearing record does not support their contention. Here, the RLS director provided input at the October 2011 CSE meeting regarding the student's academic and

[6] The student's psychologist described himself as a clinical psychologist and the student's DBT therapist (see Dist. Ex. 20).

social/emotional functioning (see Tr. p. 84-86; Dist. Ex. 23 at p. 1). In addition, the evaluative information available to the October 2011 CSE included descriptions of the student's functioning and behavior within the classroom setting (see Dist. Ex. 4). Based upon a review of the hearing record and given that the parents cite no legal authority or facts upon which to conclude that the October 2011 CSE meeting constituted an initial evaluation (or a reevaluation) of the student triggering the obligation to conduct a classroom observation of the student, the October 2011 CSE was not automatically obligated to perform a classroom observation of the student by operation of law and, as further described above, the October 2011 CSE otherwise had sufficient evaluative information available to develop the student's October 2011 IEP. Thus, even if required in this case, the absence of a classroom observation did not result in a failure to offer the student a FAPE for the 2011-12 school year.

Based on the above, the evidence in the hearing record demonstrates that the evaluative information available to and considered by the October 2011 CSE—as well as input provided by the parents and the RLS director and the student's psychologist—was sufficient to develop an appropriate IEP for the student (see Tr. pp. 66, 84-86). A review of the October 2011 IEP, in conjunction with the evaluative information available to the CSE, demonstrates that the October 2011 CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development. Further, and as noted more fully above, the description of the student's needs in the October 2011 IEP were consistent with the evaluative information and input from the director of RLS, the school psychologist, the student's private psychiatrist, and the parents at the time of the October 2011 CSE meeting (compare Dist. Ex. 23 at pp. 2-4, with Dist. Exs. 7; 12; 14). Furthermore, as conveyed in the evaluative information, the October 2011 IEP present levels of social/emotional development reflected that the student had significant difficulty with depression, frustration tolerance, and socialization (see Dist. Ex. 23 at p. 5). Finally, as described in the evaluative information, the October 2011 IEP indicated the student worked hard and utilized coping skills to address his difficulties with social/emotional functioning (id.). The student's present levels of physical development indicated the student has received a diagnosis of major depressive disorder for which he was being treated with medication (id.). Moreover, a review of the October 2011 IEP indicates that the CSE utilized multiple assessments to describe the student's present levels of performance and special education needs (see Dist. Ex. 23 at p. 2-5). Accordingly, the evaluative information considered by the October 2011 CSE provided it with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop the student's IEP (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).

C. October 2011 IEP

1. Annual Goals

The district argues that contrary to the IHO's decision, the annual goals in the October 2011 IEP were measureable and addressed the student's needs. The parents reject the district's contentions. Based upon a review of the evidence in the hearing record, the IHO's findings must be reversed.

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]).

Upon review, the October 2011 IEP contained seven annual goals that addressed the student's needs in the areas of self-advocacy, study skills, social/emotional and behavioral skills, and coping strategies (see Dist. Ex. 23 at p. 7). Specifically, to address the student's study skills, the October 2011 CSE created three annual goals to improve the student's ability to self-advocate pertaining to academics (id.). To address the student's significant difficulties with social/emotional functioning, the October 2011 CSE developed four annual goals to improve the student's coping skills and to improve his self-concept and social skills (id.). In addition, all of the annual goals included criteria from which to measure progress (i.e., 85 percent success over 10 weeks), methods of measurement (i.e., structured interview), and a schedule as to when progress would be measured (i.e., every 10 weeks) (id.). Contrary to the IHO's decision, the October 2011 IEP included annual goals to address the student's depression, anxiety, and impulsivity, and moreover, the October 2011 IEP included annual goals related to counseling (compare IHO Decision at p. 46, with Dist. Ex. 23 at p. 7 and Tr. pp. 282-87). Notably, the annual goals addressed the student's emotional difficulties by targeting the development of coping skills and a positive self-concept—all of which a counselor would address in counseling sessions. In addition, at the impartial hearing the district school psychologist testified that the annual goals addressed the student's social/emotional and related academic needs (see Tr. pp. 282-87).

Thus, overall the evidence in the hearing record supports a finding that the annual goals in the October 2011 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see 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]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

2. Consideration of Special Factors—Interfering Behaviors

The parents assert that the October 2011 IEP did not include discussions about the student's behaviors that interfered with his academics and lacked a crisis management plan. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP.

Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).[7] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

[7] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

In this case, it is undisputed that the October 2011 CSE did not conduct an FBA, develop a BIP, or include a crisis management plan in the October 2011 IEP (see Dist. Ex. 23 at p. 6). However, based upon an examination of the evaluative information available to the October 2011 CSE, at that time the student did not engage in behaviors that impeded his learning or that of others, and therefore the October 2011 CSE was not required to conduct an FBA or develop a BIP for the student (see Dist. Exs. 2 at p. 1; 4 at pp. 1-6; 6 at pp. 1-4; 7 at pp. 1-7; 12 at pp. 1-5; 13 at pp. 1-5; 14 at pp. 1-10; 20 at p. 1). Rather, the evaluative information described the student, for example, as an active participant in class who related well with teachers and classmates and completed assignments (see Dist. Ex. 4 at pp. 1-6). In addition, the hearing record does not contain evidence indicating that the student engaged in maladaptive behaviors that would otherwise warrant an FBA or a BIP (see Tr. pp. 1-762; Dist. Exs. 1-44; Parent Exs. A-H; J-Y; IHO Exs. I-III).

Moreover, while the evidence in the hearing record reflects the student's history of suicidal ideation and suicide attempts, the evidence in the hearing record also reveals that the district responded to the student's emotional crises and related needs at the time of the crisis without having a formalized crisis management plan in place for this student (see Tr. pp. 620-23, 631, 643). Specifically, during 8th and 10th grade when the student presented with crises at school, the district's mental health staff assessed the student and then addressed the crisis by recommending an evaluation of the student, as well as hospitalization for treatment (see Tr. pp. 631, 643). In addition, the hearing record shows that at time of the October 2011 CSE meeting, based on the evaluative reports and input from CSE members including the parents and the RLS director, the student did not present at that time as being in crisis (see Dist. Exs. 2 at p. 1; 4 at pp. 1-6; 6 at pp. 1-4; 7 at pp. 1-7; 12 at pp. 1-5; 13 at pp. 1-5; 14 at pp. 1-10; 20 at p. 1). Also, the RLS director reported the student did not present with suicidal ideation and suicidal attempts while at RLS, and RLS offered the student access to the mental health clinicians throughout the day, similar to the assistance available to the student in the district's recommended program and placement (see Tr. pp. 510, 513; Dist. Ex. 23 at p. 1).

Based on the above, the evidence in the hearing record shows that at the time of the October 2011 CSE meeting, the student did not exhibit behaviors that impeded his learning or that of others such that the October 2011 CSE was required to conduct an FBA, develop a BIP, or create a formalized crisis management plan in the October 2011 IEP for the student (see 8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

3. TSP Program, Indirect Consultant Teacher Services, and Resource Room

As previously noted, the district asserts that the IHO ignored testimonial and documentary evidence in concluding that the TSP program was not appropriate for the student. The parents reject the district's contentions, and argue that the October 2011 failed to include any details regarding the qualifications or training of the consultant teacher or how the consultant teacher services and resource room services would be used. Upon review of the evidence in the hearing record and contrary to the IHO's decision, the TSP program recommended in the October 2011 IEP—together with indirect consultant teacher services, resource room services, related services, annual goals, and management needs—was reasonably calculated to enable the student to receive meaningful educational benefits.

In reaching the decision to recommend the TSP program—and as noted in the management needs section of the October 2011 IEP—the CSE strove to recommend a "school environment [that] must honor the student's academic levels while providing support to manage his anxiety and depression regarding school related issues" (Dist. Ex. 23 at p. 5). Therefore, in accordance with the student's very superior cognitive skills and high average to superior academic skills—along with his difficulties with social/emotional functioning—the October 2011 CSE recommended the TSP program with indirect consultant teacher services and resource room services, which would allow the student to continue to attend general education classes for each subject area with the necessary "structure and routine" to assist with his social/emotional difficulties (see Dist. Ex. 23 at pp. 1, 8). Consistent with State regulations, the indirect consultant teacher services recommended in the October 2011 IEP would provide the student's general education teachers with support throughout the school day in order to assist them in "adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m][1], [2]; see Dist. Ex. 23 at pp. 1, 4-5; see also Dist. Ex. 23 at p. 8 [noting indirect consultant teacher services to be provided "[d]aily," for "5 h[ours] 15 min[utes]" per day, in an "integrated" setting]).[8] Also consistent with State regulations, the resource room services recommended in the October 2011 IEP would assist the student by "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]; see Dist. Ex. 23 at p. 1; see also Dist. Ex. 23 at p. 10 [explaining that the student "require[d] special instruction in an environment with a smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards"]).[9]

