



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-080

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

Appearances:

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the cost of her son's tuition at Carmel Academy (Carmel) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student has attended Carmel, an out-of-state nonpublic school, since the 2011-12 (third grade) school year (see Tr. pp. 286, 300; Dist. Ex. 4 at p. 1).¹

On June 3, 2013, a CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 3). Finding that the student was eligible for special education and related services as a student with an other health-impairment, the June 2013 CSE recommended that the student receive integrated co-teaching (ICT) services in a general education classroom with special education teacher support services (SETSS), as well as counseling, speech-language therapy, and occupational therapy (OT) (Dist. Ex. 3 at pp. 14-15). By final notice of

¹ The Commissioner of Education has not approved Carmel as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

recommendation dated June 18, 2013, the district summarized the special education and related services recommended in the June 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex 6).

In a letter dated August 15, 2013, the parent acknowledged receipt of the public school placement assignment for the 2013-14 school year (Parent Ex. C at p. 1). The parent also asserted that, despite attempts to contact the assigned public school site, she had been unable to schedule a visit (id.). The parent indicated that she would visit the assigned school in September 2013 to "assess its appropriateness" (id.). The parent also notified the district of her intent to unilaterally place the student at Carmel at district expense, and requested the district provide the student with transportation to Carmel (id.).

The parent visited the assigned public school site on November 7, 2013 and, by letter to the district dated November 21, 2013, expressed her concerns with the school and notified the district of her intent to continue the student's enrollment at Carmel for the 2013-14 school year and to seek reimbursement for the costs of his tuition (Parent Ex. B at pp. 1-2).² In particular, the parent asserted that the classroom providing ICT services she viewed was too large to address the student's needs, the academic pace in the classroom was too fast for the student, the students in the class "seemed to be" higher functioning than the student, and that she was "concerned" the student either would not receive his related services or would miss academic instruction to receive them (id.). Further, the parent stated that she was "advised" that the student would experience emotional difficulties transitioning from a small classroom and the June 2013 IEP did not include a plan to support the student's transition to the recommended program (id.). Finally, the parent stated that the assigned school had scored poorly in several measures of school quality (id. at p. 2).

On March 3, 2013, the parent signed an enrollment contract with Carmel for the student's attendance during the 2013-14 school year (Parent Ex. F at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated October 3, 2013, the parent alleged that the CSE denied the student a FAPE for the 2013-14 school year (Parent Ex. A). The parent alleged that the June 2013 CSE failed to conduct specific evaluations and did not consider "sufficient, current, evaluative and documentary material" (id. at p. 2). The parent alleged that the June 2013 CSE failed to share any materials with Carmel staff participating in the meeting via telephone, "failed to discuss any documents or evaluative material" at the CSE meeting, and did not "adequately consult" the parent or Carmel staff regarding the CSE's recommendations (id.). Moreover, the parent contended that the CSE failed to "seriously consider" the concerns of the parent and Carmel staff regarding the appropriateness of the recommended program and that the June 2013 IEP did not reflect her concerns (id.).

The parent alleged that the June 2013 IEP was not reasonably calculated to enable the student to make measurable progress or avoid regression (Parent Ex. A at p 2). Further, the parent contended that the June 2013 IEP did not fully and accurately reflect the student's present levels

² The parent indicated that she contacted the school in September 2013 and was informed that the earliest date she could visit the school was November 7, 2013 (Tr. p. 291; Parent Ex. B at p. 1).

of academic and social/emotional performance or his management needs (id. at pp. 2-3). The parent further asserted that the June 2013 IEP failed to include goals addressing all of the student's needs and that some of the included goals were vague and generic (id. at p. 3). In addition, the parent argued that the recommended program for a general education placement with ICT services and SETSS would not provide sufficient individual attention and support (id.). The parent also contended that the June 2013 CSE failed to discuss providing the student with transition supports and the IEP failed to include a transition plan to assist the student in moving from Carmel to the recommended public school setting (id. at pp. 2-3).

