



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-159

### **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, Theresa Crotty, Esq., of counsel

Law Offices of Regina Skyer & Associates, LLP, attorneys for respondents, William Meyer, 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 the respondents' (parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Lang School (Lang) for the 2013-14 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**

As a preschool student with a disability during the 2012-13 school year, the student attended an integrated preschool program, which consisted of 14 typically developing peers, eight special education peers, one special education teacher, one early childhood education teacher, and two assistant teachers (see Dist. Ex. 7; see also Dist. Ex. 3 at pp. 1, 3).<sup>1</sup> On April 26, 2013, the

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<sup>1</sup> On January 17 and 18, 2013, the parents executed an enrollment contract with Lang for the student's attendance during the 2013-14 school year (see Parent Ex. D at pp. 1, 3). The Commissioner of Education has not approved Lang as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

CSE convened to conduct the student's "turning five" conference and to develop an IEP to be implemented beginning September 2013 for the 2013-14 school year (kindergarten) (see Dist. Ex. 15 at pp. 1, 7-8, 10; see also Tr. pp. 27-29, 48, 63). Finding that the student remained eligible for special education and related services as a student with autism, the April 2013 CSE recommended integrated co-teaching (ICT) services in a general education setting for instruction in mathematics, English Language Arts (ELA), social studies, and sciences at a community school, together with the following related services: two 30-minute sessions per week of occupational therapy (OT) in a small group, two 30-minute sessions per week of physical therapy (PT) in a small group, three 30-minute sessions per week of speech-language therapy in a small group, and two 30-minute sessions per week of counseling in a small group (*id.* at pp. 1, 7-8, 10).<sup>2</sup> In addition, the April 2013 CSE created annual goals to address the student's needs (*id.* at pp. 3-7).

In a final notice of recommendation (FNR) dated June 17, 2013, the district summarized the special education and related services recommended in the April 2013 IEP, and identified the particular public school site to which the district assigned the student to attend during the 2013-14 school year (see IHO Ex. IX at p. 1).

On June 21, 2013, the parents visited the assigned public school site (see Parent Ex. F; see also Parent Ex. A at p. 2). In an e-mail dated June 21, 2013, the parents contacted the parent coordinator at the assigned public school site, and indicated that based upon the visit, they learned that the student was not "registered" at the assigned public school site (see Parent Ex. F). In the e-mail, the parents requested the name of the individual who provided this information to them at the visit (*id.*).

In an FNR dated June 27, 2013, the district summarized the special education and related services recommended in the April 2013 IEP, and identified the particular public school site to which the district assigned the student to attend during the 2013-14 school year (see Dist. Ex. 19).<sup>3</sup>

In a letter dated August 23, 2013, the parents notified the district of their intentions to place the student at Lang for the 2013-14 school year and to seek funding for the student's placement (see Parent Ex. A at p. 1). In addition, the parents rejected the student's April 2013 IEP, asserting that the management needs could not be implemented in the "recommended program," the "sheer number" of management needs in the IEP indicated that the student required a "more supportive academic setting than an ICT class," the annual goals were not sufficient and failed to address the "totality" of the student's needs, the annual goals could not be implemented or "met" in the "recommended program," the April 2013 CSE failed to recommend parent counseling and training and failed to "meaningfully consider all programs" on the continuum of services, the April 2013 CSE failed to rely upon sufficient evaluative information, and the April 2013 CSE deprived the parents of the opportunity to meaningfully participate at the meeting (*id.* at p. 2). The parents further indicated that they "disagree[d] with the recommended program" because it was not sufficiently supportive and not based upon the student's "unique special education needs" (*id.*).

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> Due to a clerical error, the district sent the parents the June 27, 2013 FNR, and requested that the parents "disregard" the FNR mailed to them on June 17, 2013 (see Dist. Ex. 19; IHO Ex. IX at pp. 1-2). The June 27, 2013 FNR identified the same assigned public school site as in the June 17, 2013 FNR, which the parents visited on June 21, 2013 (compare Dist. Ex. 19, with Parent Ex. F and IHO Ex. IX at p. 1).

With respect to the assigned public school site, the parents noted that at the time of their visit the assigned public school site did not have an "ICT class" or any "available spots in their ICT classes in September" and furthermore, the assigned public school site did not have the student "in their records" (*id.*). Therefore, because the district failed to recommend an "appropriate program and placement," the parents intended to enroll the student at Lang and seek tuition reimbursement; in addition, the parents requested the provision of transportation services (*id.* at pp. 2-3).

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

By due process complaint notice dated November 1, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (*see* Dist. Ex. 1 at pp. 1-2). The parents asserted that the April 2013 CSE was not properly composed due to the absence of the student's then-current special education teacher and the absence of a special education teacher responsible for implementing the student's IEP (*id.* at p. 3). Additionally, the parents alleged that the April 2013 CSE failed to rely on sufficient evaluative information to develop the student's "present levels of performance, educational and cognitive profile, and areas of need" (*id.* at p. 3). In addition, the parents asserted that the present levels of performance in the April 2013 IEP were "vague" and failed to "adequately describe [the student's] strengths and weaknesses" (*id.* at p. 4). The parents further alleged that the ICT "classroom placement" was not sufficiently supportive without "1:1 assistance," and had voiced their objection to such a recommendation (*id.* at p. 3). Moreover, the parents contended that the April 2013 CSE failed to "meaningfully review any goals, management needs, or promotional criteria" at the meeting (*id.*). The parents also noted that the management needs in the IEP failed to "address all the issues discussed at the IEP meeting" and did not provide adequate support to the student (*id.* at p. 4). With respect to the annual goals, the parents asserted that they were vague, not measurable, and did not address "every area" of the student's deficits (*id.*). With regard to the assigned public school site, the parents repeated the concerns set forth in the June 21, 2013 e-mail and August 23, 2013 letter (*compare* Dist. Ex. 1 at p. 4, *with* Parent Ex. F *and* Parent Ex. A at pp. 1-2).

Turning to the unilateral placement, the parents contended that Lang addressed the student's "academic and social/emotional needs and [was] reasonably calculated to enable [the student] to receive educational benefits" (Dist. Ex. 1 at pp. 4-5). Finally, the parents alleged that they cooperated with the April 2013 CSE, and thus, equitable considerations would not bar an award of tuition reimbursement in this case (*id.* at p. 5). For relief, the parents requested reimbursement for the costs of the student's tuition at Lang for the 2013-14 school year (*id.*).

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

On March 14, 2014, the parties proceeded to an impartial hearing, which concluded on July 7, 2014, after five days of proceedings (*see* Tr. pp. 1-309). In a decision dated September 8, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year, that Lang was an appropriate unilateral placement, and equitable considerations weighed in favor of the parents' request for relief (*see* IHO Decision at pp. 13-24).

Consistent with the parents' assertion, the IHO found that the April 2013 CSE was not properly composed, noting that the hearing record lacked evidence to establish that the "required members were present or that the special education teacher" in attendance would be responsible for implementing the student's April 2013 IEP (*id.* at pp. 14-16). Additionally, the IHO determined that while the April 2013 CSE relied upon sufficient evaluative information, the hearing record

failed to contain sufficient evidence to support the April 2013 CSE's decision to recommend ICT services or to establish that ICT services would meet the student's needs (*id.* at pp. 15-18). Moreover, the IHO found that the hearing record was devoid of evidence to establish that the annual goals, short-term objectives and management needs were appropriate for the student or that the assigned public school site could implement the same in the "recommended ICT classroom setting" (*id.* at p. 17). Finally, the IHO determined that while the annual goals for the student's related services aligned with the information reported about his needs, the annual goals for academics and counseling were developed without the input of the student's then-current teachers (*id.* at pp. 18-19).

With regard to the assigned public school site, the IHO found that the hearing record failed to contain sufficient evidence to establish that it could properly implement the April 2013 IEP or that the assigned public school site had an "ICT class" available for the student (*see* IHO Decision at pp. 19-20).

Turning next to the unilateral placement, the IHO determined that Lang was appropriate because it provided the student with a "small structured therapeutic environment" and "special education services" that met his "academic, behavior, [and] social and emotional needs" (IHO Decision at pp. 21-23). Finally, finding that the parents fully cooperated with the April 2013 CSE and provided the district with timely notice of their intention to unilaterally place the student at Lang, the IHO concluded that equitable considerations weighed in favor of the parents' request for tuition reimbursement (*id.* at pp. 23-24).

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

The district appeals and alleges that the IHO improperly determined that the district failed to offer the student a FAPE for the 2013-14 school year. Specifically, the district argues that the April 2013 CSE was properly composed, the evaluative information relied upon by the April 2013 CSE supported its decision to recommend ICT services, and the ICT services and management needs were appropriate to meet the student's needs. The district further asserts that the annual goals in the April 2013 IEP were measurable and addressed the student's needs. Finally, the district argues that while speculative, the assigned public school site had an ICT classroom available for the student to attend during the 2013-14 school year and could properly implement the April 2013 IEP.<sup>4</sup>

In an answer, the parents argue to uphold the IHO's decision in its entirety.<sup>5</sup>

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<sup>4</sup> The district does not appeal the IHO's determinations that Lang was an appropriate unilateral placement or that equitable considerations weighed in favor of the parents' requested relief; as such, the IHO's findings are final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

<sup>5</sup> While captioned as a "Verified Answer and Cross-Appeal," the parents clarified in a letter to the Office of State Review, dated November 13, 2014, that the pleading contained a typographical error and they did not intend to file a cross-appeal in this matter. To the extent that the parents do not appeal the IHO's determination that the April 2013 CSE relied upon sufficient evaluative information to develop the IEP, the IHO's finding is final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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. CSE Process

#### 1. April 2013 CSE Composition

The district asserts that the IHO erred in finding that the April 2013 CSE was not properly composed. Specifically, the district argues that the district special education teacher at the April 2013 CSE meeting fulfilled the statutory requirements, and moreover, the absence of the student's then-current teachers did not result in a failure to offer the student a FAPE because the April 2013 CSE relied upon sufficient and current evaluative information—including teacher reports and related service providers' reports—to develop the student's IEP. A review of the evidence in the hearing record supports the district's assertions, and thus, the IHO's finding must be reversed.

At the time of the April 2013 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]).<sup>6</sup> As noted above, 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]).

In this case, the evidence in the hearing record demonstrates that the following individuals attended the April 2013 CSE meeting: a district special education teacher, a district regular education teacher, a district school psychologist (who also served as the district representative), a social worker, and the parents (see Dist. Exs. 15 at p. 11; 16). It is undisputed that the student's then-current preschool special education teacher did not attend the April 2013 CSE meeting, and further, that the district special education teacher attending the CSE meeting did not meet the regulatory criteria of a "special education teacher of the student." In addition, it is unclear from the evidence in the hearing record whether the district special education teacher who attended the April 2013 CSE meeting would be responsible for implementing the student's IEP had the student attended the district's program.

Therefore, while the April 2013 CSE's failure to include a special education teacher of the student constitutes a procedural violation—and assuming without deciding that the absence of a

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<sup>6</sup> The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).



special education teacher who would be responsible for implementing the student's April 2013 IEP constitutes a procedural violation—the hearing record lacks sufficient evidence to conclude that such procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see also A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]). Rather, the evidence in the hearing record indicates that the parents participated in the creation of the April 2013 IEP (see Tr. pp. 149, 151-52). In particular, the parents offered input regarding the student's deficits, and vocalized their concerns with respect to whether the recommended ICT services would provide the student with sufficient support (see Tr. 151-54). In addition and as explained more fully below, the April 2013 CSE relied upon reports from the student's then-current teacher and related service providers to develop the April 2013 IEP (Tr. pp. 69-70). Moreover, at the impartial hearing, the district school psychologist who attended the April 2013 CSE meeting testified that—at the time of the CSE meeting—the district special education teacher in attendance provided special education teacher support services (SETSS) (see Tr. pp. 64-65). However, the district school psychologist further testified that the district special education teacher had both a "background in early childhood education" and experience teaching in an "ICT class," which provided the April 2013 CSE with a "tremendous wealth of special education information" (*id.*). In addition, the district school psychologist testified that—at the time of the April 2013 CSE meeting—the regular education teacher in attendance currently taught in an "ICT class," which provided the CSE with a "nice perspective" because she could "speak to an ICT setting from a [regular education] teacher's vantage point" (Tr. pp. 66-67). Consequently, the IHO's finding that the April 2013 CSE was not properly composed must be reversed.

## **2. Evaluative Information and Present Levels of Performance**

In this instance, although the sufficiency of the evaluative information and the present levels of performance in the April 2013 IEP are not directly in dispute, a discussion thereof provides context for the discussion of the issues to be resolved—namely, whether the annual goals, management needs, and ICT services were appropriate to meet the student's needs.

Consistent with the IHO's findings, the evidence in the hearing record demonstrates that the April 2013 CSE relied upon the following evaluative information to develop the April 2013 IEP, and in particular, the present levels of performance: an April 2011 summary form, a June 2012 CPSE IEP, a December 2012 neuropsychological evaluation report (December 2012 evaluation), a December 2012 speech-language progress report, a January 2013 OT progress report, a January 2013 education progress report, a January 2013 PT progress report, a January 2013 preschool teacher interview and classroom observation (January 2013 preschool report), a January 2013 classroom observation report, and a March 2013 social history update (see Dist. Exs. 3-7; 9-11; 13; 27; see also Tr. pp. 28-37; IHO Decision at pp. 6,15-16).

According to the December 2012 evaluation—which assessed the student's intelligence, language, visual perception and motor functioning, memory, attention, impulse control, social perception, achievement, academic skills, adaptive functioning, and social/emotional functioning—the student settled easily into the testing process, demonstrated a "great degree of focus and stamina" for a student his age, made eye contact, stayed on topic, and shared joint attention (see Dist. Ex. 4 at pp. 1-6, 11). During work-related tasks, the student was appropriately engaged with the evaluator, but when not actively engaged, the student would rock in his seat,

laugh, and repeat a nonsense word (*id.* at p. 11). With respect to communication, the student demonstrated strong receptive and expressive language skills, he could process "lengthy aurally presented directives," and he spoke in complete, grammatically correct sentences; however, the student required prompting to greet, he rarely initiated conversation, and he demonstrated little interest in sustained dialogue—all of which indicated pragmatic language challenges (*id.* at p. 11-12). When assessing the student's play skills, the student became upset and asked to leave, demonstrating little interest in the toys; and, further, he did not like the examiner trying to enter his play (*id.* at p. 11).

As part of the December 2012 evaluation, an administration of the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) to the student revealed that his overall performance fell within the very superior range (*see* Dist. Ex. 4 at pp. 1, 12). In particular, the student achieved the following standard scores: verbal comprehension index, 123 (superior range); visual spatial index, 145 (very superior range); fluid reasoning index, 124 (superior range); working memory index, 131 (very superior range); processing speed, 121 (superior range) and full-scale IQ, 139 (very superior range) (*id.* at pp. 1, 12-16). Given the student's cooperativeness and willingness to try, the student's scores were a valid indicator of his abilities at the time of testing (*id.* at p. 12).

Consistent with the WPPSI-IV results, an administration of the Developmental Neuropsychological Assessment Test-Second Edition (NEPSY-II) to the student revealed similar strengths, as well as areas of relative weakness (*see* Dist. Ex. 4 at pp. 2-3, 13-16, 18). With regard to the following subtests, the student performed in the very superior, superior, and advanced ranges: speed naming, phonological processing, block construction, geometric puzzles, design copying, visuomotor precision, manual motor sequences, imitating hand positions, word generation, theory of mind (visual portion), and affect recognition (*id.* at pp. 2-3, 13-16, 18). Although the student performed in the advanced range in the visual portion of the theory of mind subtest, the student demonstrated some relative difficulty in the verbal portion of this subtest with perspective taking, identifying deception, and interpreting nonliteral language (*id.* at p. 18). Notably, although the student demonstrated "relative difficulty," his testing results fell within normal age limits (*id.* at p. 18). In addition, while the student demonstrated a "remarkable attention span during testing," he also demonstrated a relative weakness when performing the statue subtest (assessing attention and impulse control), scoring in the borderline range (*id.* at p. 16). Likewise, the student demonstrated another area of relative difficulty in a measure of narrative memory; the evaluator interpreted the student's results in the "memory aspect of this exercise" as not challenging for the student, "but instead the mere act of engaging in a lengthy dialogue and building a narrative" was challenging (*id.*).

In addition to the WPPSI-IV and the NEPSY-II, the evaluator administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student to assess his academic skills (*see* Dist. Ex. 4 at pp. 4, 17-18). Testing results yielded the following standard scores: math problem solving, 153 ("clearly exceptional"); and early reading skills, 129 ("advanced") (*id.* at pp. 4, 17-18). The evaluator noted that the student was "so advanced academically that the examiner had to break with typical testing protocol, and administered subtests to him that [were] not designed for preschoolers" (*id.* at p. 17). Given the student's age at the time of testing, normative data for word reading was not available; however, the student read all of the words on the test, matched words on the basis of beginning and ending sounds, identified rhyming words, read fluently, and decoded words (*id.*). The student could generate rhyming words or blend sounds to

create words, which was inconsistent with his strong phonological processing and working memory abilities (id.). With regard to the student's math skills, the evaluator noted that the student was "clearly exceptional for a child his age" because he could count in one-to-one correspondence, complete number patterns, skip count by tens, perform an array of subtraction and addition word and calculation problems, work with numbers well over ten, and solve a problem with four addends with no explanation from the examiner (id. at p. 18). The evaluator noted that although she attempted to administer the spelling subtest of the WIAT-III to the student, "it was a bit too advanced" for him (id. at p. 17). Likewise, the student's writing skills were not formally assessed, and the evaluator remarked that the student's immature pencil grasp and improper writing technique were of concern (id. at pp. 17-18).

To assess the student's adaptive behavior skills as part of the December 2012 evaluation, the evaluator administered the Vineland Adaptive Behavior Scales, Second Edition (VABS) with the parents (mother) serving as the informant (see Dist. Ex. 4 at pp. 4, 18-19). While the student performed overall within the "adequate range on most measures," the student demonstrated "significant delays" in socialization skills and performed within the moderately low range with regard to interpersonal and coping skills; however, the student performed within the adequate range in the areas of play and leisure skills (id.). With respect to communication skills, the evaluator reported the student's expressive language skills as adequate, noting that the student was limited by his difficulty sustaining conversations and providing narratives (id.). Likewise, the student's receptive communication skills were also adequate, but limited by his "selective listening" tendencies; in addition, the evaluator attributed the student's "advanced" written communication skills to the student being an avid reader (id.). The student's daily living skills all fell within the adequate range, including personal, domestic, and community skills (id. at pp. 4, 19-20). With regard to the motor skills, the student, overall, fell within the adequate range, but the evaluator noted "significant variability" within this domain (id. at p. 19). More specifically—and aside from an immature pencil grasp—the student demonstrated age-appropriate fine motor skills; however, his gross motor skills fell within the "moderately low range" due to his inability to hop, skip, and catch a baseball-sized ball (id. at pp. 4, 19).

Additionally, the evaluator assessed the student's language skills through an administration of the Clinical Evaluation of Language Fundamentals Preschool-Second Edition (CELF Preschool-2) and the Comprehensive Assessment of Spoken Language (CASL), which found the student's performance to be within the superior to very superior range with the exception of the student demonstrating a scattering of skills when requesting help and demonstrating an understanding of conversational turn-taking (see Dist. Ex. 4 at pp. 2, 12-13). The evaluator further described the student's greatest challenges as "narrative building and conversation" (id. at p. 13).

The evaluator also administered the Autism Diagnostic Observation Schedule—(ADOS) to the student to assess his social/emotional skills, and the student's overall performance on the ADOS just met criteria for autism (Dist. Ex. 4 at p. 20). Specifically, with respect to the reciprocal social interaction domain, the student met the criteria for an autism spectrum disorder, while according to the communication scale, the student met the criteria for autism (id. at pp. 4-5, 20). The evaluator noted that while the student "enjoyed all other aspects of testing, this play and conversational-based activity frustrated him" (id. at p. 20). According to the evaluator, the student disengaged "when activities became less structured and more informal," and as a result, the student's scores on the ADOS "d[id] not convey his complex array of strengths and weaknesses" (id. at pp. 4-5, 20). While the student's play skills were found to be restricted and immature, the

student's performance improved when asked to engage in a highly structured play scenario; yet, the evaluator reported the student could not sustain his focus on the play through to the end (id. at p. 20).

As part of the December 2012 evaluation, the parents, the student's then-current special education itinerant teacher (SEIT), and the student's then-current classroom teacher were asked to complete the Autism Spectrum Rating Scales (ASRS) (Dist. Ex. 4 at pp. 5-6, 20). The evaluator opined that the "variability in these responses highlight[ed] just how appropriate [the student] c[ould] be in a learning environment" (id. at p. 20). Specifically, the evaluator noted that while responses from the parents and the SEIT were highly consistent with an autism spectrum disorder, the student's then-current classroom teacher's responses were not; however, all three responders reported that peer socialization and self-stimulatory behaviors were areas of significant challenge for the student (id. at pp. 20-21). The evaluator further opined that although the student made "some truly impressive gains over the years, he continue[d] to present with features of a [p]ervasive [d]evelopmental [d]isorder (PDD)" (id. at p. 21). Specifically, while the student possessed "exceptional language skills" and sought out and enjoyed interactions with adults, the evaluator noted that he continued to have difficulty with pragmatic language skills, conversational skills, play scenarios, peer interactions, restricted areas of interest, and self-stimulatory behaviors when unstructured (id. at p. 21).

Overall, the December 2012 evaluation report indicated that the student presented as an "exceptionally bright little boy, with intellectual potential measured as falling within the [v]ery [s]uperior range" (Dist. Ex. 4 at p. 22). Further, the student loved work-related activities and displayed remarkable attention and an impressive degree of frustration tolerance except during unstructured activities and play time (id. at pp. 21-22). The student performed "extremely well" on measures of expressive and receptive language, visual-spatial processing, and memory; in addition, the student demonstrated "advanced" fine motor, visual motor, and graphomotor skills (id. at p. 22). Consistent with the student being described as "'gifted'" by the evaluator, the student was found to be "years above grade-level in reading and math skills" (id.). According to the evaluator, overall, the student continued to function on the autism spectrum with delays in pragmatic language skills, play, conversational language, peer interactions, and in demonstrating restricted interests and stereotypical behaviors (id.).

A review of the April 2013 IEP reveals that the April 2013 CSE incorporated information from the December 2012 evaluation—namely, the testing results from the WPSI-III, WIAT-III and the VABS, as well as information consistent with portions of the evaluator's narrative descriptions of the student's skills—within the present levels of performance and individual needs section of the IEP (compare Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 4 at pp. 1-4, 11-21).

As detailed in a December 2012 speech-language progress report, the student's speech-language skills were not formally assessed for the update because the he scored within the above-average to superior range on "formal language measures for the past two years" (Dist. Ex. 5 at p. 1). Consistent with the December 2012 neuropsychological report, the speech-language report indicated that the student exhibited difficulties in the areas of social communication and language processing, and he preferred to play alone; however, with adult support the student demonstrated improvement in engaging with classmates (id.; see Dist. Ex. 4). According to the December 2012 speech-language progress report, the student was notably more engaged in free play activity from "April until mid-August of last year," which evaluator attributed to the student's strong connection with two peers (Dist. Ex. 5 at p. 1). The student initiated "play with these special friends and

occasionally used his language to negotiate, following their models" (id.). When these two friends moved on to other schools in September 2012 and a new group of students enrolled in the student's class, he became "somewhat more reserved and self-directed," and he required an adult to facilitate interaction and play with others (id.). The report, however, also indicated that the student was more flexible in accepting adult prompts to move out of his routinized play, and, occasionally, he commented or asked questions of his peers (id.). According to the speech-language progress report, overall, the student was "pretty amenable to prompts and gentle persuasion" when inviting others to play and taking turns with "each other's ideas" (id. at p. 2). The evaluator also described the student's progress in both receptive and expressive language skills (id.). Specifically, the student demonstrated difficulty with pragmatic and social skills, such as the "back-and-forth of simple conversation," spontaneously posing questions or making comments, looking at others when speaking to them, answering questions with a response other than "I don't know," and the speed with which he responded (id.). The evaluator recommended that the student's speech-language therapy sessions take place with "typically developing peers whenever possible because [the student] [was] excellent at following others' models" (id.). A review of the April 2013 IEP reflects—consistent with the information in the December 2012 speech-language progress report—the student's difficulties with pragmatic language and social interaction communication within the present levels of performance and individual needs section of the IEP, as well as within the annual goals in the IEP (compare Dist. Ex. 15 at pp. 1-6, with Dist. Ex. 5 at pp. 1-2).

With regard to the January 2013 OT progress report, the student exhibited challenges with attention and self-awareness, sensory processing, motor planning, postural control, balance, bilateral skills, and fine motor skills (see Dist. Ex. 6 at p. 1). The evaluator assessed the student's progress through the administration of the Peabody Development Motor Scales-Second Edition (PMDS-2), clinical observations, and parent report (id. at p. 3). At that time, the student demonstrated strengths in visual perceptual and visual motor skills, and "progressive strengths in his physical navigation of space;" however, he continued to demonstrate difficulties in the areas of "flexibility, coping with frustration and unpredictability, engaging in extended circles of communication, and understanding/recognizing social cues" (id.). Further, the student presented with challenges in sensory processing; initiating, organizing, and sequencing multi-step novel activities; and with his pencil grasp (id.). A review of the April 2013 IEP indicates that the April 2013 CSE included information from the January 2013 OT progress report concerning the student's challenges with sensory processing and fine motor skills in the present levels of physical development and in the management needs sections of the IEP (compare Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 6). Additionally, the annual goals in the April 2013 IEP addressed the student's needs identified in the January 2013 OT progress report, including graphomotor skills, attention, sensory processing, bilateral skills, and upper body control (compare Dist. Ex. 15 at pp. 3-5, with Dist. Ex. 6).

A January 2013 education progress report described the student's adjustment to the 2012-13 integrated classroom setting, and noted that the student "reverted to choosing primarily solitary activities;" however, as the student became "more comfortable and familiar with the peers in the classroom," the student began playing near peers and commenting on their play (Dist. Ex. 7). The student continued to require adult support to sustain a play theme, conversation, or successful interactions with peers (id.). As the student continued to demonstrate age-appropriate academic abilities, the "team's area of focus" remained on the student's progress toward his social goals (id.). A review of the April 2013 IEP reflects information obtained from the January 2013 education

progress report within the present levels of performance, the management needs, and the annual goals sections of the IEP (compare Dist. Ex. 15 at pp. 1-6, with Dist. Ex. 7).

According to the January 2013 PT progress report, the student negotiated stairs using alternating feet; he pedaled a tricycle for more than 500 feet; he negotiated a six-inch balance beam; and he jumped forward 24 inches over an eight-inch hurdle, and down from a 12 inch stool (Dist. Ex. 11). At that time, the student continued to work on standing on one foot for three to five seconds, negotiating a four-inch balance beam, hopping forward on one foot, throwing and catching a tennis ball, and kicking a soccer ball in order to improve his strength, balance, and gain age-level gross motor skills (id.). A review of the April 2013 IEP reflects information obtained from the January 2013 PT progress report within the present levels of physical development, the management needs, and the annual goals sections of the IEP (compare Dist. Ex. 15 at pp. 1-2, 6, with Dist. Ex. 11).

In a January 2013 preschool report, the social worker described the student as having all skills firmly established except for those skills that were described as emerging, which included playing cooperatively with peers, sharing a teacher's attention with peers, and telling a story making sense of details and sequencing events (see Dist. Ex. 9 at p. 5). In addition, the student had "not exhibited" the ability to hold a pencil with a pincer grip, and two additional fine motor skills were marked as "refer to OT" (id.). In January 2013 classroom observation report, the social worker described the student as "easily engaged in his interaction with his neighbor" at the sand table, positively responding to teacher directions, displaying an average attention span, expressing his feelings with complete sentences, and exhibiting fair transition skills (Dist. Ex. 10). The student was further described as not easily distracted by auditory or visual stimuli and able to work either independently or with a partner during choice time (id.). A review of the April 2013 IEP reflects information obtained from the January 2013 preschool report and the January 2013 classroom observation within the present levels of performance, the management needs, the annual goals, and the recommendation sections of the IEP (Tr. p. 53; compare Dist. Ex. 15 at pp. 1-5, with Dist. Ex. 9 and Dist. Ex. 10).

Finally, the evidence in the hearing record indicates that the April 2013 CSE considered a March 2013 social history update, which consisted of a parent (mother) interview conducted by the same social worker who completed the January 2013 classroom observation (Dist. Exs. 10; 13). The parent reported that the student was healthy, doing very well academically, and although his challenges were social, he had friends at school (id. at p. 1). According to the parent, the student was well behaved at home and in the community (id.). A review of the April 2013 IEP reflects information obtained from the March 2013 social history update within the present levels of physical and social development sections of the IEP (compare Dist. Ex. 15 at pp. 1-2, with Dist. Ex. 13).

## **B. April 2013 IEP**

### **1. Annual Goals**

Turning next to the district's assertion that the annual goals in the April 2013 IEP were appropriate, 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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). The IDEA does not require that annual goals be drafted at a CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \* 8 [S.D.N.Y. Sept. 29, 2012]).

A review of the April 2013 IEP indicates that it included approximately 15 annual goals to address the student's identified needs in the areas of attention; oral language; proactive learning; writing (graphomotor skills); counseling (peer relations); self-regulation and social functioning in the classroom; range of motion in upper extremities; fine-motor strength and endurance; balance; ball-handling skills; sensory processing; and pragmatic, conversational, and social language skills (see Dist. Ex. 15 at pp. 3-6). Consistent with regulations, each annual goal included an evaluative criteria (i.e., three out of five trials or 80 percent accuracy); an evaluation procedure (i.e., teacher or provider observations or class activities); and a schedule to measure progress (i.e., one time per quarter) (id.).

At the impartial hearing, the district school psychologist testified that the four "academic" annual goals were not developed by the April 2013 CSE to address the student's "intellectual functioning," but rather, to address his needs in the areas of attention, oral language, proactive learning, and writing, which were associated with his PDD (Tr. pp. 43-47; see Dist. Ex. 15 at pp. 3-4). Moreover, the district school psychologist testified that the April 2013 CSE developed three annual goals related to counseling to comprehensively address the student's needs related to his diagnosis of having a PDD, which included a history of language and socialization difficulties (Tr. pp. 47-48; see Dist. Ex. 15 at pp. 4-5). According to the district school psychologist, the April 2013 CSE developed three OT annual goals and two PT annual goals for the student, which the CSE derived from his "previous provider and previous services" (Tr. pp. 48-49; see Dist. Ex. 15 at pp. 5-6). To address the student's pragmatic, social, and conversational language needs, the April 2013 CSE also developed three speech-language annual goals to focus on the student's need to develop his "social use of language" (Tr. pp. 47, 49; see Dist. Ex. 15 at p. 6).

Overall, the hearing record supports a finding that the annual goals in the April 2013 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146-47; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

## 2. ICT Services

Contrary to the IHO's finding, the district asserts that the evaluative information relied upon by the April 2013 CSE supported its decision to recommend ICT services. The parents reject this

contention. A review of the evidence in the hearing record supports the district's assertion, and thus, the IHO's finding that the recommended ICT services—together with the related services and management needs—were not supported by the evaluative information available to the April 2013 CSE must be reversed.

According to State regulation, school districts may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines 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]). In addition, State regulation requires that personnel assigned to each class "shall minimally include a special education teacher and a general education teacher," and each class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

In reaching the decision to recommend ICT services, the parents testified that the April 2013 CSE discussed the December 2012 evaluation report, including the recommendations within the report (see Tr. pp. 198-99). According to the district school psychologist, the April 2013 CSE's recommendation for ICT services was neither completely "consistent" nor completely "dissimilar" with the recommendation in the December 2012 evaluation report (Tr. pp. 57-58; see Dist. Ex. 4 at pp. 22-23). More specifically, the December 2012 evaluation report included a recommendation that the student be placed in a "small, structured and specialized class placement within a specialized school," and the district school psychologist testified that the "significant difference" between the recommendation in the December 2012 evaluation report and the April 2013 CSE's recommended placement was that the CSE did not recommend a "specialized school" where the student would not have access to typically developing peers (Tr. pp. 57-58). In addition, the district school psychologist testified that the ICT services provided the student with a "second teacher" (special education teacher), "a higher level of structure and support, and the opportunity for small group instruction," which was not "completely distinct" from the recommendation in the December 2012 evaluation report (Tr. pp. 57-59; see Dist. Ex. 4 at pp. 22-23). Furthermore, the district school psychologist testified that the April 2013 CSE did not follow the recommendations in the December 2012 evaluation report because the CSE considered the recommendation for a "small, specialized school, without the opportunity to participate in the [regular education] curriculum, without the ability to participate socially, and psychologically, and intellectually, with typically developing peers" as "way too restrictive;" in addition, the April 2013 CSE "fundamentally disagreed" with the recommendation in the December 2012 evaluation report because it "grossly underestimated" the student's ability" and at the same time, "grossly overestim[ed] his impairment" (Tr. pp. 57-60; see Dist. Ex. 4 at pp. 22-23). The evidence in the hearing record also indicated that at the time of the April 2013 CSE meeting, the student was attending an integrated preschool program and demonstrated progress (see Dist. Ex. 7). Additionally, the December 2012 speech-language progress report and January 2013 education progress report both indicated that the student would benefit from being with typically developing peers in the classroom (see Dist. Exs. 5; 7).

In making its placement recommendation, the district school psychologist testified that the April 2013 CSE also considered but rejected a general education setting with related services because that placement option would not meet the student's needs, and further, the student would benefit from having a second teacher in the classroom (see Tr. pp. 54-55; Dist. Ex. 15 at p. 11). Additionally, the district school psychologist testified that the April 2013 CSE also considered and



rejected a special class placement in a specialized school because that placement option was too restrictive for the student (see Tr. pp. 54-56; Dist. Ex. 4 at p. 11).

In addition to the recommended ICT services, the April 2013 CSE also recommended the following strategies to address the student's management needs: frequent consultation among his related service providers and classroom teachers, small group work, verbal and nonverbal prompts, preview of new material, clear and explicit instructions, peer models, and attention to relevant stimuli (see Dist. Ex. 15 at p. 2; see also Tr. pp. 43, 53). In conjunction with the ICT services, the April 2013 CSE further addressed the student's needs by recommending related services of OT, PT, speech-language therapy, and counseling services (see Dist. Ex. 15 at p. 7).

In this case, given the April 2013 CSE's obligation to balance the IDEA's requirement to place the student in the LRE with the importance of providing an appropriate educational program that addressed the student's needs (see *M.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 143 [2d Cir. 2013]), a review of the evidence in the hearing record supports a finding that the recommended ICT services—together with the related services and management needs—recommended by the April 2013 CSE was supported by the evaluative information and was reasonably calculated to enable the student to receive educational benefits for the 2013-14 school year.

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

Contrary to the IHO's findings, the district argues that the assigned public school site had an ICT classroom available for the student to attend during the 2013-14 school year and could properly implement the April 2013 IEP. For reasons explained more fully below, the IHO's findings must be reversed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is

prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>7</sup> When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year based, in part, upon its failure to provide sufficient evidence regarding the assigned school site or whether the assigned school could have implemented the student's IEP cannot stand, because a retrospective analysis of how the district would have implemented the student's April 2013 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site—which the student never attended—and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. A at pp. 1-6; D). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Accordingly, the IHO's decision cannot stand on the claims that the district failed to offer sufficient evidence about the assigned public school site and whether it

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<sup>7</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham 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.

would have properly implemented the April 2013 IEP.<sup>8</sup>

## VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the IHO's decision must be reversed.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated September 8, 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 September 8, 2014, is modified by reversing that portion which directed the district to reimburse the parents for the costs of the student's tuition at Lang for the 2013-14 school year.

**Dated:**            **Albany, New York**  
                         **December 10, 2014**

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

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<sup>8</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).