The University of the State of New York

The State Education Department
State Review Officer
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No. 13-176

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondents, Neal Rosenberg, Esq., of counsel

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

A CSE meeting was held on April 20, 2012 to conduct the student's annual review and develop the student's IEP for the 2012-13 school year (Dist. Ex. 1 at p. 1; see Tr. pp. 87-88, 267). At the time of this CSE meeting, the student was enrolled in a district school and was placed in a general education classroom providing integrated co-teaching (ICT) services within a district

community school (Dist. Ex. 3 at p. 1; see Tr. pp. 218, 253).[1] In a letter to the student's teacher dated April 29, 2012, the parents requested a follow-up meeting to discuss the results of a privately-obtained evaluation conducted in March 2012 (Dist. Ex. 10; see Tr. pp. 217-20; Parent Ex. A).[2] The parents additionally indicated that the student had been accepted to Churchill and requested that the CSE "reconsider your recommendations for [the student]," opining that an ICT program was not meeting her needs and seeking deferral to the district's central based support team (CBST) (Dist. Ex. 10).[3] In a subsequent letter to the district dated June 1, 2012, the parents requested that the CSE reconvene "to discuss [the student's] most recent IEP and your recommendations for her . . . in light of the new information sent to you on April 29, 2012" (Dist. Ex. 11). The parents identified this as a "time sensitive matter" and indicated an interest in meeting "as soon as you and the rest of [the student's] team are available" (id.).

In response to the parent's request, the CSE reconvened on July 26, 2012, at which time it considered the results of the private evaluation as well as other evaluative reports and developed a new IEP (Tr. pp. 25-28; Dist. Ex. 3). At the time of the July 2012 CSE meeting, the student was seven years old and eligible for special education and related services as a student with a learning disability (Dist. Ex. 3 at pp. 1, 10; see Tr. pp. 85-86).[4] The CSE recommended placement in a general education classroom with ICT services for math (ten times per week), English language arts (ELA) (ten times per week), social studies (two times per week), and sciences (two times per week) (Dist. Ex. 3 at pp. 1, 6). The CSE further recommended four weekly sessions of special education teacher support services (SETSS) in ELA and an additional weekly session of SETSS in math, provided either as a push-in or pull-out service (id. at p. 6). The CSE also recommended the related service of Occupational Therapy (OT) for two 30-minute sessions per week in a group of two, either in a separate location or in the general education classroom (id. at p. 7).

In a letter sent to the district by facsimile on August 23, 2012, the parents expressed disagreement with the recommended placement (Parent Ex. L at p. 1). The parents stated that the recommendation for ICT services was "in direct conflict with the [private] evaluation we presented to the IEP team" (id. at p. 1). The parents further alleged that the CSE informed them that "because

[1] For the sake of clarity, this decision will refer to this placement on the continuum of services as a classroom providing ICT services even though the hearing record, at times, refers to the services as "collaborative team teaching" or "CTT" (see, e.g., Tr. pp. 90, 220, 264, 271). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued policy guidance document which provides more information about these services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

[2] The hearing record reflects that, as the result of the private evaluation, the student received diagnoses of dyslexia, dyscalculia, and an attention deficit hyperactivity disorder (Parent Ex. A at pp. 2-3).

[3] The CBST is responsible for identifying state-approved nonpublic school placements for students for whom the CSE has determined no appropriate public school placement exists.

[4] The student's eligibility for special education programs and services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

of 'Phase 1' [the parents] could only be offered what [the student's public school] ha[d] available" (id.). The parents found this "troubling" because the student was "falling further and further behind her peers" (id.). The parents also claimed that they were "told that [they] would not be allowed to observe the [recommended] program" (id.). The parents then indicated that the student would attend Churchill School "[u]nless and until an appropriate placement is identified for [the student]" (id.). On August 23, 2012, the parents signed an enrollment contract for the student's attendance at Churchill for the 2012-13 school year (Parent Ex. B).