The parent asserted that the public school site to which the student was assigned was "not appropriate" for the student and that the classroom in which the district proposed to implement the IEP would not be "appropriate or sufficiently supportive" for the student (Parent Ex. A at pp. 3-4). Initially, the parent contended that "it was unclear" whether a special education teacher would be present for the entire day, "raising concerns" that the school would not implement the student's IEP (id. at p. 4). The parent additionally asserted that the proposed classroom would be both "too large and overwhelming" for the student given his deficits and would not provide the student with appropriate instruction at the student's academic level (id.). The parent further asserted that the students in the recommended classroom were higher functioning than the student, that the class would move at too fast a pace for the student, and the student required "similarly-functioning" peers to learn and make progress (id.). The parent also contended that the classroom's "rigorous schedule" raised concerns that the student would not receive the related services mandated by his IEP (id.). Finally, the parent alleged that the public school site received a failing grade with regard to school environment, raising concerns about the student's safety and the level of support the student would receive at the public school site (id.).

The parent asserted that her unilateral placement of the student at Carmel was appropriate, and requested reimbursement or direct funding for the costs of the student's tuition (Parent Ex. A at p. 5).³

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on January 23, 2015, which concluded on March 26, 2015, after two days of proceedings (see Tr. pp. 1-308). In a decision dated June 25, 2015, the IHO found that the district offered the student a FAPE for the 2013-14 school year (see IHO Decision at pp. 4, 49, 51-55). Initially, the IHO held that the district had sufficient evaluative information to determine the student's needs and appropriately considered the information in developing the student's program (id. at pp. 51-53, 55). The IHO held that the CSE considered the input of the parent and Carmel staff in developing the IEP and reasonably chose to disagree with their recommendations (id. at p. 54). Next, the IHO held that the evaluative information supported the CSE's recommendation for a program consisting of a regular education classroom placement and ICT services (id. at pp. 53-55). The IHO also held that, the parent's challenges to the assigned public school site were "too subjective and anecdotal" to conclude that the school could not implement the recommended program in light of the evidence in the hearing record indicating how the student's IEP would have been implemented at the assigned school (id. at p. 54). Finally, the

³ The parent also purported to "reserve the right" to raise additional claims; however, she did not amend her due process complaint notice at any time during the impartial hearing (Parent Ex. A at p. 5).

IHO ordered the district to conduct or contract for an updated comprehensive neuropsychological assessment of the student (id. at p. 55).

IV. Appeal for State-Level Review

The parent appeals, proceeding pro se, contending that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 school year, and requests that the IHO's decision be overturned. Initially, the parent asserts that the IHO's conclusions exhibited bias in favor of the district. The parent contends that the district failed to adequately evaluate the student and "refused to consider information" about the student proffered by Carmel staff and that the evaluative information relied on by the district was insufficient. In particular, the parent asserts that the June 2013 CSE failed to conduct neuropsychological testing of the student and relied on an outdated private neuropsychological evaluation; did not have sufficient evaluative information regarding the student's needs in the areas of written expression, graphomotor skills, or executive functioning; did not conduct a classroom observation of the student; and did not review a social history. The parent also argues that the June 2013 CSE failed to afford the parent or Carmel staff the opportunity to participate in the CSE meeting or in the development of the June 2013 IEP. The parent further asserts that the June 2013 CSE failed to share documentation with her prior to the June 2013 CSE meeting and made "no effort" to provide Carmel staff an opportunity to participate in the creation of the student's IEP. The parent argues that the CSE failed to "seriously consider concerns expressed" by the parents and by Carmel staff regarding the proposed program for the student.

With respect to the June 2013 IEP, the parent argues that it did not reflect or address the student's needs. Specifically, the parent asserts that the IEP failed to reflect the student's diagnosis of a learning disorder, failed to describe the student's word retrieval or processing speed issues, and failed to describe the level of support the student was provided the previous school year or indicate that the student had been integrated into larger classrooms with support. The parent further asserts that the June 2013 CSE failed to follow appropriate procedures regarding the creation of annual goals by failing to discuss the goals during the CSE meeting and that the IEP lacked a goal for speech intelligibility. The parent contends that the recommendation for placement in a general education classroom with ICT services and SETSS was not appropriate because the student required a more supportive program to adequately address his attention needs, and that the June 2013 CSE improperly based its recommendation on programmatic considerations rather than the needs of the student. The parent asserts with regard to the assigned public school site that the student could not have been appropriately grouped in a classroom providing ICT services, the school would not have been able to implement the student's IEP, and that the assigned public school site had received a "failing grade" in the area of school environment and a "below average" rating for academic expectations from the district.