At the impartial hearing, the assistant superintendent described the TSP program as an "overarching program" to address the student's anxiety, depression, and executive functioning skills throughout the school day (see Tr. p. 72). According to the assistant superintendent, the October 2011 CSE recommended resource room services to provide "direct instruction with special education" to provide supports and to address the student's needs related to homework, such as editing and revision work, and to further provide the student with the "opportunity" to review his work with a special education teacher and to review long range assignments so he would continue to make progress (id.). More generally, the assistant superintendent described the TSP program housed within a district school as for students similar to this particular student's "profile"—meaning, students with at least "average" to "above average" IQs with an accompanying "fragile nature" or "emotional component" that interfered with academics (Tr. p. 73). The assistant superintendent explained that the TSP program provided such students with a program that honored the students' "intelligence" while simultaneously providing "therapeutic

[8] State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher, to a student with a disability to aid such student to benefit from the student's regular education classes," while "[i]ndirect consultant teacher services means consultation provided by a certified special education teacher to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m][1], [2]).

[9] State regulation describes the purpose of a resource room program as "supplementing the regular or special classroom instruction of students with disabilities who are in need of such supplemental programs" (8 NYCRR 200.6[f]).

support throughout the entire school day" (id.). The assistant superintendent further explained that students in the TSP program received schedules based upon their academic abilities and needs, which might require "special additional resource room or an integrated co-taught class" (Tr. pp. 73-74). In addition, the assistant superintendent explained that the TSP program included a "therapeutic support teacher" and a "teaching assistant" assigned to the program (Tr. p. 74). During the school day, the students had access to "resource room support at any time during the day" if a student felt "uncomfortable" or if a crisis developed—students could leave their program and access the teaching assistant or the teacher in a particular class (id.). In addition, the assistant superintendent testified that the teaching assistant worked with the "general ed[ucation] teachers" to ensure that the teachers were "aware of any needs the student[s] might have" with regard to "their academic program" (id.). Upon questioning by the IHO, the assistant superintendent clarified that in the TSP program, students attended "regular classes" but could go to a "separate room" where either a teaching assistant or a teacher remained during the day to provide assistance (Tr. p. 75). In addition, the assistant superintendent indicated that in this particular case, the October 2011 CSE discussed whether the student required a teaching assistant or additional adult support within his classes, but because the student "was doing really well at that point," the October 2011 CSE did not recommend that type of additional support for him (Tr. pp. 75-76). Upon further questioning by the IHO, the assistant superintendent explained that a student's resource room was scheduled for a specific time during the day, but typically, students spend their "study halls and their lunch hours in the TSP room . . . by choice" because they felt comfortable there (Tr. p. 76). Additionally, the assistant superintendent testified that the "TSP teacher" was a "highly qualified special education teacher" with experience teaching students with "emotional needs" (Tr. pp. 76-77).

Next, the assistant superintendent testified that based on the student's history at the district and his current functioning—including his high cognitive abilities—the student could attend classes within a general education setting (see Tr. pp. 77-78). In addition, while not documented in the October 2011 IEP, the district's prior written notice, dated October 13, 2011, indicated that the October 2011 CSE discussed other placement options for the student, including a nonpublic school as "proposed by the parents," but rejected this option "because it was overly restrictive and the student's needs could be met in a less restrictive environment" (Dist. Ex. 24 at p. 1).

In conjunction with the TSP program, the October 2011 CSE recommended supplementary aids and services and program modifications or accommodations that included a positive reinforcement plan to "reduce his stress and anxiety," as well as structure and routine to "mitigate his increased anxiety" (Dist. Ex. 23 at p. 8). In addition, the October 2011 CSE recommended supports for school personnel on behalf of the student, which included team meetings to allow staff to "share information at the end of each marking period to best plan for the student" (id.). To provide the student with additional social/emotional support, the October 2011 CSE recommended counseling services and created annual goals—as discussed above—to further address the student's social/emotional needs (see id. at pp. 1, 7-8). The district school psychologist indicated the recommended program was appropriate for the student because it provided him with a balance of support for his academic and emotional needs (see Tr. p. 291).