A. Due Process Complaint Notice

By due process complaint notice dated December 6, 2012, the parents requested an impartial hearing and asserted that the district failed to offer the student a free appropriate public education (FAPE) (Dist. Ex. 1). In particular, with regard to the IEP development process the parents alleged that: (1) the district did not reevaluate the student despite parental and teacher concerns; (2) the April 2012 CSE did not reconvene following a parental request; (3) the July 2012 CSE was improperly composed; (4) the July 2012 CSE did not "follow proper procedures in conducting the meetings"; (5) the July 2012 CSE did not consider relevant documentation in making its recommendations; and (6) the July 2012 CSE did not "incorporate the private evaluation into the IEP" (id. at p. 1). Regarding the program offered to the student, the parents alleged that the annual goals contained in the July 2012 IEP did not meet the student's needs and an ICT setting would be too large and distracting for the student and would not provide an appropriate level of small group or individualized support (id. at pp. 1-2).

The parents also argued that Churchill was an appropriate placement because it provides the student with appropriate special education support. The parent requested that the CSE reconvene and recommend Churchill as the student's placement. In the alternative, the parents requested public funding for the costs of the student's placement at Churchill.

B. Impartial Hearing Officer Decision

On March 20, 2013, an impartial hearing convened and following three, nonconsecutive days of proceedings, concluded on July 2, 2013 (Tr. pp. 1-323). By decision dated August 12, 2013, the IHO found that the district failed to offer a FAPE to the student for the 2012-13 school year (IHO Decision). Initially, the IHO found the CSE's failure to explicitly identify alternative placement options on the IEP established that it did not actually consider any other options than ICT services (id. at p. 12). The IHO further found that the private evaluation presented to the CSE indicated the need for a smaller class size than provided by an ICT placement, such that the CSE's failure to consider the provision of a special class placement supported a conclusion "that the CSE was literally not listening to the parents' views" (id. at pp. 12-13). The IHO concluded that the district failed to offer the student a FAPE because "the parents' opportunity to participate in the decision making process was significantly impeded" (id. at p. 13). Having made this determination, the IHO indicated that she would "not address the parents' other claims" (id.).

The IHO next found that Churchill was an appropriate placement for the student (IHO Decision at p. 14). The IHO found that the student's program at Churchill was "aligned with [her] present levels of performance and identified management needs," and that she was grouped with students with similar levels of functional ability (id.). The IHO also found that the student made

progress in this setting (id.). The IHO further found that the district's arguments that Churchill was overly restrictive and did not provide the amount of OT required by the July 2012 IEP did not prevent Churchill from being an appropriate placement for the student (id.).

The IHO found that equitable considerations supported the parents' request for tuition reimbursement (IHO Decision at p. 15). The IHO found that the parents cooperated with the CSE by providing evaluations and notifying the CSE promptly regarding "their concerns, their interest in Churchill[,] and their withdrawal of the student" (id.). Additionally, the IHO noted that the district did not claim that the parents impeded the district's ability to develop an IEP for the student, whereas the district failed to "formally respond[] to [the parents'] requests for a reconsideration and finally scheduled a review when staff who knew the student appear to have been unavailable" (id.) Finally, in ascertaining appropriate relief, the IHO found the testimony of the student's father credible regarding the parents' inability to pay the student's tuition at Churchill tuition and ordered the district to reimburse the parents for tuition already paid and directly fund the balance of the student's tuition (id.).

IV. Appeal for State-Level Review

The district appeals, arguing that it offered the student a FAPE for the 2012-13 school year. The district asserts that the IHO erred in finding that the district denied the student a FAPE because the CSE did not consider placement options other than ICT services (with or without SETSS). The district also contends that the IHO erred in finding that the CSE did not adequately consider the private evaluation report and the recommendations made therein. The district argues that, although the CSE must consider the recommendations of parents and private evaluators, it is not required to adopt them. The district additionally contends that the recommended program was an appropriate placement that represented the least restrictive environment (LRE) for the student. Further, the district argues that it developed appropriate goals and strategies to address the student's management needs.

The district also argues that Churchill was not an appropriate placement for the student, as it did not represent the LRE for the student and did not provide her with sufficient OT. The district further contends that equitable considerations preclude granting the requested relief, arguing that the parents' request for deferral to the CBST, testimony at the impartial hearing, and the deposit paid to Churchill proved that the parents never seriously considered a public placement. In an answer, the parents argue that the IHO's opinion should be upheld in its entirety.[5]

[5] The parents do not cross-appeal any findings of the IHO; however, they affirmatively assert that the CSE failed to consider the parents' request for a State-approved nonpublic school, which is addressed more fully below. Additionally, the parents make several factual allegations that do not relate to issues raised in their due process complaint notice and, as such, cannot be considered on appeal. One of these allegations, relating to the manner in which the CSE determined the student's functional levels in math, was first discussed by the district at the impartial hearing (Tr. pp. 36-38). However, it appears that the district pursued this examination of the witness as a solicitation of general background information as part of routine questioning and not as a means by which the district sought to raise evidence as a defense to a claim that was identified in the due process complaint notice (see A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *10-*11 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *23 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]).

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 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 (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]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district

must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Impartial Hearing and Review

Before reaching the merits in this case, I must determine which claims may be properly heard on appeal. Here, the IHO based her decision on a finding that the district's failure to consider options other than an ICT placement significantly impeded the parents' opportunity to participate in the July 2012 CSE meeting. A review of the entire hearing record reveals that the IHO exceeded her jurisdiction by sua sponte raising, addressing, and relying upon the district's failure to consider other placement options along the continuum of services—which the parents did not raise in their due process complaint notice—in order to conclude that the district failed to offer the student a FAPE for the 2012-13 school year. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing and may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; 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 *6 n.2 [S.D.N.Y. May 14, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Upon review, I find that the parents' due process complaint notice cannot reasonably be read to include the issue of whether the district, by failing to consider placement options other than the provision of ICT services, significantly impeded their opportunity to participate in the decision making process with regard to the provision of FAPE to the student (see Dist Ex. 1). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at *6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at *13). Accordingly, the IHO exceeded her jurisdiction in finding that the district denied the student a FAPE for the 2012-13 school year based upon an

issue sua sponte raised, addressed, and relied upon in the decision, and this determination must therefore be annulled.

However, even if this issue were properly raised and could be considered by the IHO, I note, in the alternative, that the IHO's conclusion is not supported by the evidence in the hearing record, which weighs heavily in favor of the conclusion that the parents participated in the CSE meeting and that their preferences for programing preferences were heard, but not shared, by the district members of the CSE. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

In this instance, a review of the hearing record reflects that the parents' ability to participate in the development of the student's July 2012 IEP was not significantly impeded. The parents attended the July 2012 CSE meeting, along with a special education teacher, a general education teacher, a school psychologist who also served as the district representative (the district representative), and an additional parent member (Dist. Ex. 3 at p. 13; see Tr. pp. 28-29). The student's father testified that the district representative listened and responded to the parents' concerns "at times" (Tr. p. 260). Despite the IHO finding that the CSE did not listen to the parents' concerns that the student required a classroom with a smaller student-to-teacher ratio, the hearing record reflects that the parents were not seeking the student's placement in a district special class placement but, rather, a recommendation by the district for the student's placement in a nonpublic school (Tr. pp. 233-34, 238; Dist. Ex. 10).

Prior to the date of both the April and July 2012 CSE meetings to develop the student's program for the 2012-13 school year, the parents made a payment toward the student's Churchill tuition for the 2012-13 school year (Parent Ex. D; see Parent Ex. C). Following the April 2012 CSE meeting, the parents wrote a letter to the student's teacher dated April 29, 2012 requesting that the district refer the student to the CBST and indicating that the student had been accepted to Churchill (Dist. Ex. 10; see Tr. p. 233). The student's father testified at the impartial hearing that at the time they wrote the April 29, 2012 letter, the parents "wanted to" enroll the student in Churchill, but were concerned that they would be unable to pay the tuition (Tr. pp. 233-34).

As detailed above, the evidence in the hearing record indicates that, at the time of the July 2012 CSE meeting, the parents were seeking public funding for the student's placement at Churchill, and there is no evidence in the hearing record that the parents specifically requested during the CSE meeting that the district consider placing the student in a special class in a district

public school (Tr. pp. 233-34, 238; Dist. Ex. 10).[6] Additionally, the district was not required to consider placing the student in a nonpublic school, as a district is not obligated to consider removal from the public school to a nonpublic placement if it is able to provide the student with an appropriate educational program within the public education system (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19 [S.D.N.Y. Sept. 16, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-8 [S.D.N.Y. Mar. 19, 2013]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 148 [S.D.N.Y. 2006]). "'[I]f the district can supply the needed services, then the public school is the preferred venue for educating the child'" (T.G., 2013 WL 5178300 at *19, quoting W.S., 454 F. Supp. 2d at 138). As further outlined below, the district was able to meet the student's needs and offer her a program reasonably calculated to provide her with educational benefits for the 2012-13 school year.

Based upon the foregoing, the parents' opportunity to participate in the development of the July 2012 IEP was not significantly impeded by the district's failure to consider placement of the student in a nonpublic school (T.P., 554 F.3d at 253; see J.L. v. City Sch. Dist. of the City of New York, 2013 WL 625064, at *12 [S.D.N.Y. Feb. 20, 2013]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; R.R., 615 F. Supp. 2d at 294).[7]

B. Consideration of Private Evaluation

While the IHO concluded that the failure to adopt the recommendations contained in the private evaluation indicated that the district did not sufficiently consider the evaluative data contained therein, a careful review of the July 2012 IEP establishes that the CSE considered the findings and recommendations presented in the private evaluation report as well as input from the parents, even though the CSE's ultimate program recommendation differed from that of the private evaluator (compare Dist. Ex. 3 at pp. 1, 4-5, 7-8, with Parent Ex. A at pp. 2-6).

A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd.

[6] Although the student's father testified that he requested a "smaller class," it is unclear from context whether he was referencing public funding for the student's placement at Churchill or seeking to initiate discussion at the CSE meeting with regard to alternate options available in a public school setting (Tr. p. 264; see Tr. pp. 263-72). This is not sufficient evidence in this case to hold that the district significantly impeded the parent's participation in the development of the student's IEP.

[7] The parents now argue, on appeal, that the CSE's recommendation was predetermined. This allegation was not contained in the parents' due process complaint notice and, thus, cannot be considered on appeal for the reasons stated above. In any event, this claim is based upon the facts discussed above that allegedly impeded the parents' participation in the development of the student's IEP. Thus, even if this claim could be considered, it would be rejected for the same reasons.

of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]; see T.G., 2013 WL 5178300, at *18; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F.Supp.2d 417, 436 [S.D.N.Y. 2010]).

Here, the hearing record reflects that the CSE appropriately considered the private evaluation. The CSE reconvened at the parent's request to discuss the results of this evaluation (Tr. p. 89; Dist. Exs. 10; 11; Parent Ex. A). The district representative testified that while she was unsure whether the CSE specifically discussed the private evaluation, she indicated that the committee discussed the July 2012 psychoeducational report conducted by the district, which incorporated the relevant details of the private evaluation report (Tr. pp. 34-35, 37, 100-101; compare Dist. Ex. 4 at pp. 1, 3-4, with Parent Ex. A at pp. 2-5). Specifically, the district evaluation incorporated the private evaluator's comparison of the student's performance on two separate administrations of the same standardized achievement test (compare Dist. Ex. 4 at p. 3, with Parent Ex. A at p. 3). The district evaluation also included the private evaluator's narrative interpretation of the student's academic functioning, some of which was not readily apparent from the student's test scores (compare Dist. Ex. 4 at p. 3, with Parent Ex. A at pp. 3-4). In addition, the district report included the private evaluator's observation of the student's improved ability to compose connected text, as well as her ongoing challenges with employing conventional spelling (compare Dist. Ex. 4 at p. 3, with Parent Ex. A at p. 3). Finally, the district psychoeducational report included the private evaluator's assessment of the student's early math skills (compare Dist. Ex. 4 at p. 3, with Parent Ex. A at p. 4).

Much of the information presented in the private evaluation report and repeated in the district psychoeducational evaluation report, including the private evaluator's determination that the student met criteria for a diagnosis with dyslexia, was also reflected in the present levels of performance section of the July 2012 IEP (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 4 at pp. 1, 3, and Parent Ex. A at pp. 2-5). For example, the IEP included the private evaluator's description of the student's literacy skills, detailing signs of growth as well as her continued struggles (compare Dist. Ex. 3 at p. 1, with Parent Ex. A at pp. 2-5). Specifically, the IEP included the private evaluator's depiction of the student's progress as evidenced by her expanded ability to compose sentences, while still exhibiting "weak reading mechanics" (compare Dist. Ex. 3 at p. 1, with Parent Ex. A at p. 3). The present levels of performance in the IEP also included reference to the student's growth between the two administrations of the standardized achievement tests by the private evaluator, with details of a substantial increase in the student's writing and math scores (compare Dist. Ex. 3 at p. 1, with Parent Ex. A at pp. 3-4).

In addition to drawing upon the private evaluator's depiction of the student's academic progress and challenges in the present levels of performance section of the July IEP, aspects of the private evaluator's recommendations are reflected in several of the proposed goals (compare Dist. Ex. 3 at pp. 4-5, with Parent Ex. A at pp. 5-6). The district school psychologist testified that the student's annual goals were developed to correlate with the student's deficits as specified in the present levels of performance (Tr. pp. 60-61). In the instant case, reading, writing, and math goals that were included in the IEP reflected information contained in the private evaluation report

(compare Dist. Ex. 3 at pp. 4-5, with Parent Ex. A at pp. 3-6). Specifically, after particularizing the student's difficulties in reading, the private evaluator recommended a "multisensory, systematic" approach to reading instruction (Parent Ex. A at pp. 4-5). The CSE developed reading goals to address the student's acknowledged reading deficits, including a goal to improve the accuracy and fluency of the student's phonetic analysis using a multisensory instructional model (Dist. Ex. 3 at p. 4).

The private evaluation also offered recommendations for small group instructional settings and test modifications such as extended time limits and a separate location with minimal distractions, all of which were carried over to the July IEP (compare Dist. Ex. 3 at pp. 4-5, 8, with Parent Ex. A at pp. 5-6). Additionally, the district school psychologist testified that the CSE recommended continuation of OT services based upon the recommendation of the private evaluator (Tr. pp. 66-67; Parent Ex. A at p. 6).

Accordingly, the evidence in the hearing record reveals that the CSE fulfilled its obligation to consider the private evaluation, and in doing so adopted, some but not all of the private evaluator's recommendations. While the parents contend that the CSE should have simply adopted all of the report's recommendations, this is not, as noted above, required by the IDEA (see, e.g., J.C.S., 2013 WL 3975942, at *11; T.G., 2013 WL 5178300, at *18).

C. SETSS and ICT Services

Turning next to the parties' dispute regarding the SETSS/ICT services recommendation in the July 2012 IEP, a brief discussion of the other evaluative information, present levels of performance, and annual goals is useful for the purpose of providing background context. In addition to the private evaluation, the July 2012 CSE also relied upon a number of district-generated reports (Dist. Exs. 4; 7; 8). The district representative completed her own assessment of the student's cognitive development in July of 2012 (Dist. Ex. 4). The district representative detailed her observations of the student as well as those of the student's first grade teacher (id.). The IEP reflects information obtained from the district psychoeducational evaluation, with input from the teacher's report as well as the student's report card. For example, the student's performance on an individualized intelligence test was reported in the present levels of performance section of the IEP, and a teacher's description of the student as friendly and cooperative was similarly referenced in the IEP (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 4 at pp. 1-2, and Dist. Ex. 8 at p. 1).

The evaluation results portion of the July 2012 IEP present levels of performance listed the student's full scale IQ—obtained during the July 2012 psychoeducational evaluation—as "within the average range and at the 70th percentile" (Dist. Ex. 3 at p. 1). In addition, the student's marked improvement between the first and second administrations of a standardized achievement test was documented, with such examples as, "[the student] was unable to complete any writing task" during the October 2011 evaluation, but, five months later, scored in the 61st percentile during the March 2012 private evaluation (id.; see Parent Ex. A at pp. 3-4). The present levels of performance in the academic domain further denoted significant growth in the student's math calculation score on the same test, in that the student earned a standard score of 69 on the October 2011 administration, and a standard score of 93 in March of 2012 (Dist. Ex. 3 at p. 1; see Parent Ex. A at pp. 3-4). Comparing the student's performance on the October 2011 and March 2012 academic

assessments, the July 2012 CSE observed that there were "gains in every area" (Dist. Ex. 3 at p. 1). The present levels of performance also included descriptions of the student's classroom functioning, including the leveled texts she had mastered, math skills she was working on, and relative strengths and weaknesses in her problem solving skills in reading and math (id.). The present levels of performance also referred to the parents' concern that the ICT placement was not meeting their daughter's academic needs (id.).

In the area of social development, the student was described as a "respectful, friendly, cooperative student who always follows directions" (Dist. Ex. 3 at p. 2). No physical development concerns were noted (id.). The management needs noted in the IEP focused on supporting the student's academic achievement, such as repeating directions, using graphic organizers, and reinforcing the successful completion of tasks (id.).

At the impartial hearing, the district representative testified that the student's progress on standardized testing between October 2011 and March 2012 revealed substantial growth, with many scores within the "average" range for a student her age (Tr. pp. 38-45; see Dist. Ex. 4 at p. 3; Parent Ex. A at p. 3). The student's first grade report card additionally reflected growth (Dist. Ex. 7). Nonetheless, it also documented some continuing academic struggles (Dist. Ex. 7; see also Tr. pp. 49, 77).

In addition, while the parent reported that during her first grade year at the district school, the student "hated going to school and . . . started biting her nails [as well as] acting out at home," no evidence in the hearing record suggests that the district knew or had reason to know of such behaviors (Tr. p. 216). The student's first grade teacher described her as "a respectful, friendly, cooperative student" who, when she did not understand directions, would ask for them to be repeated (Dist. Ex. 8 at p. 1; see also Dist. Ex. 3 at p. 2). The student's first grade teacher also indicated that the student enjoyed positive peer relationships, was "always willing to play or work cooperatively," and was "a great leader in the classroom" (Dist. Ex. 8 at p. 2). The district school psychologist who conducted the July 2012 psychoeducational evaluation recounted an exchange she had with the student during her evaluation, in which the student stated, "I hope these results allow me to stay in my old school and not go to the new school" (Dist. Ex. 4 at p. 1).

Next, the July 2012 IEP included seven annual goals designed to meet the student's reading, writing, math, and fine motor needs (Dist. Ex. 3 at pp. 4-5). Each goal included criteria for measuring achievement of the goal, such as percent of accuracy or the number of correct responses in a given number of trials (id.). In addition, each goal included a method by which progress would be measured, including teacher/provider observation, teacher made materials, running records, portfolio, and class activities (id.). Furthermore, a progress monitoring schedule was indicated for each goal (id.). Finally, the goals included instructional strategies and settings in which the proposed goals might be met, often reflecting the influence of the private evaluator's input, such as the use of a multisensory approach and small group instruction (id.; see Parent Ex. A at pp. 5-6).

Specifically, reading goals addressed the student's need to strengthen her decoding skills, and incorporated the private evaluator's recommendation for multisensory instructional strategies (Dist. Ex. 3 at p. 4; Parent Ex. A at p. 5). In another reading goal, strategic instruction using scaffolding to support improved decoding, word recognition, and comprehension was

recommended to be provided in small group settings (Dist. Ex. 3 at p. 4). The writing goal targeted the student's emerging understanding of capitalization and punctuation using a variety of strategies and tools to foster self-assessment and self-correction (id. at p. 5). The math goals included a recommendation for small group instruction during which the student would expand her mastery of basic addition and subtraction computation skills, as well as acquiring strategies for solving word problems, etc., challenges noted by the private evaluator (Dist. Ex. 3 at p. 5; Parent Ex. A at pp. 4-5). The July 2012 IEP also included a goal to improve the student's handwriting (Dist. Ex. 3 at p. 5).

In this context, the CSE recommended placement in a general education classroom with ICT services and SETSS. As noted above, State regulations provide that ICT services consist of "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students," staffed by both a regular education teacher and a special education teacher, with a limit of 12 students with disabilities in a class providing ICT services to its students (8 NYCRR 200.6[g]). The Second Circuit has recently interpreted ICT services as defined by State regulations as constituting a placement wherein additional services are provided to a student with disabilities within the general education environment (M.W. v. New York City Dep't of Educ., 725 F. 3d 131, 144-45 [2d Cir. 2013]).

The CSE's ICT recommendation, as the hearing record indicates, was based upon the CSE's consideration of the documentation available to it at the July 2012 CSE meeting (Tr. p. 77). The CSE's review revealed, as indicated above, that the student made academic progress and prospered socially in an ICT setting during the 2011-12 school year. Notably, the student's scores on standardized testing showed marked improvement between October 2011 and March 2012 (Dist. Ex. 3 at p. 1). In a June 2012 teacher report, the student's teacher during the 2011-12 school year spoke to, among other things, the student's healthy social development in her relationships with peers and authority (Dist. Ex. 8 at p. 2). The teacher also opined that the student's ICT classroom met her educational needs (id.). Given this evidence, the CSE recommended that the student "remain in the ICT program" (Tr. p. 77; Dist. Ex. 3 at p. 2).

Additionally, to address the parents' concerns that ICT services provided insufficient support, the CSE added SETSS to address the student's remaining academic challenges (Dist. Ex. 3 at pp. 1, 6). As noted by the district representative, supplementing the ICT program with SETSS reflected the CSE's acknowledgment of the parents' concerns about the student "having dyslexia and having some difficulties with reading" (Tr. p. 77). The SETSS services would offer the student either "push in or pull out" small group support and provide assistance in reading, writing and math (Tr. pp. 78-79; Dist. Ex. 3 at p. 6). The district representative also explained at the impartial hearing that SETSS providers were trained in the reading intervention program recommended by the private evaluator and, as such, could provide the student with that type of specialized support (Tr. pp. 79-80). The CSE also provided for the continuation of OT services, partly due to the private evaluator's recommendation that it continue to be included as a mandated service in the student's IEP (Tr. pp. 66-67; Dist. Ex. 3 at p. 5; Parent Ex. A at p. 6).

In addition to the supports inherent in the ICT, SETSS, and related services the CSE recommended, the IEP delineated and identified modification and resources necessary to address the student's academic management needs, including allowing for the repetition of directions, questions and instructions, the provision of a personal word wall to help the student with her

spelling and vocabulary skills, "checking in" with a teacher when unsure of how to complete an assignment, the use of graphic organizers for writing tasks and manipulatives for solving math problems, assistance with developing step-by-step strategies for task completions, timing the student to ensure that she remained on task, and asking the student if she experienced difficulty with homework assignments (Dist. Ex. 3 at p. 2). The IEP also provided for pre-teaching, re-teaching, and positive reinforcement when the student completed an assigned task (id.).

In sum, the evidence in the hearing record supports the conclusion that the July 2012 CSE's determination that ICT services, together with SETSS, OT, and specified modifications and resources to address the student's management needs, was appropriate to sufficiently addressed the student's identified needs and IEP services such that IEP services challenged by the parents were reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year in the LRE and, therefore, the July 2012 IEP offered the student a FAPE.

VII. Conclusion

The IHO limited the analysis in her decision primarily to the issue of whether the parents were denied meaningful participation at the July 2012 CSE meeting by the district's failure to consider a special class placement option; however, as discussed above, this claim, was not raised in the parents' due process complaint notice and, in the alternative, the evidence did not support that there was a procedural defect, or that such a defect led to a denial of a FAPE and, therefore, must be reversed. The evidence in the hearing record also establishes that the July 2012 CSE considered and incorporated the recommendations of the private evaluation obtained by the parents. The evidence also shows that the CSE developed an IEP that included SETTS and ICT services for the 2012-13 school year that were reasonably calculated to provide the student with educational benefits.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 12, 2013, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to fund the cost of the student's tuition at Churchill.

Dated: **Albany, New York**
November 27, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER