



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-069

### **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, Cynthia Sheps, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Lawrence D. Weinberg, 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 provide an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for the student's tuition costs at the York Preparatory School (York Prep) for the 2013-14 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

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 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]).

### **III. Facts and Procedural History**

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on February 26, 2013, to formulate the student's individualized education plan (IEP) for the 2013-14 school year (see generally Parent Ex. C). The parent disagreed with the recommendations contained in the February 2013 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2013-14 school year and, as a result, notified the district of his intent to unilaterally place the student at York Prep (see Dist. Ex. 8 at p. 1; Parent Ex. H). In a due process complaint notice, dated September 24, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. A pp. 1-7).

An impartial hearing convened on October 24, 2013 and concluded on February 11, 2014 after three days of proceedings (Tr. pp. 1-232). In a decision dated April 9, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, that York Prep was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 8-12). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition at York Prep for the 2013-14 school year (IHO Decision at p. 12).

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

The parties' familiarity with the particular issues for review on appeal in the district's petition and the parent's answer thereto is also presumed and will not be recited here.<sup>1</sup> The gravamen of the issues presented on appeal which must be resolved are as follows: 1) whether the lack of a general education teacher at the February 2013 CSE meeting rose to the level of a denial of FAPE, 2) whether the parent was denied his right to participate in the February 2013 CSE process; and 3) whether the IHO erred in determining that the integrated co-teaching (ICT) services with special education teacher support services (SETSS) recommended in the February 2013 IEP was not appropriate to address the student's needs.

### **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

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<sup>1</sup> The district submitted a reply to the parent's answer. Pursuant to State regulations, a reply is limited to responding to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the parent did not interpose any procedural defenses in, or submit additional evidence with, its answer; therefore, consistent with the practice regulations, the district was not permitted to submit a reply to the parent's answer and their reply will not be considered.

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit"

(Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

## VI. Discussion

### A. Mootness

As an initial matter, in his answer the parent argues that this matter is "effectively" moot, therefore rendering the district's petition "frivolous" and a "waste of the SRO's limited resources." In support of this claim, the parent argues that the district was required to fund the student's unilateral placement at York Prep during the pendency of the underlying proceedings, which spanned the entire 2013-14 school year (Tr. pp. 5-6; Order of Pendency at p. 4; Answer ¶ XX) and, therefore, all of the relief sought by the parents in this matter has been achieved and the dispute between the parties is no longer real or live (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84-85 [2d Cir. 2005]).

To be sure, it is unclear at this juncture the value of the parties continuing this dispute as the district is responsible for the costs of the student's tuition at York Prep for the 2013-14 school year, and the adequacy of the February 2013 IEP is only marginally relevant to any new IEP generated at a different CSE meeting, during which the district is required by the IDEA to assess the student's continuing development in an annual review; thus each school year must be treated separately for purposes of a tuition reimbursement claim, and evaluating a prior year program that the student never attended is not educationally sound on a going forward basis for new IEP planning (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077, at \*21-\*26 [N.D.N.Y. Mar. 31, 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008]; Application of a Student with a Disability, Appeal No. 13-199). Therefore, the parents are correct and the tuition reimbursement claim for the 2013-14 school year has been rendered moot by virtue of pendency. However, in light of a limited number of recent district court decisions holding that tuition reimbursement cases may, in some circumstances, be subject to an exception to mootness even when the requested relief has been achieved as a result of pendency, in the interest of administrative and judicial economy, I have addressed the merits of the appeal (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at \*2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at \*9-\*10 [E.D.N.Y. July 29, 2011]; but see V.M. v No. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-20 [N.D.N.Y. 2013] [explaining that claims seeking changes to the student's IEP/educational programming for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at \*1, \*3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254-55 [S.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y. Dec. 16, 2011]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010] [finding that the exception to the mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

## **B. Scope of Review**

The district does not appeal the IHO's adverse determination that York Prep was an appropriate placement for the student (Pet. at pp. 2-3).<sup>2</sup> Therefore this determination is final and binding upon the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## **C. CSE Composition**

Turning first to the composition of the February 2013 CSE, the IHO determined that the February 2013 IEP was procedurally inappropriate due to the February 2013 CSE's failure to include a regular education teacher. Although through this nonfeasance the district failed to meet the procedural requirements set forth by State and federal regulations, for the reasons detailed below I do not find that this procedural violation—in the instant case—rises to the level of a denial of FAPE.

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]; see also 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 regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

In this case, the February 2013 CSE recommended ICT services in a general education setting with SETSS (Tr. p. 40; Parent Ex. C at pp. 15-16, 22).<sup>3</sup> A review of the hearing record reflects that attendees at the February 2013 CSE meeting included; the school psychologist, the special education teacher who also served as the district representative, an additional parent member, the parent, the parent's advocate and the student's Jump Start teacher from York Prep who participated by telephone (Tr. pp. 29, 31-32, 176-77, 198; Parent Ex. C at p. 24). The school psychologist acknowledged that there was not a regular education teacher at the February 2013 CSE meeting (Tr. p. 46). In developing the student's IEP the school psychologist stated that the February 2013 CSE relied on a 2012 psychoeducational evaluation, a 2011 academic evaluation, report card information, and information from the student's teacher regarding the student's current functioning in the classroom and academic functioning (Tr. pp. 33-34). The school psychologist further stated that the Jump Start teacher from York Prep—who was present at the February 2013 CSE meeting—consulted with the student's classroom teacher and was aware of the student's levels

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<sup>2</sup> While the Petition states "The IHO is not appealing the IHO's finding ...", as the district is the petitioner in this instant case and a review of the petition reveals that the district did not appeal the IHO's findings regarding the appropriateness of York Prep, I will accept that the district is the party which is not appealing the unilateral placement (Pet. ¶¶ 1-50).

<sup>3</sup> Although the hearing record refers to the class as a collaborative team teaching (CTT) class, for consistency with State regulations I refer to this type of class as an integrated co-teaching or ICT placement. ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]).

of functioning (Tr. p. 46). The school psychologist indicated that she felt "with all the information" available, the CSE had enough to make a recommendation (Tr. p. 47).

Upon review, I find that the district committed a procedural violation in not meeting the requirement to ensure that a regular education teacher of the student participated at the February 2013 CSE meeting. However, the hearing record does not provide a basis to conclude that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits in this instance (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*7 [S.D.N.Y. Nov. 27, 2012] [concluding that even if a regular education teacher was a required CSE member, the lack of such a teacher did not render an IEP inappropriate when there was no evidence of any concerns during the CSE meeting that the regular education teacher was required to resolve and "no reason to believe" that such teacher was required to advise on lunch and recess modifications or support]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*6-\*7 [S.D.N.Y. Sept. 29, 2012] [where the record supported a conclusion that a regular education teacher was required at the CSE meeting and it was possible that an appropriate regular education teacher under the IDEA was not present at the CSE meeting, the evidence did not show that the CSE composition rendered the IEP inadequate]). It is further noted that the parent participated in the CSE meeting and was accompanied by a parent advocate, mitigating any harm that might have flowed from the procedural violation (Tr. pp. 31-32, 198; Parent Ex. C at p. 24.)

#### **D. ICT Services and SETSS**

With regard to the issue of whether the educational placement was appropriate, I find that the IHO erred in finding that the program recommendation of general education with ICT services and SETSS did not adequately address the student's needs. Specifically the IHO stated that the student required a small, structured classroom environment with accommodations and supports including slower paced multi-sensory instruction, preview and review, directions and material broken down and repeated, 1:1 and small group instruction, extra time, organizers and testing accommodations, which he opined would not be available in an ICT class (IHO Decision at p. 11). A review of the February 2013 IEP reveals that the district's program recommendation adequately addressed the student's needs. Accordingly, for the reasons detailed below, the IHO's conclusion on this issue must be reversed.

The February 2013 CSE provided the student with ICT services for electives, math, ELA, social studies, and sciences (Tr. p. 40; Parent Ex. C at pp. 15-16). The school psychologist stated that an ICT class has two teachers, one general education teacher qualified to teach a particular subject and one special education teacher qualified to modify and adapt the work for the students with IEPs (Tr. p. 43-44). In addition the school psychologist stated that an ICT class can be run in small groups and that the material is modified so the student gets the support needed in the classroom (Tr. p. 43). Also the February 2013 CSE provided the student with SETSS five times per week (Tr. p. 40; Parent Ex. C at p. 16). The school psychologist explained that SETSS is provided in groups of 8 or fewer students and in this case was offered for the student to work on specific skills such as decoding, writing or math skills (Tr. pp. 43, 51).

To address the student's identified needs in reading fluency and comprehension, the February 2013 IEP included reading annual goals addressing decoding, reading speed, and active reading strategies (compare Parent Ex. C at p. 2, with Parent Ex. C at pp. 5-9). The IEP included English language arts (ELA) annual goals to address the student's needs in syntax, editing and organization (compare Parent Ex. C at p. 2, with Parent Ex. C at pp. 9-12). The math annual goal included on the February 2013 IEP targeted the student's need to improve her computational skills and her math vocabulary (compare Parent Ex. C at p. 2, with Parent Ex. C at pp. 12-13). Further to address the student's study skills and executive functioning needs the February 2013 IEP contained annual goals with respect to determining relevant information, planning test preparation time, practicing a variety of question formats, highlighting, rereading, using task analysis, rehearsing, and self-testing (compare Parent Ex. C at p. 2, with Parent Ex. C at pp. 13-15).

The February 2013 IEP provided reading management needs, including a multi-sensory reading program, preview of new vocabulary and multisyllabic words to improve fluency and aid retention of new vocabulary, fluency drills, use of audio-books, reminders to use active reading strategies, guided questions, and the use of post-its for taking notes and writing questions (Parent Ex. C at p. 3). Language management needs included presenting instructions in clear concise language, checking for understanding, directions repeated and broken down and preview of vocabulary (Parent Ex. C at pp. 3, 4). In the area of writing, the February 2013 IEP provided management needs, including breaking down the writing process, use of graphic organizers, use of brainstorming charts, webs, outlines, teacher support for thesis development, word bank, lists, editing checklists, and outlines of notes (Parent Ex. C at p. 4). Math management needs included reference cards with steps and formulas, regular reviews of concepts, opportunities to practice skills, use of calculator (Parent Ex. C at p. 4). The February 2013 IEP provided the student with testing accommodations of extended time, separate location, questions read, answers recorded in any manner, use of a calculator, revised test directions, use of aides and assistive technology devices and the use of a spellcheck device (Parent Ex. C at pp. 17-19).

Accordingly, I find that the program recommended by the February 2013 CSE, which included ICT services, SETSS and comprehensive management needs and goals addressing all areas of identified need for the student, was reasonably calculated to allow the student to receive educational benefit and, therefore, offered the student a FAPE for the 2013-14 school year.

### **E. Parent Participation**

Next, having found that the IHO erred in finding a denial of FAPE based upon the failure of the CSE to include a regular education teacher and the district's recommendation of ICT services and SETTS, I next address the parents' claims regarding the development of the January 2013 IEP—which were raised in the due process complaint notice and again in the answer, but not determined by the IHO—that the district failed to ensure federal and State mandated procedural requirements guaranteeing parental participation. Specifically, the parent contends that the CSE ignored his concerns regarding the proposed program, that the annual goals and transition services and goals were not developed at the February 2013 CSE meeting, and that the parent was denied the right to participate in the placement of the student in the particular assigned school. For the reasons described below, I cannot find that the hearing record supports the parent's position.



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 & Comm'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"]; Paoella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

The hearing record reflects that the parent attended the February 2013 CSE meeting accompanied by an advocate (Tr. pp. 31-32; Parent Ex. C at p. 24). The hearing record further reveals that the parent participated at the meeting and discussed the student's study skills at home and the student's social/emotional and physical development (Tr. pp. 41, 198; Parent Ex. C at pp. 2-3). The school psychologist added that at the February 2013 CSE meeting the parent, though mostly quiet, gave input when he was asked questions (Tr. p. 41). In addition, the hearing record reveals that the parent's advocate did not agree with the February 2013 CSE's program recommendation and the hearing record reflects that both the parent and the advocate stated concerns regarding the class size (Tr. pp. 41-42, 184-85; Parent Ex. C at p. 23). Notwithstanding the concerns of the parent and his advocate, the school psychologist noted that she—along with the special education teacher and the teacher from York Prep—agreed with the February 2013 CSE's program recommendation (Tr. pp. 41-42). In this case, although the parent disagreed with the district's recommendation, the hearing record reflects that the input of the parent and his advocate was accepted and considered as part of the IEP development process.

Turning next to the parents' allegations that the district predetermined the student's annual goals, and transition services and goals, because these items were not prepared at the CSE meeting, "there is no 'requirement in the IDEA or case law that the IEP's statement of goals be typed up at the CSE meeting itself, or that parents or teachers have the opportunity to actually draft the goals by hand or on the computer themselves, or that the goals be seen on paper by any of the CSE members at the meeting'" (E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*8 [S.D.N.Y. Sept. 29, 2012], quoting S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*11 [S.D.N.Y. Nov. 9, 2011]). Moreover, as discussed above, the hearing record reflects that the student's needs were fully discussed at the meeting, with both the parent and parent advocate expressing concerns and providing information, and there is no evidence that the student's goals and transition services and goals were developed without reference to either the information reviewed by the CSE or the discussions of the student and recommended program that occurred during the meeting.

Finally, the parent claims that he was denied the right to participate in the placement of the student in the particular school. While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational

placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

#### **F. Assigned School**

With respect to the parents' claims relating to the assigned public school site, which the parties continue to argue on appeal, in this instance, similar to the reasons set forth in other decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' assertions are without merit. The parents' claims regarding whether the assigned public school site could offer ICT services in all the student's subjects, turns on how the February 2013 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site (see Tr. pp. 84, 168, 213; Dist. Ex. 8; Parent Ex. H), the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

#### **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parents' request for relief (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated April 9, 2014 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2013-14 school year; and

**IT IS FURTHER ORDERED** that the IHO's decision dated April 9, 2014 is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's tuition at York Prep for the 2013-14 school year.

**Dated:**            **Albany, New York**  
                      **January 16, 2015**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**