The parent further contends that Carmel appropriately met the student's needs, and argues that equitable considerations support her request for reimbursement because she cooperated with the June 2013 CSE.⁴

⁴ The parent does not assert on appeal any argument relating to the contentions raised in her due process complaint notice regarding the composition of the June 2013 CSE and the failure of the June 2013 CSE to create a transition

The district answers, responding to the parent's claims with admissions and denials, and generally arguing for the IHO's decision to be upheld.

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]). 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 [2d Cir. Aug. 16, 2010]).

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

plan for the student; accordingly, these claims have effectively been abandoned and will not be further addressed.

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]). 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).

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]).

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

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

VI. Discussion

A. June 2013 CSE Process

1. Sufficiency of Evaluative Information

Turning first to sufficiency of the evaluative information available to the June 2013 CSE, the parent contends that the district failed to meet its burden to "adequately evaluate" the student's written expression and graphomotor skills, and his executive functioning skills in a classroom environment. The parent argues that the psychoeducational evaluation and educational evaluation relied upon were "brief and minimalist" and that the June 2013 CSE failed to conduct or review a neuropsychological evaluation, classroom observation, or medical report. The district, in its answer, asserts that the June 2013 CSE possessed sufficient evaluative material of the student and that no additional evaluations were required.

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

In this case, the IHO found that the June 2013 CSE reviewed sufficient evaluative information (IHO Decision at pp. 51-52). The hearing record shows that the June 2013 CSE considered the September 2012 psychoeducational evaluation and the May 2013 educational evaluation reports (Tr. p. 19; Dist. Exs. 4-5).⁵ The September 2012 psychoeducational evaluation report contained information describing the student's cognitive abilities, social/emotional functioning, attention, and academic skills (Dist. Ex. 4 at pp. 1-3). The evaluating school psychologist reported the results from a May 2011 administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) that yielded standard scores of 108 (average range) in verbal comprehension, 102 (average range) in perceptual reasoning, 94 (average range) in

⁵ The district school psychologist testified that she requested progress reports from Carmel and that the CSE "must have" had Carmel progress reports and report cards; however, these documents were not included in the hearing record.

working memory, and 68 (extremely low range) in processing speed (id.). At the time of the May 2011 assessment, the evaluator reported the student demonstrated difficulties with regulating his behavior and attention during challenging tasks, including timed and written tasks (id. at p. 1). With respect to current academic functioning, an administration of selected subtests of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student yielded standard scores (percentile rank) of 97 (42, average range) in word reading, 133 (99, superior range) in reading comprehension, 97 (42, average range) in numerical operations, 107 (68, average range) in math problem solving, and 91 (27, average range) in essay composition (id. at p. 2). The evaluating school psychologist also conducted a social/emotional assessment of the student using student interview, observation, and projective evaluative instruments which indicated the student was "polite and personable" with some difficulties in the area of peer interactions as well as attention, for which he required redirection and repetition (id.).

The June 2013 CSE also considered a May 2013 educational evaluation report, which provided information regarding the student's academic functioning and related needs (Dist. Ex. 5 at pp. 1-2). As part of the educational evaluation, the school psychologist conducted standardized testing, parent and student interviews, and a review of records, and summarized the results of the same previous cognitive testing as the September 2012 psychoeducational evaluation port (id.). Administration of selected subtests of the WIAT-III to the student yielded standard scores (percentile rank) of 133 (99) in reading comprehension, 110 (64) in word reading, 104 (61) in math reasoning, 96 (39) in numerical operations, and 93 (32) in spelling (id.). The report indicated the student demonstrated difficulties with communication and organization of his thoughts (id. at p. 2).

The parent asserts that the district conducted the evaluations within a 1:1 setting and lacked teacher input as well as information about the student from "real life" settings. However, the school psychologist testified that the student's providers at his private school participated in the June 2013 CSE meeting and that she used the Carmel progress reports and report cards to assist in the development of the June 2013 IEP (Tr. pp. 19, 37-38, 54-55).⁶ Specifically, upon review of the June 2013 IEP, there was detailed information provided by Carmel regarding the student's functioning within a classroom setting, academic abilities, and social/emotional functioning (Tr. pp. 19, 54-55; Dist. Ex. 3 at pp. 1-4).

The parent further asserts that the assessments conducted by the district failed to provide information regarding the student's written expression, graphomotor skills, and the effects of the student's executive function deficits in a class setting; however, a review of the evaluative reports that the June 2013 CSE reviewed reveals that the reports contained information in these areas that was ultimately reflected in the present levels of performance section of the June 2013 IEP (Dist. Exs. 3 at pp. 1-4; 4; 5). For example, the September 2012 psychoeducational evaluation report contained information regarding the student's essay composition skills and skills related to working memory as well as his abilities related to information processing, attention, planning, and organization, as well as his difficulties with remaining focused for an extended time period (Dist. Ex. 4 at pp. 1-2; see Dist. Ex. 3 at pp. 1-4). The parent also asserts that the district failed to conduct

⁶ The psychologist reported that Carmel staff stated their concerns regarding the student's difficulties with attention and need for prompting, and indicated the student would have difficulty following along in a large class setting (Tr. p. 19).

a neuropsychological evaluation. However, the parent does not specify the information lacking in the evaluative information that a neuropsychological evaluation would have provided, and as set forth above, the June 2014 reviewed sufficient evaluation information in the development of the IEP.

With regard to the parent's contention that the evaluations were not recent, the district conducted both the September 2012 psychoeducational and May 2013 educational evaluations within the current school year in which the IEP was developed (see Dist. Exs. 4-5; Parent Ex. A at p. 2). With respect to the parent's argument that the district failed to conduct a classroom observation, medical evaluation, and a social history of the student, as set forth above, the June 2013 CSE reviewed evaluative reports that assessed the student in all the areas of need including cognition, academics, and social/emotional functioning (Dist. Exs. 4-5; Parent Ex. A at p. 2). The parent does not, in her petition, set forth an argument regarding how the two evaluations relied upon by the district were deficient, other than to assert that they were "brief and minimalist." Moreover, the parent did not testify at the impartial hearing to any substantive harm caused as a result of any lack of evaluations of the student (Tr. pp. 280-304).⁷ Accordingly, there is no evidence in the hearing record showing that it was necessary for the district to conduct any further evaluations of the student prior to the June 2013 CSE or that its failure to do so impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or deprived the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *9-*10 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572, 575 [2d Cir. Oct. 29, 2014]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *4 [S.D.N.Y. Sept. 23, 2015]; M.M. v. New York City Dep't of Educ., 2015 WL 1267910, at *5-*6 [S.D.N.Y. Mar. 18, 2015]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]). Based on the information set forth above, the hearing record supports the IHO's finding that the June 2013 CSE had sufficient evaluative information available to it in order to determine the student's needs and to develop the June 2013 IEP.

2. Parent Participation

The parent contends that the district failed to provide her with relevant documentation prior to the June 2013 CSE meeting, did not provide her an opportunity to participate in the development of the student's IEP, and did not consider her concerns. The parent also asserts that the drafting of the annual goals after the CSE meeting without input from the parent or Carmel staff violated the student's rights. A review of the hearing record supports the IHO's determination that the CSE did not impede the parent's ability to participate in the CSE meeting.

⁷ While an initial evaluation of a student must include a classroom observation and a physical examination (8 NYCRR 200.4[b][1]), a reevaluation requires that a district appropriately assess the student and determine whether additional evaluative data is necessary but does not specifically require a classroom observation, especially where the CSE has adequate information regarding the student's functioning in the school environment (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *5 [S.D.N.Y. July 15, 2015]). It is unclear what information the CSE could have gleaned from these assessments, especially considering the number of Carmel staff who participated in the CSE meeting and provided information regarding the student's functioning.

Initially, present at the June 2013 CSE meeting were a district school psychologist who also served as the district representative, a district special education teacher, and, participating by telephone, the parent and a number of Carmel staff, including two of the student's then-current special education teachers, a psychologist, the director of educational resources, the student's speech therapist, and the student's occupational therapist (Dist. Ex. 3 at p. 22). The IEP reflects the parent's concerns about the student's speech-language delays, attention deficits, and fine-motor coordination (*id.* at pp. 2, 4). In addition, while the parent testified that she did not receive any documents prior to the CSE meeting, she also testified that she was able to participate in the meeting (Tr. p. 287). In particular, the parent testified that when she and Carmel staff expressed a concern that ICT services alone would be insufficient to address the student's needs, the CSE responded by adding a recommendation for SETSS to address the student's organizational needs (Tr. pp. 287-89, 300). Similarly, Carmel's director of educational resources indicated that she was able to express her concerns to the CSE regarding the recommendations, and the district responded that it would be inappropriate to recommend a special class for the student (Tr. pp. 242-44). Accordingly, although it would have been better practice for the district to ensure that all relevant documentation was provided to the parent prior to the CSE meeting, the parent's ability to express her concerns indicates that her right to participate in the development of the student's IEP was not significantly impeded (*A.P. v. New York City Dep't of Educ.*, 2015 WL 4597545, at *10 n.7 [S.D.N.Y. July 30, 2015]; *E.F. v. New York City Dep't of Educ.*, 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]). Moreover, the district was not required to adopt the views of the parents or private providers where, as discussed below, its recommendations were reasonably based on the available evaluative information (*P.G. v. New York City Dep't of Educ.*, 2015 WL 787008, at *17 [S.D.N.Y. Feb. 15, 2015]; *M.L. v. New York City Dep't of Educ.*, 2014 WL 1301957, at *10-*11 [S.D.N.Y. Mar. 31, 2014]; *J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]).

Regarding the parent's contentions involving the development of the annual goals, the district school psychologist testified that the CSE discussed the information available to it, the goals were based in large part on information provided by Carmel, and that the CSE "went over the goals at the meeting," but that the IEP was committed to writing after the meeting (Tr. pp. 55-56, 65). The district is not required to finalize an IEP at the time of the CSE meeting, and the parent's ability to participate in the CSE meeting was not impeded by the reduction of the annual goals to writing thereafter (*Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 449 [2d Cir. 2015]; *S.B. v. New York City Dep't of Educ.*, 2015 WL 3919116, at *7 [S.D.N.Y. June 25, 2015]; *B.K. v. New York City Dep't of Educ.*, 12 F. Supp. 3d 343, 362 [E.D.N.Y. 2014]; *E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]).

B. June 2013 IEP

1. Present Levels of Performance

The parent asserts that the June 2013 IEP was inadequate with respect to describing the student's needs including academic functioning, processing speed deficits, word retrieval skills, speech intelligibility, and his diagnosis of a learning disability. A review of the June 2013 IEP in conjunction with the evaluative information available to the June 2013 CSE demonstrates that the June 2013 CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development, and further, that the description of

the student's needs was consistent with the evaluative information and input from Carmel staff and the parent at the time of the June 2013 CSE meeting.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The June 2013 IEP reflected the student's needs and abilities in cognition, academics, and social/emotional functioning as identified in the September 2012 psychoeducational evaluation and May 2013 educational evaluation reports as well as input from CSE members including the parent and Carmel staff (compare Parent Ex. 3 at pp. 1-4, with Dist. Ex. 4 at pp. 1-3, and Dist. Ex. 5 at pp. 1-2). For example, with respect to standardized assessments, the June 2013 IEP present levels of academic achievement reflected the results of the cognitive and academic assessments (see Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 2). Regarding the student's reading, math, and writing skills, the IEP reflected detailed input from Carmel providers, including indicating that the student's reading, math, and writing skills were at grade level (see Dist. Ex. 3 at pp. 1-2, 19). The IEP also indicated, with respect to math, the student had "mastered subtraction" and was working on multiplication facts (id. at p. 2). The June 2013 IEP indicated the student demonstrated progress in writing including sentence writing, identification of subjects and predicates, and developing skills related to composing paragraphs with a topic sentence, three supporting details, and a closing sentence (id.). Consistent with the results of the 2012 psychoeducational evaluation, the IEP indicated the student demonstrated some difficulties with writing in that the student tended to write oversized letters with long connections between the letters but was improving regarding writing more difficult letter formations (Dist. Exs. 3 at p. 4; 4 at p. 2). The June 2013 IEP reflected that the student made great progress in speech-language therapy, including improvement in skills related to language processing and communication (Dist. Ex. 3 at p. 2). Additionally, the June 2013 IEP indicated the student benefited from small group instruction, structure, review, routine, repetition, checks for understanding, multisensory activities and interactive activities (id. at p. 1).

The June 2013 IEP present levels of social development section contained detailed information regarding the student's social/emotional functioning (Dist. Ex. 3 at p. 3). The IEP indicated the student demonstrated progress in the area of socialization and was more willing to ask for assistance as well as engage in social interactions (id. at pp. 2-3). The June 2013 IEP also reflected the student was well liked by peers and teachers (id. at p. 3). The IEP further indicted the student needed to work on taking on the perspective of others to increase effective interactions and communication (id.). The June 2013 IEP indicated the student required much support to organize his belongings and bring required materials to class (id.). The IEP indicated the student participated in a social skills group to address self-esteem, frustration tolerance, conflict resolution, problem solving, and communication skills (id.). In accordance with the September 2012 psychoeducational evaluation report, the June 2013 IEP reflected the student was often distracted by internal and external stimuli and that he exhibited difficulties with attention (Dist. Exs. 3 at p.

3; 4 at pp. 1-2). Consistent with the September 2012 psychoeducational evaluation results, the IEP indicated the student demonstrated difficulty with turn-taking conversations and maintaining attention to others during their speaking turn, for which strategies such as modeling, prompting, and reminders provided assistance to the student (Dist. Exs. 3 at p. 3; 4 at p. 2).

The June 2013 IEP present levels of physical development section reflected that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and demonstrated difficulties with executive functions, planning, and attention as well as graphomotor difficulties (Dist. Ex. 3 at p. 4). The IEP reflected that the student continued to demonstrate progress in OT, including use of cursive to write words and sentences, but required practice to maintain his skills (id.). The IEP noted the parent's concerns regarding the student's delays in speech-language, attention, and fine motor skills (id. at pp. 2, 4). The evaluative information available to the June 2013 CSE and the present levels of performance contained in the June 2013 IEP provided a consistent description of the student's academic achievement, social/emotional functioning, and physical development (see Dist. Ex. 3 at pp. 1-4; Dist. Exs. 4-5).

According to the school psychologist, the June 2013 CSE discussed the student's strengths and weaknesses with respect to cognition and academics, including skills related to reading, written expression, and math as well as processing speed (Tr. pp. 20-24). The school psychologist further testified that the June 2013 CSE also discussed the student's needs related to attention, fine motor skills, communication, and language development as well as management needs (Tr. pp. 26-27).⁸ In addition, the school psychologist testified that Carmel staff provided input to the June 2013 CSE including their concerns about the student's attention, focus and related need for prompting (Tr. pp. 19, 37-38).⁹

To the extent the parent asserts that the IEP does not reflect the student's diagnosis of a learning disorder, she does not articulate which of the student's needs were not adequately reflected on the IEP other than his word retrieval difficulties. While the head teacher in the student's classroom at Carmel testified to various learning difficulties the student experienced, her recitation of the student's needs is consistent with the IEP as described above (compare Tr. pp. 152-60, with Dist. Ex. 3 at pp. 1-5). An IEP need not specify every one of a student's deficits so long as the program is designed to address the student's needs (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]). Furthermore, although the student's word retrieval difficulties were not explicitly referenced in the present levels of performance of the June 2013 IEP, the need was addressed by way of an annual goal (Dist. Ex. 3 at p. 7).

The hearing record shows that the June 2013 IEP adequately and accurately reflected the evaluative information and directly incorporated information from the September 2012 psychoeducational evaluation and the May 2013 educational evaluation reports, as well as the input of CSE participants. Moreover, the evaluative information that the June 2013 CSE considered and the input from the CSE participants provided the June 2013 CSE with sufficient

⁸ The school psychologist testified that she wrote the IEP after the June 2013 CSE meeting based upon the CSE discussion (Tr. p. 56).

⁹ The school psychologist testified that in preparation for the June 2013 CSE she spoke with the parent and Carmel staff (Tr. p. 16).

functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP.

2. Annual Goals

The parent asserts that the June 2013 CSE failed to develop annual goals in each of the student's areas of need. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 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 hearing record indicates that the June 2013 CSE developed 28 annual goals based on the student's needs as reflected in the evaluative reports before the June 2013 CSE (see Dist. Ex. 3 at pp. 1-4, 6-13). A review of the June 2013 IEP shows the IEP contained annual goals that targeted the student's identified academic needs, including completion of assignments, spelling skills, multiplication skills, reading comprehension, word retrieval skills, writing paragraphs, and editing written work (*id.* at pp. 6-7). The June 2013 CSE also developed annual goals to address fine motor skills including graphomotor skills, cursive and print skills, catching/throwing skills, and posture (*id.* at pp. 11-13). To address executive functions and organization skills, the IEP contained annual goals to increase the student's organization and planning skills and goals that targeted the student's ability to manage school materials, supplies, and homework and increase preparedness for class and homework completion (*id.* at pp. 9, 12-13). The June 2013 CSE also developed annual goals to address the student's social skills through targeting the student's ability to identify and articulate feelings, and to improve impulse control, self-esteem, and confidence (*id.* at p. 8). Although the parent asserts the June 2013 CSE failed to include an annual goal to address speech intelligibility, the June 2013 IEP included annual goals to improve speech production and speech fluency, increase the student's vocabulary, and to improve his ability to ask and answer questions (*id.* at pp. 7, 10-11).

Furthermore, a review of the annual goals reveals that each annual goal included an evaluative criteria (i.e., 90 percent accuracy), an evaluation procedure (i.e., performance data, checklists, observations, teacher/provider made assessments), and a schedule to measure the student's progress toward meeting the annual goals (i.e., one time per month) (see Dist. Ex. 3 at pp. 6-13). Notably, the school psychologist testified that the June 2103 CSE developed the annual goals at the CSE meeting based upon input of Carmel staff (Tr. p. 65). Based on the foregoing, the annual goals were measureable and addressed the student's needs as identified in the IEP present levels of performance and the evaluative reports reviewed by the June 2013 CSE (see Dist. Ex. 3 at pp. 1-4, 6-13; Dist. Exs. 4-5).¹⁰

¹⁰ Although not dispositive, the hearing record reflects that Carmel used some of the goals from the IEP (Tr. pp. 198-99).

Thus, a review of the June 2013 IEP demonstrates that, even if the IEP did not contain goals in each of the student's areas of need, it contained a sufficient number of annual goals which were aligned with the information contained in the most recent evaluation reports and provided by Carmel at the CSE meeting, so as to guide a teacher in instructing the student and measuring his progress (see T.F., 2015 WL 5610769, at *6; D.B., 966 F. Supp. 2d at 334-35; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13-*14 [S.D.N.Y. Feb. 20, 2013]).

3. Integrated Co-Teaching Services and SETSS

The parent asserts in her petition that the June 2013 CSE's recommendation for ICT services in a general education class with SETSS was not reasonably calculated to address the student's needs and that the district failed to "seriously consider" the concerns of the parent. More specifically, the parent argues that the student required a small class and "a more supportive program" to address his needs. Upon review of the evidence in the hearing record, the June 2013 CSE's recommendation for ICT services in a general education classroom with SETSS and related services was reasonably calculated to provide educational benefit to the student.

Turning to the parent's argument that the recommended program was not supportive enough, a review of the hearing record establishes, for the reasons set forth below, that the IHO correctly determined that the CSE's recommendation for ICT services in a general education classroom placement together with SETSS and related services was appropriate. State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, state regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

The evidence in the hearing record demonstrates that ICT services together with SETSS and related services appropriately addressed the student's needs in the areas of academics, speech-language processing, attention, social skills, and fine motor skills (see Dist. Exs. 3 at pp. 1-5, 14-15; 4-5). The June 2013 CSE recommended placement in a general education classroom with ICT services in English language arts (ELA), mathematics, social studies, science, and computer (id. at p. 14). The district school psychologist testified that the June 2013 CSE developed the IEP to address the student's needs in light of the student's well-developed cognitive and academic skills (Tr. p. 28). The school psychologist testified that based upon the student's ability to learn, grade appropriate academic skills, and difficulty remaining on task, the district believed ICT services were appropriate to address his needs, with the support of two teachers to assist the student with task completion and to target his listening skills (Tr. pp. 23-24).

In addition to the supports inherent in a classroom where ICT services are provided, the June 2013 IEP provided the student with the following accommodations and strategies to address his management needs: preferential seating; divide tasks into parts and assign one part of a task at a time; extended time for task completion; frequent short quizzes and fewer long tests; monitor for understanding; shorten/adjust length of assignments; reduce paper/pencil tasks; allow for different response methods than writing; reduce copying from board; reduce distractions; use of eye contact and voice modulation to assist with attention; avoid interruptions in routine; establish calm

predictable routine; and use of mnemonic, association strategies, melody, and rhythm to assist with memory (Dist. Ex. 3 at pp. 4-5). The June 2013 CSE also recommended the following strategies: opportunities for review and practice; preview and review major concepts; extensive use of graphic organizers; extra time for written responses; motor breaks; use of multisensory techniques to present information, cue the student, and aid in learning of all content areas (*id.* at p. 5).

Both the testimony of the school psychologist and the June 2013 IEP indicated the June 2013 CSE considered other placement options for the student including general education, related services only, and SETSS but rejected those options as insufficiently supportive (Tr. pp. 24-25; Dist. Ex. 3 at p. 20). The June 2013 CSE also considered a special class placement but believed it would not address the student's needs (Tr. p. 25; Dist. Ex. 3 at p. 20). As noted above, when the parent disagreed with the CSE's recommendation for ICT services for the student, in response to her concerns, the district offered to provide SETSS to address the student's organizational difficulties (Tr. pp. 287-89). Specifically, the June 2013 CSE recommended five periods per week of SETSS to address the student's organizational and planning needs in the morning and before going home, as well as provide him with learning strategies (Tr. p. 66; Dist. Ex. 3 at pp. 5, 15). Moreover, the school psychologist explained that SETSS addressed the student's needs for organization, planning, and management of school materials (Tr. p. 26).

To further support the student's needs, the school psychologist testified that the June 2013 CSE recommended counseling to address the student's needs related to his ADHD, and that counseling services would target the student's needs related to attention through teaching the student focusing techniques (Tr. pp. 26-28; Dist. Ex. 3 at p. 15). According to the school psychologist, the June 2013 CSE recommended OT and speech-language therapy to address the student's fine motor and speech-language needs, respectively (Tr. p. 27; Dist. Ex. 3 at p. 15). Based on the evidence in the hearing record, the program recommended by the June 2013 CSE, including ICT services together with SETSS, related services, as well as comprehensive accommodations and goals, addressed all areas of need for the student and provided sufficient support.

C. Challenges to the Assigned Public School Site

With regard to the assigned public school site, the parent asserts that she was "led to believe" that the functioning of the students on the placement class was above the student's level which "raised concern" that the student would not be able to keep up with the pace of the class. The parent further contends that her visit "raised concern" that the assigned public school site would not have been able to conform to the student's IEP because the student either would not have received the mandated related services or would have missed excessive instructional time. Finally, the parent asserts her concern that the assigned public school site is "not appropriate" for the student because it had received a "failing grade for school environment."

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (*R.E.*, 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (*R.E.*, 694 F.3d at 195; *see E.H. v. New York City Dep't of Educ.*, 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 [2d Cir.

2009)). The Second Circuit has also stated that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's speculative concerns that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 611 Fed. App'x at 731).

However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by [the student's] IEP" (M.O., 793 F.3d at 246; see Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claims regarding the assigned public school site. It is undisputed that the parent rejected the recommended program and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Ex. F). The parent visited the assigned public school site following the onset of the 2013-14 school year and opined that the student would be "completely overwhelmed" by the size and pace of the ICT class and stated that the students in the ICT class "seemed to be higher functioning" than the student (Tr. p. 294; see Parent Ex. B at p. 2). The parent testified that she was concerned that the student would not deal well with the environment in the assigned school, which she found to be noisy (Tr. p. 292). The parent was also concerned that the student would be removed from class to receive his related services, stigmatizing him and causing him to miss class time (Tr. p. 295). The parent also points to the district's "progress reports" for the assigned public school, indicating that the school received a failing grade with regard to the school environment, as evidence that school would not

be "appropriate for a student who needed his needs to be met," asserting that the student required "a constantly positive environment" in order to learn (Tr. pp. 293-94, 304; see Parent Exs. I, J). While understandable that the parent would desire the best possible environment for her child, this evidence provides support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. Accordingly, the parent's claims based on her observations regarding the environment at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]; see Y.F., 2015 WL 4622500, at *7 [holding that a quality review report of some aspects of a public school was irrelevant with regard to whether the school could implement a student's IEP]). In particular, parental concerns regarding school or class size, when not contrary to a requirement in a student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 793 F.3d at 245; Y.F., 2015 WL 4622500, at *6).

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the parent's contentions would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 793 F.3d at 245-46; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

VII. Conclusion

In summary, a review of the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2013-14 school year. Moreover, the parent's arguments pertaining to the assigned public school site are speculative and need not be entertained on appeal. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether Carmel was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 1, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**