A review of the IHO's decision indicates that in finding the TSP program was not appropriate, the IHO relied heavily upon and gave more weight to the evidence presented by the parents regarding the October 2011 CSE's "discussion regarding placement," noting specifically

that the October 2011 CSE did not consider other placement options for the student despite listening to information presented by the student's psychiatrist, the parents, and reviewing the information in the October 2011 letter drafted by the student's treating psychologist—which noted how well the student was currently doing at RLS and how the student's transfer out of the district "induced hope and optimism" in the student (IHO Decision at pp. 44-45). However, even though this particular evidence demonstrated the parents' strong desire or preference to educate the student in "small classes" or to continue the student's placement at RLS, the evidence does not support a finding that the TSP program was not reasonably calculated to enable the student to receive educational benefits or that the student required a more restrictive setting—such as in a full-time special education program or placement—in order to receive educational benefits.

Based upon the foregoing, the evidence in the hearing record supports a finding that the TSP program, together with indirect consultant teacher services, resource room services, and related services, was reasonably calculated to enable the student to receive educational benefits in the LRE for the 2011-12 school year.

D. June 2012 CSE Subcommittee Process

1. Evaluative Information and Present Levels of Performance

The district alleges that the IHO erred in finding that the present levels of performance in the June 2012 IEP did not accurately reflect the student's then-current academic achievement and functional performance. In addition, the district asserts that contrary to the IHO's determination, the June 2012 IEP reflected that the CSE subcommittee reviewed and considered school reports from RLS, as well as input from RLS staff and the student's treating psychologist. The parents assert that the June 2012 IEP failed to accurately reflect the evaluative information available, and as a result, the IEPs did not adequately identify the student's needs or accurately reflect the student's present levels of performance. In light of the standards set forth previously, a review of the evidence in the hearing record reveals that the June 2012 CSE subcommittee considered, relied upon, and accurately identified and reflected the student's academic achievement and functional performance in the June 2012 IEP. As such, the IHO's determinations must be reversed.

In this instance, the evidence in the hearing record reveals that the June 2012 CSE subcommittee considered several sources of evaluative information in the development of the student's June 2012 IEP, including a November 2011 RLS educational evaluation, an April 2012 RLS educational evaluation, a May 2012 letter from the student's psychologist, and the evaluative information that was available to—and considered by—the October 2011 CSE (see Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1; 39 at p. 2; 40 at p. 1).

The November 2011 RLS educational evaluation described the student's academic and social/emotional functioning in American history, advanced literature, art, earth science, creative writing, and algebra (see Dist. Exs. 26 at pp. 1-6; 39 at pp. 1-2). According to the report, the student achieved grades ranging from A- to A in all of his classes (see Dist. Ex. 26 at pp. 1-6). The report indicated the student demonstrated excellent to superior progress, and overall, related well and worked well with others in all classes (id.). The report also indicated the student was adequately to highly motivated, and exhibited good to outstanding participation even though he was missing assignments in two classes (id.). Overall, the report noted the student exhibited

satisfactory to excellent attendance, demonstrated cooperative behavior in all classes, good study habits, excellent reading skills, and completed high quality work product (id.).

The April 2012 RLS educational evaluation similarly described the student's academic and social/emotional functioning in American history, advanced literature, art, earth science, creative writing, and algebra (see Dist. Exs. 32 at pp. 1-6; 39 at p. 2). According to the report, the student received grades ranging from A- to A+ in all of his classes (see Dist. Ex. 32 at pp. 1-6). The report indicated the student demonstrated good to superior progress, and overall, related well and worked well with others in all classes (id.). The student was also described as adequately to highly motivated, demonstrating good to outstanding participation, exhibiting satisfactory to excellent attendance, and as cooperative in all classes (id.). According to the report, the student completed assignments in four classes, but had missing assignments in two classes as well as absences in one class, which interfered with his progress (compare Dist. Ex. 32 at pp. 1-2, with Dist. Ex. 32 at pp. 3-6). Overall, the student demonstrated good study habits, provided interesting insight into the classroom subject matter, and was respectful of teachers and classmates (see Dist. Ex. 32 at pp. 1-6).

The June 2012 CSE also considered a May 2012 letter from the student's psychologist, which included his "professional recommendation that [the student] continue this course of maintenance treatment and school placement" for the next school year (Dist. Ex. 33; see Dist. Ex. 39 at p. 2). The psychologist indicated that although the student "no longer display[ed] any of the psychiatric symptomatology that was significantly impairing his functioning," the student required a "small and nurturing school placement" and thus, returning him to a "large general education setting, even if structured as 'consultant teacher services indirect'" as described in the October 2011 IEP "seem[ed] contraindicated" (id.). The psychologist noted that the student "finally" had a period of stability and was gaining self-confidence, developing friendships, and performing well academically, and therefore, he recommended that the student should continue at RLS (id.).

