



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-180

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

### **Appearances:**

The Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at the Ha'or Beacon School (Beacon) 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**

During the 2012-13 school year, the student attended Beacon (see Tr. p. 137; see generally Dist. Ex. 7 at pp. 1-10).<sup>1</sup> On June 14, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (fourth grade) (see Dist. Ex. 9 at pp. 1, 10-11, 13-14).<sup>2</sup> Finding that the student remained eligible for special education and related services as a student with an emotional disturbance, the June 2013 CSE recommended a 12:1+1 special class placement for instruction in English language arts (ELA), mathematics, social studies, and science at a community school with the following related services: one 30-minute session per

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

<sup>2</sup> For clarity, it appears that the June 2013 IEP—entered into evidence as District Exhibit 9—failed to correctly paginate all 17 pages of the document; in this decision, the unnumbered page between pages "9" and "10" will be referred to as page "9a" (see generally Dist. Ex. 9).

week of individual counseling, one 30-minute session per week of counseling in a small group, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of speech-language therapy in a small group (*id.* at pp. 1, 10-11, 13).<sup>3</sup> In addition to noting that the student required strategies to address behaviors—including positive behavioral interventions and supports—the June 2013 CSE also completed a functional behavior assessment (FBA) and developed a behavior intervention plan (BIP) to further address the student's behaviors that impeded his learning or that of others (*id.* at pp. 4-5; *see* Dist. Ex. 10 at pp. 1-5).

In a final notice of recommendation (FNR) dated July 25, 2013, the district summarized the recommendations in the June 2013 IEP, and identified the particular public school site to which the district assigned the student to attend during the 2013-14 school year (*see* Dist. Ex. 13).

On August 29, 2013, the parent executed an enrollment agreement with Beacon for the student's attendance during the 2013-14 school year (*see* Parent Ex. C). On September 3, 2013, the parent executed an addendum to the enrollment agreement with Beacon, which itemized additional tuition charges for the provision of counseling, OT, and speech-language therapy services (*see* Parent Ex. D).

In a letter to the district dated September 17, 2013, the parent indicated that at the June 2013 CSE meeting, both she and the student's teachers expressed their disagreement with the decision to recommend a 12:1+1 special class placement for the student (Parent Ex. F). The parent further indicated that due to the student's "severe behavioral issues," he required a "very structured, small setting with a lot of behavioral support" (*id.*). In addition, upon visiting the assigned public school site—which the parent identified as the "same placement offered to [the student] last year"—the parent determined that it was "much too large a setting" for the student and that the students in the observed classroom were "mostly [students] with learning disabilities" (*id.*). Additionally, the parent noted that "[n]one of the other students" had social/emotional and behavioral needs similar to the student (*id.*). The parent further noted that the "placement" could not "deal with [the student's] extremely difficult and dangerous behaviors" (*id.*). Moreover, the parent opined that the student "would be at risk" and would "not be safe" at the assigned public school site because the student would not receive the "individual help he need[ed]" (*id.*). Finally, the parent notified the district that she would enroll the student at Beacon and would request an impartial hearing (*id.*).

#### **A. Due Process Complaint Notice**

By due process complaint notice dated August 25, 2014, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (*see* Parent Ex. A at p. 1). More specifically, the parent asserted that the BIP failed to address the student's "physical aggression towards other students and his oppositional behaviors with adults and peers" (*id.* at p. 2). The parent further alleged that the June 2013 IEP did not address the student "becoming physically aggressive with others when frustrated" (*id.*). Next, the parent asserted that the June 2013 CSE reduced the frequency of the recommended speech-language therapy services from three sessions per week to two sessions per week without explanation (*id.*). In addition, the parent asserted that the June 2013 CSE modified the speech-language therapy

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<sup>3</sup> 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]).

services from individual sessions to group sessions, which would not appropriately address the student's expressive, receptive, and pragmatic language delays (id.).

With respect to the assigned public school site, the parent noted her concern that a 12:1+1 special class placement was too large for the student (see Parent Ex. A at p. 2). In addition, the parent expressed concern that the 12:1+1 special class placement at the assigned public school site did not have the "behavioral program necessary to support the student's social and emotional needs" (id.). As relief, the parent requested prospective funding or reimbursement for the costs of the student's tuition at Beacon for the 2013-14 school year (id. at pp. 2-3).

## **B. Impartial Hearing Officer Decision**

On October 28, 2014, the parties conducted the impartial hearing (see Tr. pp. 1-191). In a decision dated November 17, 2014, the IHO determined that the district offered the student a FAPE for the 2013-14 school year, and therefore, the IHO denied the parent's requested relief (see IHO Decision at pp. 9-19).

Initially, the IHO found that the district evaluated the student in "anticipation of the upcoming IEP meeting" and relied upon the student's "recent testing, reports and input of attendees"—including the parent and the student's "current school"—to develop the June 2013 IEP (IHO Decision at p. 16). Because the May 2013 psychoeducational evaluation incorporated "detailed parentally supplied information" about the student, the IHO determined that a social history was not warranted (id.). The IHO further noted that the June 2013 IEP reflected both parental input and the student's testing results, which indicated that the student performed in the "average range" (id.). In addition, the June 2013 IEP reflected information about the student's improved sleeping habits, as well as concerns about the student's "temper and frustration" (id.). Next, the IHO noted that the student had his "own FBA and BIP" and that the June 2013 IEP set forth concerns about the student's "aggression" (id. at p. 17). The IHO further noted that the June 2013 IEP indicated that the student continued to "struggle with identifying and expressing feelings and emotions appropriately and relationship in real life situations" (id.). In addition, the IHO noted that the June 2013 IEP reflected that the student continued to demonstrate "behavioral difficulties at home," the student needed to learn "anger management and strategies of how to cope with frustration," the student was not "socially savvy," he often made "inappropriate reactions with his hands," the student required "teacher prompting," and he could become "aggressive" (id.). Next, the IHO found that the June 2013 IEP included annual goals related to counseling to address the student's behaviors and the student's emotions (id.).

With respect to the size of the 12:1+1 special class placement, the IHO found that the information relied upon at the June 2013 CSE meeting did not indicate that the student would be "overwhelmed in a large group setting" (IHO Decision at p. 17). In addition, the IHO found concerns about the availability of a "counselor" at the assigned public school site to be speculative (id.). Moreover, the IHO determined that the hearing record did not contain evidence "differentiating to any extent the ability to offer any needed individualized attention in such a class [at Beacon] over the recommended small class placement" (id. at p. 18). Consequently, the IHO determined that the 12:1+1 special class placement recommendation in the June 2013 IEP was "based upon sound rationale," and the evidence in the hearing record established that the student "responded well to structure" (id.). The IHO also noted that the June 2013 IEP included a "variety of academic and management needs to address [the] student's individual needs" (id.).

Next, the IHO rejected the parent's contention that the FBA and BIP were not "appropriately formulated" (*id.*). The IHO determined that the BIP included "information regarding targeted inappropriate behavior, triggers before targeted behavior, environmental conditions which affected targeted behavior, interventions, expected behavior changes, and methods for measurement" (*id.*).

In sum, the IHO concluded that the June 2013 IEP reflected the student's evaluation results, identified the student's needs, and included annual goals to address those needs (*see* IHO Decision at p. 19). The IHO further concluded that the June 2013 IEP also provided the student with "personalized instruction with sufficient support services" to enable the student to "benefit educationally from that instruction" (*id.*). As such, the IHO concluded that the district offered the student a FAPE in the least restrictive environment (LRE) for the 2013-14 school year, and denied the parent's request for relief (*id.* at pp. 18-19).

#### **IV. Appeal for State-Level Review**

The parent appeals, and alleges that the IHO erred in determining that the district offered the student a FAPE for the 2013-14 school year. Initially, the parent asserts that at the impartial hearing she maintained that the FBA and BIP were not appropriately formulated, which resulted in a "procedurally and substantively flawed" IEP. The parent also indicated that she "challenged the lack of goals or objectives to address some of the student's core issues including but not limited to social/emotional and behavioral issues." Next, the parent argues that the IHO erred in finding that the June 2013 IEP accurately reflected the student's testing results, identified the student's needs, and established annual goals to address those needs. The parent also argues that the IHO erred in finding that the June 2013 IEP included "personalized instruction with sufficient support services" to enable the student to "benefit educationally from that instruction." The parent further asserts that the IHO erred in finding that the BIP included "information regarding targeting inappropriate behavior, triggers before targeted behavior, [and] environmental conditions which affect targeted behavior and interventions." In addition, the parent asserts that the FBA contained substantive defects, and the IHO erred by failing to address the adequacy of the FBA. The parent also asserts that due to the defective FBA, the BIP failed to include specific interventions, and the IHO erroneously concluded that the BIP included interventions to address the student's behaviors.

Next, the parent argues that the IHO erred in finding that the 12:1+1 special class placement was appropriate. More specifically, the parent alleges that the district's "rationale" to support the recommendation of a 12:1+1 special class placement was "weak" and the IHO improperly relied upon inaccurate evidence to support a finding that the 12:1+1 special class placement was appropriate. The parent also asserts that the hearing record lacked sufficient evidence to establish that the assigned public school site was appropriate. With respect to Beacon, the parent argues that the unilateral placement provided the student with specifically designed instruction to meet his special education needs and the student would receive educational benefits. Finally, the parent asserts that equitable considerations weighed in favor of the requested relief.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district also asserts that the parent improperly raised issues in the petition that the parent did not raise in the due process complaint notice—such as the

adequacy of the FBA, how the June 2013 completed the FBA, and who participated in the creation of the FBA—and thus, these issues are beyond the permissible scope of review on appeal.<sup>4</sup>

## 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.

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<sup>4</sup> In the decision, the IHO sua sponte raised and addressed the following issues that the parent did not raise in the due process complaint notice: the sufficiency of evaluative information relied upon by the June 2013 CSE, whether the June 2013 CSE failed to complete an updated social history of the student, whether the June 2013 IEP accurately reflected the student's testing results and identified the student's needs, whether the annual goals in the June 2013 IEP addressed the student's needs, and whether the June 2013 IEP provided "personalized instruction with sufficient support services" to address the student's needs (compare IHO Decision at pp. 16, 19, with Parent Ex. A at pp. 1-3). In addition, the parent now raises the following issues in the petition for the first time on appeal as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year: the sufficiency of evaluative information relied upon by the June 2013 CSE, whether the June 2013 CSE failed to complete an updated social history of the student, whether the June 2013 IEP accurately reflected the student's testing results and identified the student's needs, whether the annual goals in the June 2013 IEP addressed the student's needs, whether the June 2013 IEP provided "personalized instruction with sufficient support services" to address the student's needs, and the adequacy of the FBA—including how the June 2013 CSE completed the FBA and who participated in the creation of the FBA (compare Parent Ex. A at pp. 1-3, with Pet. ¶¶ 5, 11, 26-27, 31-42, 46). With regard to the issues raised and addressed sua sponte in the decision by the IHO, as well as the issues now raised by the parent for the first time on appeal, such issues are beyond the permissible scope of the impartial hearing and scope of review on appeal; therefore, the aforementioned issues will not be considered on appeal (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at \*7-\*8 [S.D.N.Y. Dec. 3, 2014]). Furthermore, to the extent that 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 "open[s] the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-29 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [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]), the issues raised in the parent's petition for the first time on appeal—while initially raised by the district during direct examination of a district witness—only elicited background information (see Tr. pp. 34-36). Finally, although the IHO did not address the reduced frequency of the recommended speech-language therapy services in the June 2013 IEP or the decision to modify the speech-language therapy services from individual to group services, the parent did not appeal the IHO's failure to address these issues, and thus, the issues will be deemed abandoned or waived.

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. June 2013 IEP**

#### **1. Consideration of Special Factors—Interfering Behaviors**

Turning to the parent's contentions regarding the BIP, 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., 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. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). 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]).

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]). According to State regulation, "[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]).<sup>5</sup> 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]).

In this case, it is undisputed that the student demonstrated behaviors that impeded his learning or that of others and that the June 2013 completed an FBA and developed a BIP for the student (see Dist. Exs. 9 at pp. 3-5; 10 at pp. 1-5). The evidence in the hearing record reveals that in completing the FBA, the June 2013 CSE relied upon several sources of "observational data" and "collaborated with the parent" and the Beacon staff (Tr. p. 34; Dist. Ex. 10 at p. 1). At the impartial hearing, the district school psychologist who attended the June 2013 CSE meeting testified that based upon the information reviewed, the CSE discussed whether the student continued to

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<sup>5</sup> 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]).

demonstrate behaviors, whether the student improved his behaviors, and where "behavioral concerns" continued to exist (Tr. p. 34; see Tr. pp. 45-46). The district school psychologist also testified that, in order to develop the BIP, the June 2013 CSE discussed the student's current behavioral concerns and the triggers of those behaviors, as well as what the student responded to with regard to those behaviors (id.).

Within the FBA, the June 2013 CSE identified the student's inappropriate behaviors (i.e., difficulty with focus and distractibility, difficulty expressing his feelings appropriately in a group situation, low frustration tolerance, very rigid in his way of thinking, oppositional at times, and difficulty regulating his emotions); the contextual factors or triggers that contributed to the behavior and a hypothesis regarding the general conditions under which the behavior usually occurred (i.e., feelings of anxiety triggered by new learning or social situations, conflicts with peers); and probable consequences that served to maintain the behavior (i.e., excitement, releasing his feelings of anger or anxiety, escape from class activity) (see Dist. Ex. 10 at pp. 1-2). In addition, the June 2013 FBA included baseline information regarding the frequency, duration, and intensity of the student's inappropriate behaviors, and the settings in which the behaviors occurred (id. at p. 1). The June 2013 FBA listed previously attempted interventions—such as close monitoring, prompting, redirection, verbal explanations and praise—together with a description of the results of those interventions; planned interventions (i.e., close monitoring, prompting, verbal explanations, implementation of a token economy behavior management strategy, instruction in a small group setting); and items that the student viewed as positive reinforcement (i.e., token economy or rewards, such as points, prizes, trips, verbal praise) (id. at p. 2). Finally, the June 2013 FBA identified expected behavior changes and described the methods or criteria for outcome measurement (id.).

With regard to the June 2013 BIP—consistent with State regulations and contrary to the parent's allegations—the BIP identified three targeted behaviors: difficulty focusing and working in a timely manner; difficulty managing, regulating, and coping with his emotions; and difficulty expressing his feelings when angry or frustrated (see Dist. Ex. 10 at pp. 4-5). In addition, the June 2013 BIP identified the expected behavior changes and intervention strategies, such as prompting, guidance, support, redirection from adults, and the use of behavior checklists, recommended to effectuate the expected behaviors changes (id.). The June 2013 BIP also described the methods or criteria for outcome measurement (id.).

Furthermore, in addition to the BIP, the June 2013 IEP included contained annual goals to address the student's behavioral needs, including his social skills, anger and frustration, understanding his actions, keeping his hands to himself, accepting classroom rules, decreasing disruptive behaviors, and displaying good sportsmanship (see Dist. Ex. 9 at pp. 8-9). In addition, the June 2013 IEP included strategies to address the student's management needs and the student's social development needs, such as praise and encouragement, positive reinforcement, counseling, consistent and firm limit setting, and preferential seating (id. at p. 4).

Based upon the foregoing, the evidence in the hearing record supports a finding that the June 2013 CSE addressed the student's behavioral needs and formulated an FBA and a BIP that were designed to target the student's interfering behaviors, and therefore, any alleged deficiencies in the BIP would not result in a finding that the district failed to offer the student a FAPE (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*8 [S.D.N.Y. June 16, 2014]; A.C., 553 F.3d at 172).

## 2. 12:1+1 Special Class Placement

Next, the parent's allege that the IHO erred in finding that a 12:1+1 special class placement was appropriate. The parent argues that the IHO improperly supported this finding with unreliable evidence, and further, that the evidence in the hearing record does not support the June 2013 CSE's decision to recommend a 12:1+1 special class placement because the student continued to need a "very small class size in order to make meaningful progress." In addition, the parent asserts that the 12:1+1 special class placement was "simply too large." A review of the evidence in the hearing record does not support the parent's allegation. Thus, the IHO's finding need not be disturbed.

In this case, although neither the sufficiency of the evaluative information nor the adequacy of the present levels of performance in the June 2013 IEP are directly disputed, a brief discussion thereof provides context for the discussion of the issue to be resolved—namely, whether the 12:1+1 special class placement was appropriate to meet the student's needs for the 2013-14 school year. Here, the evidence in the hearing record reveals that the June 2013 CSE relied upon and considered the following to develop the June 2013 IEP: a May 2013 psychoeducational evaluation report, a 2012-13 Beacon School progress report, and input from the parent and the Beacon staff attending the CSE meeting (see Tr. pp. 27, 29-30; Dist. Exs. 6 at pp. 1-7; 7 at pp. 1-10; 9 at pp. 1-4). According to the May 2013 psychoeducational evaluation, the student's cognitive functioning fell within the average range (see Dist. Ex. 6 at pp. 3-4, 6).<sup>6</sup> In particular, the student's language abilities fell within the average to high average range, his visuospatial abilities ranged from the borderline to the superior range, and his working memory scores fell within the average to high average range (*id.* at pp. 3-4). Academically, the student also performed within the average range in both reading and mathematics (*id.* at pp. 4-6). On an early reading skills subtest, the student performed in the average range ("third grade level"); the student performed similarly on a reading comprehension subtest (average range, "middle third grade level") (*id.* at p. 4-5). On a word reading subtest, the student's scores fell within the average range ("end of second grade level") (*id.* at p. 4). In mathematics, the student performed in the average range on a numerical operations subtest ("beginning third grade level") and within the average range on a math problem solving subtest ("middle of second grade level") (*id.* at p. 5).

While demonstrating solidly average cognitive and academic functioning, the May 2013 psychoeducational evaluation also reported that the student continued to demonstrate "behavioral difficulties at home," which "negatively impacted [his] friendships" (compare Dist. Ex. 6 at pp. 1-5, with Dist. Ex. 6 at pp. 5, 7). In addition, the student was "sensitive," and exhibited a "bad temper" when "denied his own way" (Dist. Ex. 6 at p. 5). According to parent report, the student needed to "learn anger management and strategies of how to cope with frustration" (*id.*). As noted by one of the student's then-current teachers, the student required "much individual attention" and to feel as though he "belong[ed]" (*id.*). However, the same teacher described the student as a "well-behaved student who follow[ed] the rules and [was] respectful" (*id.*). Socially, the teacher indicated that the student—while able to get along with his peers—had difficulty "understanding social cues," and if "tired or cranky," the student had difficulty "coping and managing his

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<sup>6</sup> As noted in the June 2013 IEP, Beacon staff attending the CSE meeting agreed that the May 2013 psychoeducational evaluation "fairly" and "accurate[ly]" depicted the student's "current overall functioning in school" (Dist. Ex. 9 at p. 1).

emotions" (id.). According to the student's then-current counselor, the student was "well-behaved" and responded to the "structure and routine of the school program" (id.).

Generally, the June 2013 CSE incorporated much, if not all, of the testing results and the particular skills the student demonstrated as a result of the May 2013 psychoeducational evaluation into the present levels of performance in the June 2013 IEP (compare Dist. Ex. 6 at pp. 1-7, with Dist. Ex. 9 at pp. 1-4). Overall, the present levels of performance and individual needs section of the June 2013 IEP reflected the student's solidly average cognitive and academic functioning, while identifying areas of relative weakness in the student's math problem solving skills, reading skills, and writing skills (compare Dist. Ex. 9 at pp. 1-4, with Dist. Ex. 6 at p. 6, and Dist. Ex. 7 at pp. 1, 4-5). The June 2013 CSE also identified the student's behavioral and social needs within the present levels of performance and individual needs section of the IEP (compare Dist. Ex. 9 at pp. 1-5, with Dist. Ex. 6 at pp. 2-3, 5, and Dist. Ex. 7 at pp. 6-7).

To address the student's identified needs, the June 2013 CSE indicated within the management needs section of the IEP that the student required a "small, structured, self-contained class with support services to address [his] academic, language, fine motor and social/emotional needs" (Dist. Ex. 9 at p. 4). Consequently, the June 2013 CSE recommended a 12:1+1 special class placement—together with related services, annual goals, management needs, an FBA, and a BIP—at a community school for the 2013-14 school year (id. at pp. 5-11, 13-14). State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). At the impartial hearing, the district school psychologist testified that in reaching the decision to recommend a 12:1+1 special class placement, the June 2013 CSE considered the student's need for "structure" in light of "[e]veryone mention[ing] that he responded well to structure and attention from the teacher" (Tr. p. 32). In addition, the district psychologist testified that the June 2013 CSE "felt that [the student] needed a small class to help address those social needs" the student lacked due to his immaturity (id.). Moreover, the June 2013 CSE believed the student "could remain in a community class as a least restrictive environment in order to deal with his behavior concerns" (id.; Tr. pp. 40-42). While the June 2013 CSE understood that there were "some behavior concerns that need[ed] to be addressed," the CSE wanted the student to remain in the LRE but still have a "small classroom setting," which was "why" the CSE felt that the 12:1+1 special class placement was the "most appropriate setting for him" (Tr. pp. 41-42).

At the June 2013 CSE meeting, the parent and the Beacon staff voiced their opinions and concerns about the recommended 12:1+1 special class placement—and for a classroom "smaller than" a 12:1+1—but the June 2013 CSE decided that based upon the student's "behavior," his "profile" did not warrant a placement recommendation in a 12-month school year program in a specialized school (Tr. pp. 42-43). Furthermore, the information presented to the June 2013 CSE indicated that although the student had "behavior concerns," he responded "well to praise and encouragement" and a specialized school setting would be "too restrictive for him" (Tr. p. 43).

Prior to recommending a 12:1+1 special class, the evidence in the hearing record indicates that the June 2013 CSE considered and rejected other placement options, including a 6:1+1 special class and an 8:1+1 special class at a specialized school (see Dist. Ex. 9 at p. 14). In addition, the June 2013 CSE noted in the IEP that the student's then-current teacher reported that the student's

behaviors were "not uncontrollable," therefore, the student could "function within a small environment with lots of praise and attention" (id.).

In addition to the 12:1+1 special class placement and to further support the student, the June 2013 CSE also recommended strategies to address the student's management needs, including a small, structured, self-contained class; related services; work broken down into smaller increments; use of drill and repetition; practice and review of learned skills and new concepts; use of various learning modalities; preferential seating; praise and encouragement; positive reinforcement; and consistent and firm limit setting (see Dist. Ex. 9 at pp. 3-4). To address the student's anger management issues and coping with frustration, the June 2013 IEP included both individual and group counseling services targeting the student's social/emotional needs, in addition to an FBA and a BIP (id. at pp. 4-5, 8-10). The June 2013 CSE also recommended testing accommodations, consisting of extended time, a separate location or room (with a small group, preferential seating, limited distractions, frequent breaks, and on-task prompting), and a revised test format (with directions read and re-read aloud and clarified) (id. at p. 11). The June 2013 CSE also created approximately 19 annual goals to address the student's identified needs in the areas of reading, mathematics, spelling, written language, counseling, speech-language therapy, and OT (id. at pp. 5-10).

In conclusion, the evidence in the hearing record shows that the 12:1+1 special class placement—together with related services, annual goals, management needs, an FBA, and a BIP—at a community school was reasonably calculated to enable the student to receive educational benefits and offered the student a FAPE in the LRE.

### **B. Challenges to the Assigned Public School Site**

Finally, to the extent that the parent continues to argue the merits of issues pertaining to the assigned public school site, such claims are speculative and explained more fully below, 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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the 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, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is

into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>7</sup> 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 parent cannot prevail on her claims regarding implementation of the June 2013 IEP because a retrospective analysis of how the district would have implemented the student's June 2013 IEP at the assigned public school site was not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent was familiar with the assigned public school site and chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the June 2013 IEP (see Parent Exs. C-D; compare Dist. Ex. 13, with Parent Ex. E). Therefore, the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time 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

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<sup>7</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit 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.

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 parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on claims that the assigned public school site would not have properly implemented the June 2013 IEP.<sup>8</sup>

However, even assuming for the sake of argument that the parent could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, 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 IEPs in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at \*13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

## VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and it is not necessary to reach the issues of whether the parent's unilateral placement of the student at Beacon was an appropriate placement or whether

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<sup>8</sup> 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., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 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 Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. 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; 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., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at \*11).

equitable considerations weighed in favor of the parent's request for relief (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
March 6, 2015**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**