FINDINGS OF FACT AND DECISION

Case Number:	155154
Student's Name:	
Date of Birth:	
District:	
Hearing Requested By:	Parent
Date of Hearing:	December 2, 2015 February 8, 2016 June 1, 2016
Actual Record Closed Date:	December 23, 2016
Hearing Officer:	Jeffrey Schiro, Esq.

NAMES AND TITLES OF PERSONS WHO APPEARED ON DECEMBER 2, 2015

For the Student:

, Advocate

For the Department of Education:

, District Representative,

NAMES AND TITLES OF PERSONS WHO APPEARED ON FEBRUARY 8, 2016

For the Student:

, Advocate

For the Department of Education:

, District Representative,

NAMES AND TITLES OF PERSONS WHO APPEARED ON JUNE 1, 2016

For the Student:

, Advocate

, Parent

, (*via telephone*)

For the Department of Education:

, District Representative,

I. JURISDICTION - OVERVIEW OF ADMINISTRATIVE PROCEDURES

This impartial due process 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. This hearing was requested by the advocates for the student and the parent in a due process complaint notice dated March 25, 2015. The primary issue to be determined at this hearing is whether the Department of Education (the "DOE") shall be ordered to reimburse the parent, and/or directly pay for, costs associated with the student's unilateral private placement at [redacted] for the 2013/14 school year (Ex. P-A).[1]

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 (the "CSE") that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives. *See* N.Y. Educ. Law § 4402; *see also* 20 U.S.C. §§ 1414(d)(1)(a)-(b); 34 C.F.R. §§ 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. *See* 20 U.S.C. §§ 1221e-3, 1415(e)-(f); 34 C.F.R. §§ 300.151 - 300.152, 300.506, 300.511; N.Y. Educ. Law § 4404(1); 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." *See* 8 NYCRR § 200.5(i)(1); *see also* 20 U.S.C. §§ 1415(b)(6)-(7); 34 C.F.R. §§ 300.503(a)(1)-(2), 300.507(a)(1). An impartial hearing officer ("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

[1]References to the hearing transcript are noted as "R." References to exhibits admitted into evidence are noted as "Ex."

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 (5) business days before the hearing; and obtain a verbatim record of the proceeding. *See* 20 U.S.C. §§ 1415(f)(2)(a), (h)(1)-(3); 34 C.F.R. §§ 300.521(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 forty-five (45) days after the expiration period or adjusted period for the resolution process. *See* 34 C.F.R. §§ 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. *See* 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5). The decision of the IHO is binding upon both parties unless appealed. *See* N.Y. Educ. Law § 4404(1). A party aggrieved by the decision of an IHO may appeal that decision to a State Review Officer ("SRO"). *See* N.Y. Educ. Law § 4402(2); *see also* 20 U.S.C. § 1415(g)(1); 34 C.F.R. § 300.514(b)(1); 8 NYCRR § 200.5(k).

II. PROCEDURAL HISTORY

The DOE appointed me to hear this matter on March 25, 2015. *See* 8 NYCRR § 200.5(j)(3)(i). Hearings in this matter was thereafter held on: December 2, 2015; February 8, 2016; and June 1, 2016.[2] Appended to this decision are: a statement of appeal rights; a list of the persons in attendance at the hearings; and a list of the documents received into evidence. *See* 8 NYCRR § 200.5(j)(5)(v).

III. FACTUAL BACKGROUND

At the time of the March 25, 2015 due process complaint, the student was

[2]Following my appointment to this case, the parties moved to extend the case compliance date in this matter several times in order to accommodate the availability of the parties' witnesses and in order to allow for adequate time for my review of the hearing record taken on the extensive issues raised in the parent's due process complaint. In considering those requests, I weighed the cumulative impact of the relevant factors and found that the stated reasons for the extensions justified the delay in the resolution of the matter and were in accordance with the requirements of due process. Accordingly, requests for extensions of the case compliance date were granted (R. 5-9, 46-47, 105-106; Exs. IHO-I - IHO-XIX). *See* 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5).

, has been diagnosed with , and presents with (Exs. SD-1 at 2-3, SD-3, SD-5, P-A). For the 2013/14 school year, the student attended the at the ("") in (Exs. P-A, P-E, P-F, P-G, P-G, P-J). The Commissioner of Education has not approved as a nonpublic school with which public school districts may contract to instruct students with disabilities. *See* 8 NYCRR §§ 200.1(d), 200.7. The student's current eligibility for special education and related services as is not in dispute in this hearing (Exs. SD-1 at 1, P-A, P-C at 1). *See* 34 C.F.R. § 300.8(c)( ); 8 NYCRR § 200.1(zz)( ).[3]

The student attended at , where he was first evaluated and provided services through . The student then attended for about years. Following that time, the student attended (Ex. SD-3).

Testing administered on June 1, 2009 suggested , with . , the student's scores reflected (Ex. SD-2 at 2).

In January 2013, the student's . On the abbreviated form of the , he obtained a . The student was also administered the . The student were found to be within ( ) (Ex. SD-2 at 2-3).

At a meeting held on April 10, 2013, the CSE recommended that student receive the majority of his instruction in a in a community school on a basis. The CSE also recommended that the student receive related services of:

[3] .

(Ex. SD-1 at 8-9, 12-13).

On April 22, 2013, the parent signed an enrollment contract for the student's attendance at for the 2013/14 school year (Ex. P-H).

In a final notice of recommendation ("FNR") dated May 30, 2013, the DOE advised the parent that the student's recommended program would be implemented at in . In June 2013, the parent return the FNR to the DOE with a note stating that, after observing the proposed program, she did not believe it constituted an appropriate placement for him because " " (Ex. P-D).

In a letter dated August 12, 2013, the parent advised the CSE that she was rejecting its proposed program for the student and would unilaterally place him at for the 2013/14 school year at public expense (Ex. P-E). This hearing ensued.

IV. POSITIONS OF THE PARTIES

A. The DOE

The parent's claim for tuition reimbursement and/or direct payment for the student's unilateral placement at for the 2013/14 school year should be denied. The DOE offered the student a free appropriate public education in the least restrictive environment for the 2013/14 school year. The CSE which developed the student's IEP was duly constituted. The CSE relied on sufficient and adequate evaluative information to develop its IEP for the student. The parent was permitted to meaningfully participate in the CSE meeting. The IEP goals and objectives were reasonably related to the student's educational needs. The proposed program was reasonably calculated to confer meaningful educational benefit to the student. was an inappropriate and overly restrictive placement for the student which failed to meet his special education needs. The relevant equities also do not support the parent's tuition reimbursement/direct payment claim.

B. The Parent

The DOE should be ordered to reimburse the parent, and/or directly pay, for the

student's unilateral placement at [redacted] for the 2013/14 school year. The DOE failed to develop an appropriate educational program for the student. The CSE which developed the student's IEP was not duly constituted. The CSE relied on insufficient evaluative information when it developed its IEP for the student. The parent was not permitted to meaningfully participate in the CSE meeting. The IEP goals and objectives were not reasonably related to the student's educational needs. The [redacted] and [redacted] of the proposed program was not appropriate. The other students in the proposed program did not have similar [redacted] needs. [redacted] appropriately addressed the student's unique educational needs. The relevant equities also support an award of tuition reimbursement, and/or direct public funding, of the student's tuition to [redacted] (Ex. P-A).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Applicable Legal Standards

Two purposes of the IDEA, *see* 20 U.S.C. §§ 1400-1482, are: (a) to ensure that students with disabilities have available to them a free appropriate public education ("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 (b) to ensure that the rights of students with disabilities and parents of such students are protected, *see* 20 U.S.C. § 1400(d)(1)(A)-(B); *see generally Forest Grove v. T.A.*, 557 U.S. 230, 239 (2009); *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).[4]

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

[4]The term "free appropriate public education" means special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. *See Rowley*, 458 U.S. at 206-07; *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 2013 WL 3155869 (2d Cir. June 24, 2013); *R.E. v. New York City Dep't. of Educ.*, 694 F.3d 167, 189-90 (2d Cir. 2012), *cert. denied* 2013 WL 1418840 (U.S. June 10, 2013); *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 has indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not," *see 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. *See* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 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.*, 2010 WL 3242234, at *2 (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*, 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*, 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. See 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." *See 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." *See Walczak*, 142 F.3d at 132 (*quoting Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989); *see also Grim*, 346 F.3d at 379. Additionally, school districts are not required to "maximize" the potential of students with disabilities. *See 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.'" *See Cerra*, 427 F.3d at 195 (*quoting Walczak*, 142 F.3d at 130); *see also 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" *See Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997); *see also Rowley*, 458 U.S. at 192. The student's recommended program must also be provided in the least restrictive environment ("LRE"). *See* 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), 300.116(a)(2); 8 NYCRR §§ 200.1(cc), 200.6(a)(1); *see also 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*, 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. Board 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 C.F.R. § 300.320(a)(1); 8 NYCRR § 200.4(d)(2)(i); *Tarlowe v. Dep't of Educ.*, 2008

WL 2736027, at *6 (S.D.N.Y. July 3, 2008), 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 C.F.R. §§ 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 C.F.R. § 300.320(a)(4); 8 NYCRR § 200.4(d)(2)(v).

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. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985). The remedy of tuition reimbursement has been extended to authorize direct payments to a private school for educational services rendered where *Burlington/Carter* factors are satisfied. *Mr. A. v. New York City Dep't of Educ.*, 769 F. Supp. 2d 403, 427-28 (S.D.N.Y. 2011); *S.W. v. New York City Dep't of Educ.*, 646 F. Supp. 2d 346, 358-60 (S.D.N.Y. 2009); *Connors v. Mills*, 34 F. Supp. 2d 795, 805-06 (N.D.N.Y. 1998).

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. *See* N.Y. Educ. Law § 4404(1)(c); *see also 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).

B. Proposed Public Program - Procedural

Turning to the first prong of the *Burlington/Carter* test, I must determine whether the DOE complied with the procedural protections of the IDEA. *See Cerra*, 427 F.3d at 192.

1. CSE Composition

The parent alleges that the April 10, 2013 CSE was not properly constituted (Ex. P-A at 2). An IEP must be prepared by a CSE having each of its required members. *See, e.g., Application of a Child with a Disability* (Byram Hills Cent. Sch. Dist.), Appeal No. 99-54 (SRO July 31, 2000). A CSE must consist of: the parents of the student; at least

one regular education teacher of the student (if the child is, or may be, participating in the regular education environment); at least one special education teacher of the student, or if appropriate, at least one special education provider of the child; a school psychologist; a representative of the school district qualified to provide or supervise the provision of special education; and an individual who can interpret the evaluations being reviewed by the CSE. *See* 20 U.S.C. §§ 1414(b)(4)(A), (d)(1)(B); 34 C.F.R. § 300.321; N.Y. Educ. Law §§ 4402(1)(b), 4410(3), 8 NYCRR § 200.3(a).

The evidence contained in the hearing record reflects the April 10, 2013 CSE meeting was duly constituted. In attendance at the April 10, 2013 CSE meeting was the student's special education teacher from [redacted], a general education teacher (who also served as the district representative of the meeting), the parent, a school psychologist, a parent advocate, and a [redacted] (R. 58, 68; Ex. SD-1 at 15).

Alternatively, to the extent that the parent objected to Mr. [redacted] serving as the general education teacher at the April 10, 2013 meeting, I find that his participation in the meeting did not result in or contribute to a denial of FAPE. The IDEA requires that a CSE include not less than one regular education teacher of the student, if the student is or may be participating in the general education environment. *See* 20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.321(a)(2); N.Y. Educ. Law § 4402(1)(b)(1)(a)(ii); 8 NYCRR § 200.3(a)(1)(ii); *E.A.M. v. New York City Dep't of Educ.*, 2012 W.L. 4571794, at *6 (S.D.N.Y. Sept. 29, 2012). The April 2013 CSE did not contain a regular education teacher who provided instruction to the student during the 2012/13 school year; however, it did include a regular education teacher, *i.e.*, Mr. [redacted] (Ex. SD-1 at 15). Even assuming, *arguendo*, that this was a procedural violation, it did not rise to the level of a denial of FAPE in this instance, *see* 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); 8 NYCRR § 200.5(j)(4)(ii), as the student was not recommended to participate in [redacted] during the 2013/14 school year (Ex. SD-1 at 8).

2. Adequacy of Evaluations

The parent alleges that the CSE failed to administer the necessary evaluations to form the basis for the development of an appropriate IEP (Ex. P-A at 2).

A school district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation, *see* 34 C.F.R. § 300.303(a)(2); 8 NYCRR § 200.4(b)(4); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary, *see* 34 C.F.R. §§ 300.303(b)(1)-(2); 8 NYCRR § 200.4(b)(4). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities. *See* 8 NYCRR § 200.4(b)(3). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP. *See* 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1)(ii); *Letter to Clarke*, 48 IDELR 77 (OSEP 2007). In particular, a school district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. *See* 20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3); 8 NYCRR § 200.4(b)(6)(x). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status. *See* 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); 8 NYCRR § 200.4(b)(6)(vii). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified. *See* 34 C.F.R. § 300.304(c)(6); 8 NYCRR § 200.4(b)(6)(ix).

I find that the CSE had adequate evaluative information of the student's functional,developmental and academic needs upon which to premise its program for the student for the 2013/14 school year (R. 59; Ex. SD-1 at 1-3). At the April 10, 2013 meeting, the CSE considered: a January 2013 progress report prepared by the student's [redacted] teacher; a January 12, 2013 [redacted] progress report; a January 15, 2013 [redacted] evaluation; a January 15,

2013 ; a February 22, 2013 progress report; and an April 8, 2013 progress report (R. 59; Exs. SD-1, SD-2, SD-3, SD-4, SD-5, SD-6, SD-7). Ms. , the student's teacher at , was also present at the April 2013 CSE meeting, participated in the meeting's discussion and gave input regarding the student's (R. 58-59; Ex. SD-1 at 15).

3. Adequacy of IEP Goals

The parent alleges that the goals included in the student's IEP failed to meet his unique educational needs (Ex. P-A at 2). An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the student's other educational needs that result from the student's disability. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); 8 NYCRR §§ 200.4(d)(2)(iii), 200.16(3)(3). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee. *See* 8 NYCRR § 200.4(d)(2)(iii)(b); *see also* 20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3).

I find that the CSE's IEP for the student for the 2013/14 school year established annual educational goals which were reasonably related to his educational deficits. The April 10, 2013 IEP included annual goals in: which were consistent with those educational deficits identified in the IEP and described what he could reasonably be expected to accomplish within a period. The annual goals also included the evaluative criteria, evaluation procedures and schedules to be used to measure the student's progress toward meeting each annual goal (R. 62-63; Ex. SD-1 at 4-7). *See* 8 NYCRR § 200.4(d)(2)(iii)(b); *see also* 20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3).

C. Proposed Public Program - Substantive

As noted earlier, the IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE. *See* 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." *See Rowley*, 458 U.S. at 203. 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), *quoting Rowley*, 458 U.S. at 192.

Based on the evidence submitted into the hearing record, I find that the CSE's proposed program was reasonably calculated to provide the student with meaningful educational benefit. According to the student's [redacted] teacher at [redacted], the student was [redacted] in the spring of 2013 (R. 79; Exs. SD-1 at 1-2; SD-4). For the 2013/14 school year, the CSE recommended that student receive [redacted] in a community school on a [redacted] basis. The CSE also recommended that the student receive related services of: [redacted] were also included in the student's IEP (R. 60; Ex. SD-1 at 8-10, 12-13). The CSE's recommended program mirrored his [redacted] program at [redacted], although there were only [redacted] enrolled students in the private program during the 2012/13 school year (R. 66, 77; Ex. SD-1 at 2).

Ms. [redacted] (formerly [redacted]) testified at the hearing that the student's primary educational need was support for [redacted] (R. 80). To address those [redacted], the April 2013 CSE recommended the following [redacted] for the student: [redacted]

(R. 60-61; Ex. SD-1 at 3). The CSE also included an annual educational goal in the student's IEP to and (Ex. SD-1 at 7).

D. Proposed Placement

The parent asserts that the IEP could not have been appropriately implemented in the recommended placement, that , and that the was not appropriate for him (Ex. P-A at 2).

Generally, the sufficiency of the program offered by a school district must be determined on the basis of the IEP itself. See R.E., 694 F.3d at 186-88. The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ.*, 2015 WL 2146092, at *3 (2d Cir. May 8, 2015); *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 (2d Cir. Mar. 19, 2015); *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 576 (2d Cir. Oct. 29, 2014); *T.Y.*, 584 F.3d at 419. The Second Circuit has explained that, when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child," *see P.K. v. New York City Dep't of Educ.*, 526 Fed. App'x 135, 141 (2d Cir. May 21, 2013), and 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. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 87 (2d Cir. July 24, 2013), *quoting R.E.*, 694 F.3d at 187. Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself, 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. v. New York City Dep't of Educ.*, 553 Fed. App'x 2, 9 (2d Cir. Jan. 8, 2014), *quoting R.E.*, 694 F.3d at 187 n.3. Therefore, if the student never attends the public schools under the proposed IEP, there can be no

denial of a FAPE due to the parent's suspicions that the school district will be unable to implement the IEP. See R.E., 694 F.3d at 195; E.H., 2015 WL 2146092, at *3.

However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP. *See M.O. v. New York City Dep't of Educ.*, 793 F.3d 236, 244-45 (2d Cir. 2015); *R.E.*, 694 F.3d at 191-92; *T.Y.*, 584 F.3d at 419-20; *C.F.*,746 F.3d at 79. In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP." *See M.O.*, 793 F.3d at 246; *see also Y.F. v. New York City Dep't of Educ.*, 2015 WL 4622500, at *6 (S.D.N.Y. July 31, 2015) (noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"); *M.C. v.New York City Dep't of Educ.*, 2015 WL 4464102, at *6-*7 (S.D.N.Y. July 15, 2015) (noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP); *S.E. v. New York City Dep't of Educ.*, 2015 WL 4092386, at *12-*13 (S.D.N.Y. July 6, 2015) (noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"); *N.S. v. New York City Dep't of Educ.*, 2014 WL 2722967, at *12-*13 (S.D.N.Y. June 16, 2014).

In view of the foregoing, the parent cannot prevail on her claims regarding the implementation of the April 2013 IEP and/or the assigned public school site. It is undisputed that the parent rejected the recommended public program and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the DOE became obligated to implement the April 2013 IEP (Ex. P-H).[5]

As to the parent's argument that the student would not have been appropriately functionally grouped within the proposed [redacted] classroom (Exs. P-A at 2, P-D), the

[5]Indeed, the January 15, 2013 [redacted] indicates that the student has never attended a public school program (Ex. SD-3).

basis of that concern was an observation of the proposed program in June 2013 (R. 94; Ex. P-D). The parent did not obtain any information regarding the specific classroom into which the student may have been placed had he attended the assigned school, or the functional abilities of the students in any such class. The evidence contained in the hearing record provides support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. A number of courts have noted the speculative nature of grouping claims when a student never attends the assigned public school site, and the parent presents no argument for departing from this authority. *See M.C.*, 2015 WL 4464102, at *7; *R.B. v. New York City Dep't of Educ.*, 15 F. Supp. 3d 421, 436 (S.D.N.Y. 2014), *aff'd*, 603 Fed. App'x 36; *B.K. v. New York City Dep't of Educ.*, 12 F. Supp. 3d 343, 371 (E.D.N.Y. 2014); *N.K. v. New York City Dep't of Educ.*, 961 F. Supp. 2d 577, 590 (S.D.N.Y. 2013); *J.L.*, 2013 WL 625064, at *11 (noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"). Accordingly, the parent's claims based on her observations regarding other students at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance. *See R.B.*, 589 Fed. App'x at 576 (holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP).

As the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion that the DOE would have denied the student a FAPE by failing to implement the IEP at the assigned public school site based on functional grouping or ability to implement required services would necessarily be based on impermissible speculation, and the DOE was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto. *See M.O.*, 793 F.3d at 245-46; *R.B.*, 589 Fed. App'x at 576; *F.L.*, 553 Fed. App'x at 9; *K.L.*, 530 Fed. App'x at 87; *R.E.*, 694 F.3d at 187 & n.3.

E. Conclusion

In summary, the evidence in the hearing record establishes that the DOE offered the student a FAPE for the 2013/14 school year. Having made this determination, it is not necessary to consider the appropriateness of [redacted] or to consider whether equitable factors favor an award of tuition reimbursement and/or direct payment to the private school. *See M.C. v. Voluntown*, 226 F.3d 60, 66 (2d Cir. 2000); *C.F. v. New York City Dep't of Educ.*, 2011 WL 5130101, at *12 (S.D.N.Y. Oct. 28, 2011); *D.D-S. v. Southold Union Free Sch. Dist.*, 2011 WL 3919040, at *13 (E.D.N.Y. Sept. 2, 2011), *aff'd* 2012 WL 6684585 (2d Cir. Dec. 26, 2012).

VI. ORDER

NOW, THEREFORE, IN LIGHT OF THE ABOVE FINDINGS OF FACT, IT IS

HEREBY ORDERED THAT:

The parent's claim for reimbursement and/or direct payment of the student's tuition to [redacted] for the 2013/14 school year is **DENIED**.

Dated: January 6, 2017

[redacted]
JEFFREY J. SCHIRO, ESQ.
Impartial Hearing Officer

JS:[redacted]

PLEASE TAKE NOTICE

Within 35 days of the date of this decision, the parent and/or the New York City Department of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.

"The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period." (8NYCRR279.2[b]) Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and sample forms for filing an appeal are included with this decision. Directions and forms can also be found in the Office of State Review website: www.sro.nysed.gov/appeals.htm.

DOCUMENTATION ENTERED INTO THE RECORD

PARENTS

A. Due Process Complaint Notice/Impartial Hearing Request, 3/25/15, 4 pgs.

B. [redacted] Program Description, undated, 3 pgs.

C. Individualized Education Program (IEP), 4/10/13, 11 pgs.

D. Final Notice of Recommendation (FNR), 5/30/13, 2 pgs.

E. Ten Day Notice Letter, 8/12/13, 2 pgs.

F. Class Schedule, 2013/14, 1 pg.

G. Report Card, June 2014, 1 pg.

H. Enrollment Contract, 4/22/13, 1 pg.

I. Affidavit of Payments, 7/2/15, 1 pg.

J. Attendance Record, 2013/14, 1 pg.

K. U.S. Individual Income Tax Return (Form 1040), 2013, 2 pgs.

L. Proof-of-Payments, 2013/14, 3 pgs.

DEPARTMENT OF EDUCATION

1. Individualized Education Program (IEP), 4/10/13, 15 pgs.

2. [redacted] Evaluation Report, 1/15/13, 4 pgs.

3. [redacted], 1/15/13, 1 pg.

4. Student Progress Report, 1/2013, 1 pg.

5. [redacted] Progress Report, 1/12/13, 1 pg.

6. [redacted] Progress Report, 2/22/13, 2 pgs.

7. [redacted] Progress Report, 4/8/13, 1 pg.

IMPARTIAL HEARING OFFICER

I. Confirmation of Extension, 6/8/15, 1 pg.

II. Confirmation of Extension, 7/8/15, 1 pg.

III. Confirmation of Extension, 8/7/15, 1 pg.

IV. Confirmation of Extension, 9/8/15, 1 pg.

V. Confirmation of Extension, 10/8/15, 1 pg.

VI. Confirmation of Extension, 11/6/15, 1 pg.

VII. Confirmation of Extension, 12/9/15, 1 pg.

VIII. Confirmation of Extension, 1/8/16, 1 pg.

IX. Confirmation of Extension, 2/4/16, 1 pg.

X. Confirmation of Extension, 3/9/16, 1 pg.

XI. Confirmation of Extension, 4/8/16, 1 pg.

XII. Confirmation of Extension, 5/9/16, 1 pg.

XIII. Confirmation of Extension, 6/3/16, 1 pg.

XIV. Confirmation of Extension, 7/1/16, 1 pg.

XV. Confirmation of Extension, 8/5/16, 1 pg.

XVI. Confirmation of Extension, 9/7/16, 1 pg.

XVII. Confirmation of Extension, 10/4/16, 1 pg.

XVIII. Confirmation of Extension, 11/7/16, 1 pg.

XIX. Confirmation of Extension, 12/7/16, 1 pg.