At the impartial hearing, the assistant superintendent testified that the parents and the RLS director actively participated at the June 2012 CSE subcommittee meeting (see Tr. pp. 141-42, 147). Specifically, the RLS director provided information to the June 2012 CSE subcommittee regarding the student's reading, mathematics, and writing skills (see Tr. p. 84). The June 2012 IEP indicated that the parents also participated in the CSE subcommittee discussions and the RLS director provided information regarding the student's strengths and ongoing needs (see Dist. Ex. 39 at pp. 1, 4). Additionally, while the parents disagreed with the TSP program recommendation in the June 2012 IEP, and both the parents and the RLS director continued to believe the student required a small class size, the assistant superintendent testified that the evaluative information available to the June 2012 CSE subcommittee did not indicate that the student required a small class to make progress (see Tr. pp. 89, 141-42, 147).

Next, a review of the June 2012 IEP in conjunction with the evaluative information available to the June 2012 CSE subcommittee demonstrates that the CSE subcommittee carefully and accurately described the student's present levels of academic achievement, social development, and physical development, and further, that the description of the student's needs was consistent with the evaluative information, as well as input from the RLS director and the parents presented at the meeting (see Dist. Ex. 39 at pp. 2-5). For example, the June 2012 IEP

continued to report standardized testing results from September 2011 psychological evaluation, the September 2011 educational evaluation, and the June 2011 psychoeducational evaluation (compare Dist. Ex. 39 at pp. 2-3, with Dist. Exs 7; 12; 14; 23 at pp. 1-4). Based on input from the RLS director, the June 2012 IEP reflected the student's mathematics, reading, and writing needs—namely, that the student achieved mathematics grades in the A range, the student demonstrated good progress and participation in reading, and the student was highly motivated during writing activities (see Dist. Ex. 39 at p. 4).

The June 2012 IEP also reflected information regarding the student's updated social/emotional functioning based upon the evaluative information available to the CSE subcommittee, as well as discussions held at the meeting regarding the student's history of recurrent major depressive disorder and that while his depression decreased over the past year, he continued to experience depressive episodes (see Dist. Ex. 39 at p. 5; compare Dist. Ex. 39 at p. 5, with Dist. Ex. 23 at p. 4). Further, the June 2012 IEP reported that the student continued to develop his coping skills and to identify triggers related to his depression and anxiety (see id.). In addition, the June 2012 IEP indicated that the student exhibited a low frustration tolerance, poor impulse control, and difficulties relating with peers and reading social cues (id.). Additionally, the present levels of physical development in the June 2012 IEP reported that the student received a diagnosis of major depressive disorder, which was treated with medication (id.).

At the impartial hearing, the assistant superintendent testified that the June 2012 CSE subcommittee identified the student's present levels of performance in academics (see Tr. pp. 84-85). Specifically, the June 2012 IEP contained information regarding the student's cognitive abilities and based upon input from RLS staff and RLS educational evaluation reports, the IEP reflected updated information regarding the student's skills in reading, writing, and mathematics (see Tr. pp. 84-85; Dist. Ex. 39 at pp. 4-5). The assistant superintendent further testified that the June 2012 CSE subcommittee identified the student's present levels of social/emotional performance and discussed the student's depression, related triggers, and the need for coping skills (see Tr. p. 85; Dist. Ex. 39 at p. 5).[10]

Therefore, based upon the foregoing, the evidence in the hearing record demonstrates that the evaluative information available to and considered by the June 2012 CSE subcommittee—as well as input provided by the parents and the RLS director—was sufficient to develop an appropriate IEP for the student. Accordingly, the evaluative information considered by the June 2012 CSE subcommittee provided it with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop the student's IEP (D.B., 2011 WL 4916435, at *8; 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).

[10] Neither the student's psychiatrist nor the student's psychologist attended the June 2012 CSE subcommittee meeting (see Dist. Exs. 34; 38; 39 at p. 1).

E. June 2012 IEP

1. Annual Goals

The district argues that contrary to the IHO's decision, the annual goals in the June 2012 IEP were measureable and met the student's needs. The parents reject the district's contentions. Based upon a review of the evidence in the hearing record and in light of the standards set forth previously, the IHO's findings must be reversed.

Here, the June 2012 IEP continued to recommend seven annual goals that addressed the student's needs in the areas of self-advocacy, study skills, social/emotional and behavioral skills, and coping strategies (compare Dist. Ex. 39 at p. 7, with Dist. Ex. 23 at p. 7). Specifically, to address the student's study skills, the June 2012 CSE subcommittee continued to recommend three annual goals to improve the student's ability to self-advocate pertaining to academics (id.). To address the student's significant difficulties with social/emotional functioning, the June 2012 CSE subcommittee continued to recommend four annual goals to improve the student's coping skills and to improve his self-concept and social skills (id.). In addition, all of the annual goals included modified criteria from which to measure progress (i.e., 80 percent success over 4 weeks or 85 percent success over 5 weeks), but continued to recommend similar methods of measurement (i.e., structured interview), and similar schedules as to when progress would be measured (i.e., every 10 weeks or by the end of each marking period) (id.). Contrary to the IHO's decision, the June 2012 IEP included annual goals to address the student's depression, anxiety, and impulsivity, and moreover, the June 2012 IEP included annual goals related to counseling (compare IHO Decision at p. 46, with Dist. Ex. 39 at p. 7). Notably, the annual goals addressed the student's emotional difficulties by targeting the development of coping skills and a positive self-concept—all of which a counselor would address in counseling sessions.

Upon review, although the June 2012 subcommittee continued to recommend the same annual goals in the June 2012 IEP as had been recommended in the October 2011 IEP, the CSE subcommittee modified the annual goals to include updated criteria (compare Dist. Ex. 23 at p. 7, with Dist. Ex. 39 at p. 7). In examining the evaluative information before the October 2011 CSE and the June 2012 CSE subcommittee, the hearing record reflects that the student's academic and social/emotional needs generally remained unchanged during that time (see Dist. Exs. 2 at p. 1; 4 at pp. 1-6; 6 at pp. 1-4; 7 at pp. 1-7; 12 at pp. 1-5; 13 at pp. 1-5; 14 at pp. 1-10; 20 at p. 1; 23 at pp. 1-11; 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1; 39 at pp. 1-11). Therefore, given the similarity of the student's needs in October 2011 and June 2012, it was reasonable and appropriate for the June 2012 CSE subcommittee to recommend annual goals in the June 2012 IEP that remained similar to the annual goals in the October 2011 IEP with the exception of modifying the criteria upon which to assess the student's progress (see Tr. pp. 294-96).

Moreover, the district school psychologist testified that the annual goals in the June 2012 IEP remained the same, but the June 2012 CSE subcommittee increased the criteria for meeting the annual goals based on the student's demonstrated progress (see Tr. pp. 294-96). Additionally, the district school psychologist testified that the June 2012 CSE subcommittee developed annual goals to address the student's social/emotional and related academic needs (id.). Due to the consistency of the student's functioning with respect to academics and social/emotional functioning, the addition of new goals by the CSE subcommittee was not warranted, and as set

forth above the annual goals remained appropriate to address the student's needs and were measurable.

Thus, overall the evidence in the hearing record supports a finding that the annual goals in the June 2012 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B., 973 F. Supp. 2d at 359-61; E.F., 2013 WL 4495676, at *18-*19; D.B., 966 F. Supp. 2d at 334-35; S.H., 2011 WL 6108523, at *8; W.T., 716 F. Supp. 2d at 288-89; Tarlowe, 2008 WL 2736027, at *9; M.C., 2008 WL 4449338, at *11; W.S., 454 F. Supp. 2d at 146-47).

2. Consideration of Special Factors—Interfering Behaviors

The parents assert that, similar to the October 2011 IEP, the June 2012 IEP did not include discussions about the student's behaviors that interfered with his academics and lacked a crisis management plan. However, a review of the evidence in the hearing record and in light of the standards set forth previously, the parents' assertions must be dismissed.

Again, it is undisputed that the June 2012 CSE subcommittee did not conduct an FBA, develop a BIP, or include a crisis management plan in the June 2012 IEP (see Dist. Ex. 39 at p. 6). However, based upon an examination of the evaluative information available to the June 2012 CSE subcommittee—and significantly, given the student's improvement in the area of his social/emotional functioning and his ability to exhibit adaptive behaviors rather than maladaptive behaviors—the June 2012 CSE subcommittee was not required to conduct an FBA or develop a BIP for the student at that time since his behaviors did not impede his learning or that of others (see Tr. p. 510; Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1; 39 at p. 5). Rather the evaluative information before the June 2012 CSE subcommittee reflected, for example, that the student related well with teachers and students, completed assignments, and participated in class (see Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1). In addition, the hearing record does not contain evidence indicating that the student engaged in maladaptive behaviors that would otherwise warrant an FBA or a BIP (see Tr. pp. 1-762; Dist. Exs. 1-44; Parent Exs. A-H; J-Y; IHO Exs. I-III).

As noted above, while the evidence in the hearing record reflects the student's history of suicidal ideation and suicide attempts, the evidence in the hearing record also reveals that the district responded to the student's emotional crises and related needs at the time of the crisis without having a formalized crisis management plan in place for this student (see Tr. pp. 620-23, 631, 643). The evidence in the hearing record also shows that at time of the June 2012 CSE subcommittee meeting, the student did not present with suicidal ideation or suicidal attempts while at RLS and did not require a crisis management plan, and RLS offered the student access to the mental health clinicians throughout the day, similar to the assistance available to the student in the district's recommended program and placement (see Tr. pp. 510, 513; Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1; 39 at p. 1).

Based on the above, the evidence in the hearing record shows that at the time of the June 2012 CSE subcommittee meeting, the student did not exhibit behaviors that impeded his learning or that of others such that the June 2012 CSE subcommittee was required to conduct an FBA,

develop a BIP, or created a formalized crisis management plan in the June 2012 IEP for the student (see 8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

3. TSP Program, Indirect Consultant Teacher Services, and Resource Room

The district asserts that the IHO ignored testimonial and documentary evidence in concluding that the TSP program was not appropriate for the student. The parents reject the district's contentions. Upon review of the evidence in the hearing record and contrary to the IHO's decision, the TSP program recommended in the June 2012 IEP—together with indirect consultant teacher services, resources room services, related services, annual goals, and management needs—was reasonably calculated to enable the student to receive meaningful educational benefits.

In reaching the decision to recommend the TSP program for the 2012-13 school year—and in light of the standards set forth previously—the June 2012 CSE subcommittee also strove to recommend a "school environment [that] must honor the student's academic levels while providing support to manage his impulsivity, depression, and low frustration tolerance regarding school related issues" (Dist. Ex. 39 at p. 5). Given that the student continued to exhibit overall very superior cognitive abilities and high average to superior academic abilities and in light of the student's demonstrated progress in the areas of his social/emotional and academic needs since the October 2011 CSE convened, the evidence in the hearing record supports a finding that the TSP program—together with indirect consultant teacher services and resource room services—remained appropriate to meet the student's needs (see Dist. Exs. 26 at pp. 1-6; 32 at pp.1-6; 33 at p. 1; 39 at pp. 2-3).

In conjunction with the TSP program and similar to the program recommendations in the October 2011 IEP, the June 2012 CSE subcommittee also recommended supplementary aids and services and program modifications or accommodations that included a positive reinforcement plan to "reduce his stress and anxiety," as well as structure and routine to "mitigate his increased anxiety" (compare Dist. Ex. 39 at p. 8, with Dist. Ex. 23 at p. 8). In addition, the June 2012 CSE subcommittee recommended consultation services to provide the student with "weekly feedback from [a] case manager to review" his performance in his classes and to prevent the student from "becoming overwhelmed by [the] workload" (id.). Similar to the October 2011 CSE, the June 2012 CSE subcommittee recommended supports for school personnel on behalf of the student, which included team meetings to allow staff to "share information at the end of each marking period to best plan for the student" and additionally, to provide the student with a "therapeutic support team" that would review his "overall progress and ongoing needs" (id.). To provide the student with additional social/emotional support, the June 2012 CSE subcommittee recommended additional counseling services in a group and created annual goals—as discussed above—to further address the student's social/emotional needs (see Dist. Ex. 39 at pp. 1, 8).). According to the district school psychologist, the June 2012 CSE subcommittee—including the parents and the RLS director—believed that the group session of counseling services provided the student with additional social feedback that would assist him in meeting his annual goals (see Tr. p. 297).

Reviewing the IHO's decision, the IHO, again, relied heavily upon and gave more weight to the evidence presented by the parents regarding the June 2012 CSE subcommittee's placement discussions, noting that the CSE subcommittee did not consider "other placements" despite the "opinions of the mental health professionals and [RLS] staff," which indicated that the student

required a small class and a therapeutic setting, he should continue at RLS, and that the TSP program seemed "contraindicated" based upon the student's needs and triggers, as well as his previous attendance at the district (IHO Decision at pp. 45-46; see Tr. pp. 473, 459, 511, 531; Dist. Ex. 33).

Contrary to the parents assertions, the evidence in the hearing record indicates the June 2012 CSE subcommittee considered multiple sources of evaluative information in the development of the June 2012 IEP and upon which it based its placement recommendations for the student, including RLS educational evaluations and the May 2012 letter from the student's psychologist, which provided the most updated information about the student's social/emotional and academic functioning and needs (see Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1; 39 at pp. 1-2; 40 at p. 1). In addition, the June 2012 IEP indicated that the parents and RLS director participated in the development of the IEP (see Dist. Ex. 39 at p. 1). Here, the evidence in the hearing record indicates that the student's needs and abilities—as described in all of the evaluative information—were consistent with those reflected in the student's June 2012 IEP present levels of performance and with the recommendation for the TSP program, together with indirect consultant teacher services, resource room, and counseling (compare Dist. Ex. 39 at pp. 1-5, with Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1). The evaluative information before the June 2012 CSE subcommittee indicated the student received a diagnosis of major depressive disorder and had a history of suicide ideation and attempts for which he was hospitalized; however, the June 2012 IEP was designed to address the student's social/emotional needs, as well as his academic needs. Furthermore, the evidence before the June 2012 CSE subcommittee indicated that the student was performing well in all classes, including achieving above average grades, participating in class, completing assignments, and interacting well with classmates (see Dist. Exs. 26 at pp. 1-6; 32 at pp. 1-6; 33 at p. 1).

As noted, the evidence in the hearing record established that the student demonstrated social/emotional and academic progress since the CSE last convened in October 2011 (see Dist. Exs. 26 at pp. 1-6; 32 at pp.1-6; 33 at p. 1). Moreover, the student received privately obtained therapy treatment, including medication, and was performing and relating well in school and with others, as reflected in the updated evaluative information before the June 2012 CSE subcommittee (id.). Furthermore, the description of the student's needs in the evaluative information considered by the June 2012 CSE subcommittee was consistent with the level of support available to the student in the recommended TSP program, together with counseling services. To address the student's management needs related to academics and social/emotional functioning, the June 2012 CSE subcommittee indicated in the IEP that the student required continual management in the area of socialization, including redirection when engaging in socially inappropriate behaviors as well as encouragement to engage positively with others (see Dist. Ex. 39 at p. 5). Thus, contrary to the parents' assertions that the recommendations in the June 2012 IEP would not provide the student with adequate support regarding his social/emotional needs, the June 2012 IEP addressed these school-based social/emotional needs by recommending specific accommodations (id.).

Therefore, upon review of the hearing record, although evidence demonstrated the parents' strong desire or preference to continue to educate the student in "small classes" and to continue the student's placement at RLS, the evidence does not support a finding that the TSP program was not reasonably calculated to enable the student to receive educational benefits or that the student required a more restrictive setting—such as in a full-time special education program or

placement—in order to receive educational benefits. Consequently, the June 2012 CSE's recommendations of the TSP program, together with indirect consultant teacher services, resource room, and related services were reasonably calculated to enable the student to receive education benefits and offered the student a FAPE in the LRE for the 2013-14 school year.

F. Challenges to the Assigned Public School Site

To the extent that the parents assert that the district could not implement the student's October 2011 IEP and June 2012 IEP, the parents' assertions must be dismissed. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8 2014]; see also K.L., 530 Fed. App'x 81, 87; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

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 [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]).[11] When 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 parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 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 either the October 2011 IEP or the June 2012 IEP because a retrospective analysis of how the district would have implemented those IEPs at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the 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 either IEP at issue here (see Parent Exs. D; F). Therefore, the district is correct that the issues raised and 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.,

[11] 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 Southeast Supervisory Union, 371 Fed. App'x 151, 154 [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 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.

906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented either the October 2011 IEP or the June 2012 IEP.[12]

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. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

[12] 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. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; 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 Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 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, 964 F. Supp. 2d at 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. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; 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. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [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., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 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]).

VII. Conclusion

In sum, 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 2011-12 and 2012-13 school years, the inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at RLS was an appropriate placement or whether equitable considerations weighed in favor of the parents' requested relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). Moreover, I have considered the parties' remaining contentions and in light of the findings made herein, need not address them.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 5, 2014, is modified by reversing those portions which found that the district failed to offer the student a FAPE in the LRE for the 2011-12 and 2012-13 school years; and,

IT IS FURTHER ORDERED that the IHO's decision, dated May 5, 2014, is modified by reversing those portions which ordered the district to reimburse the parents for the costs of the student's tuition at RLS for the 2011-12 and 2012-13 school years.

Dated: **Albany, New York**
August 22, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER