The University of the State of New York

The State Education Department
State Review Officer
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No. 14-086

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

Appearances:
Thivierge & Rothberg, P.C., attorneys for petitioners, Randi M. Rothberg, Esq. and Katharine Giudice, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that respondent (district) had provided their daughter with a free appropriate public education (FAPE) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Petitioners are the parents of a student with a disability (student) who, at the time that the IEP at issue in this matter was developed, was twelve years old (Dist. Ex. 1 at pp. 1, 10).[1] The record reflects that the student - who is classified as a student with an intellectual disability and, among other things, suffers from a seizure disorder - began to show signs that she was not developing typically when she was one and a half years old (Dist. Exs. 1 at p. 1, 4 at p. 1; Tr. 158). At the time, the student began receiving early intervention services which she received until she was three (Tr. p. 158). Thereafter, the record reflects that the student began receiving services though the district's committee on pre-school education, and then ultimately began attending a

[1] By the time this appeal was filed, the student had turned thirteen (Pet. at ¶ 1).

non-public school identified in the record as the IVDU School (IVDU) when she was seven (Parent Ex. E at p. 1; Tr. at pp. 158-59).[2] Since then, the student has consistently attended IVDU, including during the 2013-14 school year at issue (Dist. Exs. 3, 4 at p.1; Parent Exs. F, H, M, N; Tr. pp 84-85, 159).

On April 11, 2013, a CSE convened to develop a 2013-14 IEP for the student (Dist. Ex. 1 at p. 11; Tr. pp. 28, 103). Finding that the student remained eligible for special education and related services as a student with an intellectual disability,[3] the April 2013 CSE recommended, among other things, a 12-month school year program in a 12:1+4 special class at a specialized school[4] with the following related services: one 30-minute session per week of individual counseling, two 30-minute sessions per week of individual occupational therapy (OT), two 30-mniute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at pp. 1, 7). In addition, the April 2013 CSE recommended the services of a full-time, 1:1 paraprofessional (id. at p. 7).

By a Final Notice of Recommendation (FNR) dated June 12, 2013, the district summarized the special education and related services recommended in the April 2013 IEP and identified the public school site to which the district assigned the student for the 2013-14 school year (Dist. Ex. 2). Thereafter, the student's mother visited this school and, by letter dated August 13, 2013, advised the district that she did not believe that it was appropriate for the student for various reasons (Parent Ex. C at pp. 1-2; Tr. p. 163). In addition, the student's mother advised the district that while she was interested in learning about any other "program options" that might have been available, that subject to an "appropriate program and placement option" being offered she would continue to send the student to IVDU and seek public reimbursement and/or funding (id.). There is no indication in the record that the district responded to this letter.

A. Due Process Complaint Notice

By due process complaint notice dated September 26, 2013, the parents requested an impartial hearing, asserting that the district did not offer the student a FAPE for the 2013-14 school year (Parent Ex. A at p. 1). In particular, the parents suggested that the April 2013 CSE was not appropriately constituted, and that the April 2011 IEP itself was predetermined and/or not developed with sufficient parental input (id. at pp. 3-4). In addition, the parents made a number of allegations concerning the April 2013 IEP, including that the present levels of performance section was insufficient, that the goals were not appropriate for various reasons, that the management needs were vague and not adequate, that the IEP did not contain appropriate accommodations/supports for the student and/or school personnel, that the proposed class ratio (12:1+4) was inappropriate, that the IEP lacked parent training and counseling, that the IEP lacked

[2] The record reflects that IVDU has both an Upper School and a Lower School and that the student attended the latter (Parent Exs.. E at p. 1, F, G, H, K, L at p. 1, M, N, O at p. 1).

[3] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).

[4] In addition to referring to the recommended class as a 12:1+4 class, the IEP also refers to this placement as a "12:1 + (3:1)" class, which appears to be a reference to the regulatory requirement that such class include a maximum of 12 students, one teacher and one other "staff person" to every three children in the class (see 8 NYCRR 200.6[h][4][iii]).

a ratio for adapted physical education, and that the IEP lacked promotion criteria (id. at pp. 2-4). The parents also argued that the public school to which the student was assigned was inappropriate, contending that 12:1+4 class would not provide the student "with the level of support and individualized instruction which she needs," that the student would not have been appropriately grouped for instructional purposes, and suggesting that school itself was too large and unsafe (id. at p. 5). As relief, the parents requested to be reimbursed for (or the district be ordered to directly fund) the student's tuition and expenses at IVDU for the 2013-14 school year.

B. Impartial Hearing Officer Decision

On December 2, 2013, an impartial hearing was convened and after five non-consecutive days of proceedings, concluded on April 11, 2014 (Tr. pp. 8-196).[5] By decision dated May 8, 2014, an IHO found that the district "met its burden of proof with respect to demonstrating that the [April 2013 IEP] provided the student with a FAPE for the 2013-14 school year" (IHO Decision at p. 9). In particular, the IHO found that the April CSE relied on a psychoeducational evaluation and reports from teachers to develop the April 2013 IEP's goals, which he concluded "were appropriate for the student and designed to address [her] academic delays" (id.). In addition, the IHO found that a 12:1+4 class, along with the provision of a 1:1 paraprofessional, was appropriate to meet the student's academic and cognitive needs (id. at p. 10), and suggested that the lack of parent training and counseling in the IEP was not a problem because such training/counseling was "programmatic" at the student's assigned public school (id. at p. 6). Further, and with respect to the assigned public school, the IHO essentially found the student would have been appropriately grouped there, and that the school would have implemented the April 2013 IEP (id. at pp. 9-10). The IHO, therefore, found that the district offered the student a FAPE for the 2013-14 school year and dismissed the parents' due process complaint notice (id. at p. 10).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO's decision, which they contend was not thorough or well-reasoned, was improper and incorrectly found that the district offered the student a FAPE for the 2013-14 school year. In particular, the parents suggest that the April 2013 CSE was not properly constituted, that the April 2013 IEP itself was predetermined, and that the district failed to properly evaluate the student. In addition, the parents argue that the April 2013 IEP did not accurately identify the student's needs, did not contain appropriate goals, and recommended an inappropriate program (i.e., a 12:1+4 class) which, among other things, the parents contend was not in the student's least restrictive environment (LRE). The parents also contend that the public school to which the student was assigned was inappropriate in that the student "would not have appropriate peers in the recommended class," that the speech therapy room was too small, that the gym and cafeteria were too large and overwhelming, and that there was a lack of supervision at the school which "appeared dangerous." Finally, the parents contend that IVDU is an appropriate placement for the student and that the "equities" favor them in this matter. The parents, among other things, request that the IHO's decision be annulled and that the district be ordered to provide

[5] The hearing record reflects that, in addition to the above, a pre-hearing conference was held on November 22, 2013 (Tr. pp. 3-4). Also, no testimony was taken on the first two days of these proceedings (Tr. pp. 8-21), and only closing arguments were presented on April 11, 2014 (Tr. pp. 180-196).

"partial reimbursement and partial direct funding for the tuition, costs, and expenses of [the student's] placement at IVDU" for the 2013-14 school year.

The district generally denies the parents allegations and contends that it offered the student a FAPE for the 2013-14 school year. In addition, the district asserts that IVDU is not an appropriate placement for the student, and it maintains that the parents "have not overcome the presumption that equitable considerations favor school districts in tuition payment cases such as this."

V. Applicable Standards

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

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

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

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review

As an initial matter, the parents raised a number of issues in their due process complaint notice that are not raised on appeal. This includes that the management needs in the April 2013 IEP were vague and not adequate, that the IEP did not contain appropriate accommodations/supports for the student and/or school personnel, and that the IEP lacked both a ratio for adapted physical education and promotion criteria. Accordingly, these issues will not be reviewed (8 NYCRR 200.5[k], 279.4[a]). In addition, the parents do not appeal the IHO's finding regarding the lack of parent training and counseling in the April 2013 IEP. Accordingly, this issue is final and binding on the parties (8 NYCRR 200.5[k], 279.4[a]; see also 34 CFR 300.514[b]).

In addition, the parents raise two arguments in their petition (i.e., that the district failed to adequately evaluate the student and that the program offered to the student in the April 2013 IEP was not in the student's LRE) which were not raised in their due process complaint notice.[6] Inasmuch as 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]; see N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 584-85 [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]; see K.L. v. New York City Dep't of Educ., 530 Fed., App'x 81, 87 [2d Cir. July 24, 2013]), and the parents did not seek the district's agreement to

[6] While the parents attempt to raise their LRE concerns as part of their challenge to the 12:1+4 class placement, whether or not a placement is "too restrictive" as the parents contend does not refer to the student-to-adult ratio in a classroom, but rather to whether a student with disabilities is being educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). In this regard, I note that all of the parents' contentions regarding the 12:1+4 class in their due process complaint notice relate to the size of the class and/or the amount of support such a class would provide, and not to whether the student would have access to mainstream peers.

expand the scope of the impartial hearing or seek to include these assertions in an amended due process complaint notice, these claims 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 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [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. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]). "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. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review because it was not raised in the party's due process complaint notice]). Such was not allowed with respect to these two issues, and thus neither will be further considered.[7]

B. 2013-14 IEP

1. CSE Composition

The parents suggest that the April 2013 CSE was improperly composed because, among other things, the district "failed to include related service professionals in the IEP meeting" (Parent Ex. A at p. 3). However, there is no requirement that related services providers attend a student's CSE meeting. Instead, the IDEA and State and federal regulations provide that in addition to the required special education teacher or, where appropriate, special education provider of the student, the CSE may include "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][iii], [ix]; see 20 U.S.C § 1414[d][1][B][iii], [vi]; 34 CFR 300.321[a][3], [6]). Here there is no indication in the record that the presence of any related service provider at the April 2013 CSE was requested, and I note that the parents do not make any claims regarding the sufficiency of the related services offered to the student in the April 2013 IEP.[8]

[7] While an exception to the above rule has been determined to exist where a non-complaining party raises issues that are outside of the scope of a due process complaint notice in affirmative support of a position taken at an impartial hearing (see, e.g., M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2014] [finding that district "opened the door" to an issue by raising it first in its opening statement and then in the questioning of its first witness]), I do not find that such is the case here. In this regard I note that while there is testimony in the hearing record regarding how various pieces of evaluative data were used by the district to develop portions of the IEP challenged by the parents such as the "present levels" and goals (Tr. pp. 31-36, 38-40), much of this testimony was elicited though questioning by the parents' attorney, and none appears to be an attempt to establish the sufficiency of any data that was used. Likewise, the issue of LRE does not appear to have been raised by the district, but was rather raised by one of the parents' witnesses in response to questioning by the parents' attorney (Tr. p. 113).

[8] While the parents do suggest that the lack of related service providers affected the sufficiency of the related services goals in the April 2013 IEP, as discussed further below I do not find that the goals in the IEP are so insufficient so as to have denied the student a FAPE.

Accordingly, I am unable to find that the lack of related services providers at the April 2013 CSE, standing alone, amounts to a procedural error that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415 [f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5 [j][4]).

2. Predetermination

The parents also contend that the program offered to the student by the April 2013 CSE was predetermined and created without meaningful consideration or input from them or others acting on their behalf (Pet. at ¶¶ 44-46). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]). In general, districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (id.).

Here, the hearing record reflects that the student's mother attended the April 2013 CSE meeting and that, while she testified that she did not recall whether she said anything at the meeting, she was able to participate thereat (Dist. Ex. 1 at p. 12; Tr. p. 53-54, 161-62, 189). In addition, the record reflects that a representative from IVDU attended the April 2013 CSE meeting and participated in discussions (Dist. Ex. 1 at p. 12; Tr. pp. 54; 103), and that information about the student and what should be included in the April 2013 IEP were discussed at the meeting (Tr. pp. 30-31, 45). Moreover, the hearing record reflects that the April 2013 CSE did, in fact, consider other educational placements for the student, including placement in a 12:1+1 class and a 6:1+1 class, but rejected those based on what was felt to be the student's needs (Dist. Ex. 1 at p. 11; Tr. pp. 53-54). Thus, while I understand that the parents and the student's teachers disagree with the recommendation of a 12:1+4 class for the student, this alone does not support a claim of predetermination (see, e.g., P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). Nor does the fact that the April 2013 CSE may not have considered other class placements which the parents may have found more desirable, as the parents seem to suggest (see, e.g., B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. Mar. 31, 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]).

Accordingly, I find that the hearing record does not support the parents' contention that the program offered to the student was predetermined.

3. Present Levels of Performance

The parents also contend that the student was denied a FAPE because her present levels of performance and individual needs were not accurately described in the April 2013 IEP.

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, a CSE must generally 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]).

The record reflects that in developing the April 2013 IEP, the April 2013 CSE utilized various sources of data concerning the student, including a psychoeducational evaluation conducted in March 2013 (Dist. Ex. 4), a progress report with information provided by IVDU personnel (Dist. Ex. 3), and input that was provided at the April 2013 CSE about the student by the student's parents and IVDU personnel who participated at the CSE meeting (Tr. pp. 38-40). As part of the psychoeducational evaluation, the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) and the Woodcock-Johnson III Tests of Achievement (WJ-III) were administered, the results of which are reflected on the April 2013 IEP (Compare Dist. Ex. 1 at p. 1; Dist. Ex. 4 at pp. 2-3). In addition, the April 2013 IEP reflects other pertinent information about the student that is consistent with evaluative data, including information about the student's functioning in math, reading and writing (Compare Dist. Ex. 1 at p. 1 with Dist. Ex. 3 at p. 1), information about the student's tendency to get frustrated and the effect this has on the student (Compare Dist. Ex. 1 at p. 2 at Dist. Ex. 3 at p.1), and information pertaining to the student's seizure activity (Compare Dist. Ex. 1 a p. 2 with Dist. Ex. 4 at p. 1).[9]

Notably, while the parents claim that the April 2013 IEP does not identify the student's present levels of performance or her individual needs, the only basis given for this assertion on appeal is that the district "disregarded the information yielded from [the student's psychoeducational evaluation] in developing its IEP for her" (Pet. at ¶23). Specifically, the parents contend that while the psychoeducational evaluation indicates that the student could not solve any basic addition or subtraction problems other than "1+1=2" and could not write anything beyond her first name, the April 2013 IEP indicates that the student can do some basic addition, was ready to learn subtraction, that the student could write one or two sentences, and that the student's handwriting was clear and legible (Pet. at ¶¶ 23-24). However, the parents contention in this regard is a bit confusing in that they also claim that this psychoeducational evaluation is unreliable and inaccurate (Pet. at ¶ 26;), and they argued at the impartial hearing that despite what this evaluation

[9] The student's seizure activity is also reflected in other parts of the April 2013 IEP as well, including in the annual goals (Dist. Ex. 1 at p. 6) and where a 1:1 paraprofessional is recommended (id. at p. 7).

reflected the student "could do more" (Tr. pp. 181-82). Moreover, the hearing record reflects that the student's academic abilities were ascertained primarily from information provided by the student's teachers (Tr. pp. 44, 48-49), and there is no claim made that the April 2013 IEP misrepresents and/or is inconsistent with the information about the student that these individuals provided.[10] In fact, I note that the parents even attempt to use the April 2013 IEP's description of the student as a basis to discredit testimony provided by one of the district's witnesses at the impartial hearing (Pet. at ¶ 54). Accordingly, I decline to find on this record that the description of the student's present levels of performance in the April 2013 IEP was inadequate.

4. Goals

The parents also contend on appeal that the goals in the April 2013 IEP are insufficient. The IHO disagreed and found that the goals contained in that IEP were appropriate for the student.

State and federal regulations require that an IEP 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 CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

Here, the April 2013 IEP contains ten annual goals and, consistent with the CSE's determination that the student would participate in an alternate assessment, various short term objectives (Dist. Ex. 1 at pp. 3-6, 9). The record reflects that these goals, in general, are intended to address the student's deficits in areas such as reading comprehension, math, writing, frustration tolerance, gross motor skills, fine motor skills, and receptive and expressive language skills (id. at pp. 3-6; Tr. pp. 31-36). Further, the annual goals and short-term objectives contained in the April 2013 IEP include the requisite evaluative criteria, evaluation procedures, and schedules to measure progress, providing, for example, criteria for measurement to determine if a goal had been achieved (e.g., three out of five trials with 80% accuracy, nine out of ten opportunities, 100 percent accuracy), the method of how progress would be measured (e.g., teacher/provider observation, performance assessment task, class activities), and a schedule of when progress toward the goals would be measured (e.g., one time per quarter) (Dist. Ex. 1 at pp. 3-6).

The parents contend on appeal that the April 2013 IEP's goals are deficient, in part, because they do not address certain needs, including certain reading-related needs (fluency, decoding and

[10] In note that, in general, districts may rely on information obtained from the student's private school personnel for purposes of assessing a student (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 330 [S.D.N.Y. 2013] [finding that despite not having conducted required evaluations, information about student provided at CSE meeting "more than fulfilled" the purpose of the evaluation requirement]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that teacher estimates are an acceptable method of evaluation]).

sight words), money and time skills, and activities of daily living. However, there is a general reluctance to finding a denial of a FAPE based on failures in IEPs to identify goals (see, e.g., B.K., 12 F.Supp.3d at 360, P.K v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011]), and the issue when assessing whether a FAPE has been offered to a student is not whether an IEP is perfect, but whether as a whole it is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; see also, e.g., Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). In that regard, I note that here, the April 2013 IEP contains goals which address many of the student's needs, and that even the parents' own witness (the principal of IVDU) testified that many of these goals - including the reading comprehension goal, the writing goal, and many of the related services goals - were appropriate for the student (Tr. pp. 105 -110). In addition, and with respect to the student's reading and math abilities, the IEP reflects that the student has significant deficits in these areas, including deficits related to sight words and decoding (which generally relate to fluency) (Dist. Ex. 1 at pp. 1 – 2).[11] Accordingly, and while the IEP's goals could perhaps have been more robust in these areas, I am unable to find that this alone would preclude these areas from being addressed, or that the student would not receive an educational benefit. Likewise, I do not find the lack of ADL-related goals in the April 2013 IEP amounts to a denial of FAPE in this instance (see, e.g., J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [failure to address all areas of need though goals not a denial of FAPE)].[12] This is especially true since the record reflects that student, who was not yet at an age where transition services would have been required (see 8 NYCRR 200.4[d][2][ix]), can still benefit from academic instruction (Parent Exs. E, K; Tr. pp. 90-92, 105-107, 133) and there is no indication in the record that ADL was raised as a concern at the April 2013 CSE. Nor do the parents specify what ADL goals the student would require in order to receive a FAPE.

In addition, the parents contend that the goals in the April 2013 IEP are deficient because certain goals (i.e., the goals related to math and PT) are not attainable by the student. However, even if this assertion were true, this alone would not preclude the student from working on these goals or from making meaningful progress in these areas. Further, and with respect to the PT goal, I note that the parents - who actually take issue with a short term objective requiring the student to jump forward and backward 3 feet on demand - rely on the testimony of IVDU's principal who testified that while she felt this "jumping activity" was something that the student would have a "very hard time" doing, that she was "not a physical therapist" and thus would not "give [her] opinion on that" (Tr. p. 108). Accordingly, I do not find that the student was denied a FAPE on this basis.

The parents also suggest that the counseling goal in the April 2013 IEP is inappropriate because it references "academic tasks" and "teacher support," but the basis for this contention is not clear as the parents simply note that the IEP recommends counseling on a pull-out basis and

[11] The IEP, for example, reflects that the student achieved a very low letter word identification score and indicates that the student, who was 12 years old at the time, had completed short and long vowels (Dist. Ex. 1 at p. 1).

[12] "ADL" refers to Activities of Daily Living.

cite to testimony provided by IVDU's principal (Pet. at ¶ 35). A review of this testimony, however, reflects that the IVDU principal indicated that she felt that the counseling goals in the IEP (of which there are two) were appropriate for the student, though she did express a concern related to how certain short-term objectives related to these goals (and which concerned the student's performance in the classroom) would be assessed (Tr. pp. 107-108). In particular, the principal indicated that she felt that certain things would need to be assessed by a teacher since the student's counselor (due to the pull-out nature of the counseling) would not be in the classroom with the student. In this regard I note that the April 2013 IEP explicitly provides that the student's progress towards her counseling goals would be assessed, in part, by both teacher and provider observations (Dist. Ex. 1 at p. 4). Accordingly, I am unable to find that the parents' allegations regarding the counseling goals provide a basis for relief.

Finally, the parents contend that the "health and safety" goal in the April 2013 IEP "doesn't make sense" in that its objectives call for the student to seek medical personnel for treatment during seizure activities (Pet. at ¶ 37). However, while I agree that this "goal" is awkward, it is not clear from the record that it was actually intended for the student. Rather, the district's CSE representative testified that this "goal" was intended for the student's paraprofessional so that he or she could monitor the student's seizure activity (Tr. p. 36). Moreover, in light of the fact that the April 2013 IEP itself recognizes that the student required a paraprofessional in order to address her seizure activity, and it in fact provided the student with a 1:1 paraprofessional for this purpose (Dist. Ex. 1 at pp. 2,7), it is not clear that this "goal" is even necessary. Accordingly, I decline to find that this "goal" provides a basis for relief.

In sum, I find that the April 2013 IEP includes goals which are designed to address various needs and/or deficits of the student. Accordingly, and viewing the IEP in its totality as must, I decline to find that the student would have been denied a meaningful educational benefit based on insufficient goals.

5. 12:1+4 Class

The parents also suggest on appeal that the 12:1+4 program recommended for the student was inappropriate, contending that the size of the class is too large, and that such a setting "would be very stressful for [her] . . . and would hinder her focus and attention" (Pet. at ¶ 43).[13] However, and for the reasons discussed below, I am unable to find on the record before me that the student would have been denied a FAPE in a 12:1+4 class based on the size of the class.

12:1+4 classes, in general, are designed to accommodate up to a maximum of 12 students with the assistance (assuming the maximum enrollment of 12 students) of five adults, including a teacher and four "additional staff," which can be teachers, supplementary school personnel and/or related service providers (8 NYCRR 200.6[h][4][iii]). As such, 12:1+4 classes provide a nearly 2:1 student-to-adult ratio, and as such offer a significant amount of support to students. In fact, and as envisioned by regulation, 12:1+4 classes are considered appropriate for students with "severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (id), and according to the assistant principal of the school to which the student was assigned,

[13] As noted above, the parents also contend that this class would not have constituted the student's LRE, but this issue was not raised in their due process complaint notice and, therefore, is beyond the scope of review and need not be addressed.

approximately 50% of the instruction in such a class is provided on an individual basis (Tr. p. 77).[14] In this case, while the student has not been classified by the district as being multiply disabled, she does present with cognitive, academic and adaptive functioning deficits, and also suffers from a seizure disorder, which the record reflects were the primary reasons (especially the student's seizure activity) for the CSE's recommendation of a 12:1+4 class for the student (Dist. Exs. 3, 4; Tr. p. 53).

In support of their contention that a 12:1+4 class would be too large and distracting for the student, the parents site to the testimony of the IVDU principal who indicated a belief that having 12 students in a class would be too distracting for the student (Tr. p. 112). However, and while there is evidence in the record indicating that the student is highly distractible (see, e.g., Dist. Ex. 4 at p. 4; Tr. p. 105), this testimony does not appear to account for the number of adults (i.e., the teacher and four "additional staff") that would also be in the classroom with the student (not to mention the individual paraprofessional that the April 2013 IEP assigns to the student) who would be able to redirect the student when necessary.[15] Accordingly, I am not persuaded by the IVDU principal's testimony that the student would not be able to focus and made progress in a 12:1+4 class. Rather, and in light of the level of support provided I find that the student could be refocused in such a class when necessary and receive a meaningful educational benefit. This is especially true since the record reflects that the student does not have any significant behavioral issues (Tr. p. 85). Accordingly, I do not find that a 12:1+4 class is inappropriate for the student based on the size of the class.

C. Assigned School Claims

Finally, in addition to the claims regarding the April 2013 IEP, the parents also make allegations in their petition concerning the public school to which the district assigned the student. Specifically, the parents contend that the district failed to support their public school recommendation or show that the student would have been functionally grouped with appropriate peers there. In addition, the parents contend that the therapy room at the assigned public school was too small, that the gym and cafeteria were too crowded and overwhelming, and they suggest that there was a general lack of supervision at the school which "appeared dangerous."

As an initial matter, the Second Circuit Court of Appeals has held that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must generally be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim,

[14] I note that one of the management needs required by the April 2013 IEP is individualized attention (Dist. Ex. 1 at p. 2).

[15] Such services, provided under the supervision of a certified special education teacher and which do not involve the provision of direct instructional services, could be provided to the student by any of the "additional staff" authorized to be in a 12:1+4 class, including staff considered to be supplementary school personnel (8 NYCRR 80-5.6).

however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at *6). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at *6, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice" (id., citing R.E., 694 F.3d at 187 n.3).

In light of the above, two general principals are clear: (1) the sufficiency of a special education program offered to a student must generally be based on the IEP which is offered to the student, and (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. Accordingly, to the extent that the parents suggest that the district was required to prove that the public school that it assigned the student to was appropriate, I am unable to agree since imposing such a requirement on the district would both (a) require that one look past the April 2013 IEP in assessing the sufficiency of the program offered to the student, and (b) require one to speculate—absent evidence to the contrary—that the district would not adequately adhere to the April 2013 IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]). In this regard, while I realize that 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 (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014], B.K., 12 F.Supp.3d at 370-372; M.L., 2014 WL 1301957, at *12; M.O., 2014 WL 1257924, at *2; 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. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted

at 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] ["Absent 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]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; 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]).

Notwithstanding the above, I recognize that there are district court cases suggesting that a parent may rely on evidence outside of an IEP which is known to the parent at the time the decision to unilaterally place a student is made (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]). While the Second Circuit recently left open the question as to whether one such case (B.R.) "properly construes R.E." (see F.L., 2014 WL 53264, at *2), the Court has not explicitly addressed this issue. However, even considering what the parents claim to have known about the assigned public school, I find that an award of tuition reimbursement is not warranted.

1. Functional Grouping

As noted above, the parents suggest that the student would not have been appropriately grouped at the assigned public school. Specifically, the parents contend that while the student is functioning at a first grade reading and math level, she would be in a class with students who were functioning at pre-reading or below kindergarten levels in math. However, and as discussed in detail above, the Second Circuit has made clear that in cases like this, where an IEP is rejected before a district has an opportunity to implement it, the sufficiency of the district's offered program must be determined on the basis of the IEP itself, and mere speculation that an IEP would not have been properly implemented is not an appropriate basis for unilateral placement (F.L., 2014 WL 53264, at *6; K.L., 530 Fed. App'x at 87; R.E. 694 F.3d at 195). To that extent, I note that "functional grouping" does not directly relate to a student's IEP, and is rather a requirement imposed upon school districts by State regulations (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). Furthermore, and to the extent that this issue is related to the implementation of a student's IEP, I am unable to find (at least without speculating) that the student would not make academic progress simply because she might be in a class with students who are functioning at academic levels below her own. In this regard I note that while state regulations do require students in special classes to be grouped, in part, based on similarity of levels of academic or educational achievement (8 NYCRR 200.6[h][2][i]), I am unable to find that the difference in academic achievement levels in this case, given the student's own delays, is so significant so as to constitute a barrier to progress. This is especially true given the amount of support the student would receive in a 12:1+4 class, as discussed above. Accordingly, I find that the parents' allegations regarding functional grouping do not support an award of tuition reimbursement.

2. School Size and Environment

The parents also make allegations regarding the physical characteristics of the assigned public school, including that the speech therapy room was "small," and that the gym and cafeteria were too crowded and overwhelming. However, the parents' claims regarding the speech therapy room are speculative in that they do not quantify how "small" the physical therapy room is, or even explain how, if at all, the size of this room might affect the student and/or the implementation of the April 2013 IEP. Furthermore, the parents' claims regarding the gym and cafeteria – which appear to be related to concerns about grouping the student with others for things like lunch, recess, and gym (Parent Exs. A at p. 5, C at p. 1) – are also speculative in that since the student did not attend the assigned school, it is difficult to determine how the student would have reacted to these circumstances (see, e.g., N.K., 961 F. Supp. 2d at 591-92). This is especially true where, as here, the hearing record reflects that the student is being grouped with other students at IVDU for things like lunch, recesses, extra-curricular activities and gym without incident (Tr. pp. 82-83; 126-28; 137-38). Accordingly, these allegations do not provide an appropriate basis for unilateral placement.

3. Safety/Supervision

Finally, the parents contend that she observed a student at the school who was swearing and left school grounds, and that she also observed students running the hallways without supervision and expressed a concern that this "lack of supervision appeared dangerous." However, whether such events (which were apparently observed during a visit to the school) are typical, or what affect, if any, this might have on the student cannot be ascertained, again, without speculation. As such, and consistent with the precedent cited above, these contentions do not provide an appropriate basis for unilateral placement.

VII. Conclusion

For the reasons discussed above, I find that the April 2013 IEP, while not perfect, provided the student with a FAPE, and that the IHO did not err in determining such. Accordingly, I need not consider the parents' contentions regarding the appropriateness of IVDU or whether equitable considerations support their claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 24, 2014

HOWARD BEYER
STATE REVIEW OFFICER