The University of the State of New York

The State Education Department
State Review Officer
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No. 17-002

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Regina Skyer and Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Lang School (Lang) for the 2015-16 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's intellectual functioning is in the high average range (Dist. Ex. 5 at p. 7). He also has a diagnosis of an attention deficit disorder (ADD) (Tr. pp. 159, 166-67; Dist. Ex. 1 at p. 2).[1] The student has attended Lang since the 2010-11 school year (Tr. pp. 107-08, 157-58).[2]

On April 13, 2015, the student's mother executed an enrollment agreement with Lang for the student's attendance for the 2015-16 school year (Parent Ex. B).

On July 16, 2015, the CSE convened for an annual review of the student's program and to develop his IEP for the 2015-16 school year (Dist. Ex. 1 at pp. 1, 12). Finding that the student

[1] The July 2015 IEP indicated that the January 2015 neuropsychological report stated that the student met the criteria for "Attention Deficit Disorder, Combined Type" (Dist. Ex. 1 at p. 2). The parent testified the student has received a diagnosis of an "ADHD" (see Tr. pp. 159, 167, 180, 194).

[2] 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).

remained eligible for special education and related services as a student with an other health-impairment, the July 2015 CSE recommended a general education placement with the support of integrated co-teaching (ICT) services in English language arts (ELA), mathematics, social studies, and science (id. at pp. 8-9).[3] The July 2015 CSE further recommended that the student participate in two periods per week of adapted physical education and that he receive related services comprised of individual and group counseling, individual and group occupational therapy (OT) and individual speech-language therapy, in addition to the support of a full-time health paraprofessional in a group (Dist. Exs. 1 at pp. 8-9, 12; 2 at p. 1).

In a July 20, 2015 school location letter, the district identified the assigned public school site designated to implement the July 2015 IEP (Dist. Ex. 3).

In an August 24, 2015 letter, the parents notified the district of their intent to unilaterally place the student at Lang for the 2015-16 school year and to seek funding of the student's tuition from the district (Parent Ex. I at p. 1). In September 2015, the student's mother visited the assigned public school site (Tr. p. 174).

A. Due Process Complaint Notice

By due process complaint notice dated January 28, 2016, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2015-16 school year (Parent Ex. A). More specifically, the parents alleged that although they shared their concerns with the July 2015 CSE that an ICT classroom would be too large for the student, who required a smaller class with more teacher supports and individualized attention, the CSE ignored these concerns (id. at p. 2).

The parents further alleged that they had learned that the assigned public school site would not have been able to implement the July 2015 IEP (Parent Ex. A at p. 2). The parents claimed that the school psychologist at the assigned public school advised them that "the program recommended on the IEP would not be appropriate for [the student] as the school's ICT program was too large and 'lively' for [him]" (id.).

Additionally, the parents contended that the student's unilateral placement at Lang was appropriate, and that equitable considerations did not preclude their request for reimbursement (Parent Ex. A at p. 2). The parents requested reimbursement for the cost of the student's tuition at Lang for the 2015-16 school year (id. at pp. 1, 4).

B. Impartial Hearing Officer Decision

On June 1, 2016, the parties proceeded to an impartial hearing, which concluded on November 2, 2016, after three days of hearings (Tr. pp. 1-206). In a decision, dated December 15, 2016, the IHO denied the parents' request for relief, having found that the district offered the student a FAPE (IHO Decision at pp. 5-9).

The IHO concluded that there were no procedural issues that impeded the provision of a FAPE to the student or that unduly limited parent participation (IHO Decision at p. 9). More

[3] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

specifically, the IHO found that the absence of a teacher from Lang at the July 2015 CSE meeting "did not have an untoward impact on the IEP deliberation and decision" (id.). Rather, he determined that the addition of paraprofessional services to meet the parents' concern for more individual assistance evidenced the parents' effective participation in the process and the CSE's responsiveness (id.).

Furthermore, the IHO concluded that the July 2015 IEP, including the recommendation for ICT services, met least restrictive environment (LRE) standards (IHO Decision at pp. 7-8). The IHO also determined that "[the] IEP in terms of content and program and considerations seem[ed] appropriate," and that it "on its face seem[ed] reasonably calculated to provide the child with educational benefits" (id. at p. 6). Lastly, for purposes of "a complete record," the IHO concluded that Lang was appropriate and there were no equitable considerations that precluded relief (id. at p. 9).

IV. Appeal for State-Level Review

The parents appeal and allege that the IHO erred in concluding that the district offered the student a FAPE for the 2015-16 school year. The parents allege that there was no evidence in the hearing record to support a finding that the July 2015 CSE appeared to be listening to their concerns. The parents contend that the district's witness did not recall the July 2015 CSE meeting and that none of the documents in the hearing record support placement in an ICT class. Additionally, they allege that the IHO did not cite to any evidence supporting his findings that the lack of a teacher from Lang at the CSE meeting did not have an untoward impact on the CSE process, that the July 2015 CSE listened to the parents' concerns, or that the July 2015 IEP seemed reasonably calculated to provide the student with educational benefits. The parents contend that the IHO erred in failing to address the parents' concerns related to the size of the recommended placement and the support available in the recommended placement. They further allege that the July 2015 CSE's recommendation for placement in a general education classroom with ICT and paraprofessional services was not individualized to address the student's special education needs. Additionally, the parents contend that the IHO erred in finding LRE considerations as a reason for the July 2015 CSE's recommendation of ICT services. With respect to the assigned public school site, the parents argue that the IHO erred in failing to address their allegations concerning the school's ability to implement the July 2015 IEP. Additionally, the parents allege that the IHO erred because he failed to reference the hearing record in his decision.

In an answer, the district generally admits and denies the parents' allegations and requests that the IHO's determination that it offered the student a FAPE 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]; 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 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. Preliminary Matters - Sufficiency of the IHO Decision

The parents allege that the IHO's decision should be set aside on the basis that he failed to reference the hearing record to support his findings.

After reviewing the IHO's decision, I agree with the parents that it did not comport with State regulations. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to the hearing record and to

applicable law and application of that law to the facts of the case are the norm in "appropriate standard legal practice," and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn. Here, the IHO failed to cite to specific portions of the hearing record that supported his determinations and concluded that the district offered the student a FAPE for the 2015-16 school year without fully developing the reasoning and factual basis for his conclusions as contemplated by the regulations at issue. While the IHO generally cited exhibits in the portion of the decision describing the background of the case, he failed to cite to the hearing record with any specificity or to provide sufficiently particularized reasons for his largely conclusory determinations (IHO Decision at pp. 2-9). Notwithstanding the foregoing, I conduct an impartial review of the issues presented on appeal and render a decision based on an independent review of the entire hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]). Accordingly, to the extent that the IHO's decision did not adequately reference the hearing record, the parties have the opportunity for an independent review and are not prejudiced.

B. July 2015 CSE Process - Parent Participation

The parents allege that the IHO failed to address their allegation that the July 2015 CSE ignored their concerns regarding the recommended program, namely, that the program would have been located in a large public school building and would not have provided the student with adequate teacher support or sufficient individualized attention. The parents contend that the district did not present evidence rebutting their concerns, specifically, that the district's witness did not recall the CSE meeting, that the documents in the record do not support the program recommendation, that the district failed to invite staff from the student's school to attend the meeting, and that the recommended program was based on what was available rather than on the student's needs. As explained more fully below, a review of the hearing record supports finding that the July 2015 CSE afforded the parents "effective participation" in the decision-making process.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [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] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's

procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

The parent testified that she provided the CSE with a January 2015 neuropsychological evaluation report and the student's end of year progress reports (Tr. pp. 160-61). A prior written notice dated July 20, 2015 indicated that the July 2015 CSE reviewed and discussed a January 2012 psychoeducational evaluation report, the January 2015 neuropsychological evaluation report, and a June 2015 teacher report (Dist. Ex. 2 at pp. 1-2). Although the district special education teacher did not initially recall the July 2015 CSE meeting during his testimony, after reviewing the prior written notice, he testified that he recalled the school psychologist reviewing the results of the January 2015 neuropsychological evaluation and the CSE discussing them (Tr. p. 28). The student's mother testified that she remembered the special education teacher reviewing the results of the January 2015 neuropsychological evaluation with her during the meeting (Tr. pp. 162-63). Based on the above, the July 2015 CSE reviewed and discussed the evaluative information available at the time of the meeting.

Turning to the parents' objection to the IHO's reasoning that the absence of a teacher from Lang at the July 2015 CSE meeting "did not have an untoward impact" on the CSE process, the parents contend that they requested the presence of a teacher from Lang to discuss the student's needs and abilities.[4] The student's mother testified that she expressed concern during the meeting about not having one of the student's teachers present from Lang and that the district school psychologist indicted that the CSE did not need a teacher present because they had a recent teachers' progress report available for review (Tr. pp. 164-65). According to the student's mother, during the meeting CSE members reviewed the student's prior year IEP and she was able to provide input about the student's performance from a parent's perspective (see Tr. pp. 165-68). While the parents' desire to have one of the student's teachers at the CSE meeting is understandable, under the specific circumstances of this case, the parents' opportunity to participate in the decision-making process was not impeded by the absence of a teacher from Lang.

The student's mother testified that she believed the presence of a teacher from Lang was required to discuss the student's academic skills and that although she could describe the student, she was not at school every day like his teachers were (Tr. pp. 164-66). However, the district did have a progress report detailing the student's current academic performance available from Lang (see Tr. pp. 164-65; Dist. Exs. 1 at pp. 1-3; 2 at p. 2; 4),[5] and the parents have not alleged in either

[4] In their due process complaint notice, the parents did not raise any allegations that could be interpreted as a claim that the July 2015 CSE did not include all of the required members (see Parent Ex. A). Similarly, on appeal, the parents do not raise the lack of a teacher from Lang at the CSE meeting as an allegation that the July 2015 CSE did not have all of the required members. Rather, the parents contend that the CSE should have responded to the request to include the student's teachers in the meeting, and accordingly, this issue is addressed as a claim relating to whether the district's failure to respond to the parents' request interfered with the parents' opportunity to participate in the CSE meeting to the extent that it resulted in a denial of FAPE.

[5] The parent testified that the CSE had the student's year end progress report, which would have been the most recent progress report that was available to the July 2015 CSE meeting, (Tr. pp. 160-61); however, the only progress report included in the hearing record regarding the 2014-15 school year is the fall 2014-15 progress report (Dist. Ex. 4). The parents submitted the two progress reports from the 2015-16 school year (Parent Exs. D-E).

the due process complaint notice or on appeal that the description of the student in the present levels of performance included in the July 2015 IEP was inaccurate.

Additionally, the parents had the opportunity to contact Lang to arrange for the presence of one of the student's teachers, but due to miscommunication between Lang, the district, and the parents, no one from Lang was present at the CSE meeting (see Tr. pp. 142-43, 163-65; Dist. Ex. 1 at p. 14). The special education teacher testified that no one from Lang was available to participate in the July 2015 CSE meeting, and he did not have a record of whether the district reached out to Lang (Tr. pp. 12, 29-30). According to the student's mother, she reached out to Lang to secure the attendance of one of the student's teachers (Tr. pp. 163-65). However, the chief administrator from Lang testified that although the school was aware of the meeting and "offered" a teacher, no one attended because the school was not informed when the meeting would take place (Tr. pp. 142-43). While it would have been the better practice for the CSE to offer to reconvene the meeting in order to arrange for the attendance of Lang staff, the parents have not provided any description of the information that the teacher would have provided or how the lack of that information inhibited their ability to participate in the meeting. Moreover, as discussed below, the parents' concerns about the student's program and placement were fully explored at the CSE meeting and continue to form the basis of their substantive claims on appeal. Accordingly, absent a specific challenge to the description of the student in the July 2015 IEP or a disagreement as to the student's abilities at the time of the CSE meeting, I am hard pressed to find that the absence of a teacher from Lang impeded the parents' ability to participate in the July 2015 CSE meeting.

The parents further contend that the July 2015 CSE predetermined the student's placement by refusing to consider programs other than ICT services. However, the evidence in the hearing record supports finding that the July 2015 CSE afforded the parents an opportunity to voice their reservations regarding the program recommendation and that the CSE made efforts to respond to the parents' concerns. The student's mother testified that the CSE discussed different "levels of … special education" and that the district CSE members thought "a 12:1:1 class was too restrictive for [the student]" (Tr. p. 169).[6] The special education teacher testified that the parents had concerns with the student to teacher ratio in an ICT classroom (Tr. p. 15). Similarly, the July 2015 IEP reflects the student's mother's concerns surrounding the recommendation, specifically her concerns that an ICT classroom was too large for the student to learn given his learning difficulties (Dist. Ex. 1 at p. 13; see also Tr. pp. 169-70). In addition, the July 2015 IEP reveals that the student's mother advised the CSE that the student needed a smaller class with more teacher supports and individualized attention (Dist. Ex. 1 at p. 13). The July 2015 IEP further establishes that the student's mother informed the CSE that "class should also be academically stimulating for [the student] because he [wa]s a high achieving student" (id.).

Based on the concerns presented, the July 2015 CSE was required to consider the student's need for support in a larger classroom setting, as well as his cognitive and academic strengths and weaknesses. As discussed further below, the CSE did so by, among other things, recommending a general education placement that afforded opportunities for the student to receive "grade

[6] The parents assert on appeal that the only reason the CSE did not recommend a 12:1+1 special class was because of the academic functioning levels of the students. While a one-word affirmative response to a question posed by counsel for the district does support this assertion (Tr. p. 49), other testimony indicates that the CSE considered the student's ability to function in an ICT class with support and the student's least restrictive environment in making its determinations (Tr. pp. 14-16, 169).

appropriate" instruction with nondisabled peers who exhibited "similar cognitive and social" profiles, and paraprofessional services to support the student "in coping with his sensory regulation and cognitive weaknesses" (Tr. pp. 13-16; see Dist. Ex. 1 at p. 2).[7] In this instance, the parents' objections to the July 2015 CSE's recommendations stem from a disagreement as to the type of program and placement the student should receive after consideration and review of the evaluative information available to the CSE, and the parents' concerns denote a difference of opinion, rather than impermissible predetermination. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [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] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]).[8]

C. July 2015 IEP

1. Integrated Co-Teaching and Related Services

The parents next allege that the recommendation for placement in the general education setting with integrated co-teaching and related services was not individualized to meet the student's special education needs. As explained more fully below, the evidence in the hearing record supports finding that placement in a general education classroom with ICT services in ELA, mathematics, social studies, and science, in addition to related services and group paraprofessional support, was reasonably calculated to enable the student to receive educational benefits.

The student's needs and present levels of performance as described in the July 2015 IEP are not in dispute in this matter; however, a discussion thereof is relevant to the determination of whether the July 2015 CSE's recommended placement was reasonably calculated to provide the

[7] In the petition, the parent asserts that she expressed concern at the CSE meeting about the assignment of a 1:1 paraprofessional to the student; however, the July 2016 IEP provided the student with paraprofessional support in a group (see Tr. p. 170; Dist. Ex. 1 at p. 9).

[8] "[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

student with educational benefits. [9] As stated previously, the hearing record reflects that the July 2015 CSE reviewed and relied upon a January 2015 neuropsychological evaluation report, a 2014-15 Lang progress report, and the student's prior IEP in the development of the 2015-16 IEP (Tr. pp. 11-12, 31, 162-65; Dist. Ex. 2 at pp. 1-2).Based on evaluative information included in the July 2015 IEP, the student exhibited average to above average intellectual abilities and average to above average academic skills; however, he also had met the criteria for ADD and demonstrated difficulties with processing speed, cognitive and writing fluency, attention, hyperactivity, anxiety, and executive functioning (Dist. Ex. 1 at pp. 1-3). The IEP reflected that despite "grade-level functioning" on standardized achievement tests, the student's "academics suffer due to his struggle with processing speed and cognitive fluency" (id. at p. 2).

The July 2015 IEP indicated that the student had worked hard for the positive results he achieved in ELA, read above grade level, understood complex ideas in both fiction and nonfiction with ease, and exhibited "a strong command of the English language, both verbally and in written form" (Dist. Ex. 1 at pp. 1-2). Additionally, with respect to reading, the IEP revealed that the student was always prepared for class and ready to conference with teachers about his text (id. at p. 2). Lastly, the IEP stated that the student had repeatedly demonstrated that he was "able to acquire in-depth understandings independently and have highly intellectual discussions" about what he was reading (id.).

The July 2015 IEP indicated that the student had improved steadily in math, at times struggled with writing steps when solving "involved" problems, and was a regular contributor to whole class discussions (Dist. Ex. 1 at p. 2). The IEP also included information regarding the student's writing skills, in that he did well on two projects and demonstrated willingness to revise his work based on teacher input, although he needed continued support to make progress on long-term writing assignments (id.).

The July 2015 IEP indicated some areas where the student required support, such as staying on topic during group discussions, refraining from impulsively speaking over others, and having difficulty independently conducting experiments, organizing data, in addition to staying organized during long-term projects (Dist. Ex. 4 at pp. 10, 24, 26; see Dist. Ex. 1 at pp. 2-3). The July 2015

[9] Although the parents allege that there are no documents in the hearing record that support the July 2015 CSE's recommendation for placement in a general education class with the support of ICT services (Petition ¶42), the parents do not allege that the description of the student in the July 2015 IEP is inaccurate or that the IEP omitted relevant information regarding the student's needs—other than the broad allegation that the student requires a self-contained class. Additionally, to the extent that the parents allege that the district failed to enter the January 2015 neuropsychological evaluation report into evidence, the parents provided a copy of the report to the district prior to the July 2015 CSE meeting (Tr. pp. 159-60, 162) and the report was relied on by the July 2015 CSE (Dist. Exs. 1 at p. 2; 2 at p. 2); however, there is no reason that the parents could not have offered the document into evidence, particularly had it contained information to support a finding that the July 2015 IEP was not appropriate to address the student's educational needs. While the burden of proof rests with the district to establish that it offered the student a FAPE for the 2015-16 school year, the parents must allege something more than the absence of the evaluation report from the hearing record—i.e., that specific information contained in the evaluation report, but not included in the July 2015 IEP, indicated a need for a self-contained class (see K.C. v. New York City Dept. of Educ., 2015 WL 1808602, at *13 [S.D.N.Y. Apr. 9, 2015][general allegations are not sufficient to raise "specific defects in the timing and depth of the evaluative materials considered by the CSE"]). Accordingly, the student's program is reviewed based on the description of the student contained in the present levels of performance. Nevertheless, in the future, the IHO should consider requesting copies of the evaluative information considered by the CSE, because it is incumbent on the IHO to develop a complete hearing record (Application of a Student with a Disability, Appeal No. 15-056).

IEP also referenced the January 2015 neuropsychological evaluation report that indicated that the student's processing difficulties and cognitive weaknesses compromised his ability to process information quickly and accurately, he needed extra time to complete tasks and exams, and support during writing tasks (Dist. Ex. 1 at p. 2). The July 2015 IEP reflected teacher comments that the student was making progress, but that he continued to require teacher support (id. at pp. 1-2).

According to reports reflected in the July 2015 IEP, the student was "doing well" socially and emotionally as compared to his functioning in the past, he had solid social skills, and good friendships and relationships with his family (Dist. Ex. 1 at pp. 2-3). The IEP indicated that the student at times became "unduly frustrated" when faced with his own limitations, and was beginning to self-monitor his level of attentiveness and distractibility in class and identify the intensity of his emotions (id.).

To address the student's special education needs, the July 2015 CSE recommended placement in a general education classroom with ICT services in ELA, mathematics, social studies, and science, in addition to related services and paraprofessional services (Dist. Ex. 1 at pp. 8-9). 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 providing ICT services "shall minimally include a special education teacher and a general education teacher," and each such class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

Contrary to the parents' claim that the recommended program was not individualized to address the student's needs, a review of the July 2015 IEP shows that it included 17 annual goals which addressed the student's needs in the areas of reading, writing, mathematics, executive functioning, regulation, fine-motor skills, gross-motor skills, speech-language skills, and social/emotional functioning (Dist. Ex. 1 at pp. 4-8). More specifically, the July 2015 CSE developed annual goals that targeted the following deficits: attention and anxiety, organizational skills, the ability to identify states of arousal when challenged by academic tasks, the ability to learn to wait, listen, think and respond appropriately in class, the need to ask a teacher for support, and the ability to identify feelings of anxiety and express feelings with the use of coping strategies (id. at pp. 6-8). Moreover, in conjunction with the ICT services, the July 2015 CSE also recommended the following strategies to address the student's management needs: chunking, movement breaks, role play, a multi-sensory approach, wait time, extra time to complete tasks, a calculator, repetition, use of technology, 1:1 conferencing, frequent teacher check-ins, praise, graphic organizers, scaffolding, a daily planner, schedules, and checklists (Tr. pp. 38-39, 42; Dist. Ex. 1 at p. 3). The July 2015 CSE further addressed the student's needs by recommending related services consisting of two 40-minute individual sessions and one 40-minute group session of counseling per week, one 40-minute individual session and one 40-minute group session of OT per week, and one 40-minute individual session of speech-language therapy per week (Tr. p. 42; Dist. Ex. 1 at p. 9). Additionally, the July 2015 CSE recommended full-time group paraprofessional services to provide the student with support to cope with his sensory regulation needs, cognitive weaknesses (i.e., processing speed), and symptoms of his attention deficit diagnosis (Tr. pp. 37-39, 42; Dist. Ex. 1 at pp. 2-3).

According to the special education teacher, following a review of the information available to the July 2015 CSE, district members of the CSE determined that a general education classroom with ICT services was an appropriate recommendation based on the student's cognitive and

academic abilities (Tr. pp. 13-14, 42). The evidence in the hearing record reflects that the July 2015 CSE considered various placement options for the student, including recommending only a general education classroom; however, the July 2015 CSE opted against this placement, having determined that it would not address the student's learning difficulties (Dist. Exs. 1 at p. 13; 2 at p. 2). Additionally, the July 2015 CSE considered a 12:1 special class placement; however, the CSE also rejected this option having deemed it "too restrictive for [the student] at this time, and because the student would "need a more rigorous academic curriculum" (id.). Ultimately, the July 2015 CSE determined that a general education classroom with ICT services was appropriate, because it was a supportive placement for the student in the LRE (see Tr. p. 14). The special education teacher further testified that this placement offered the student the advantage of sharing a classroom with general education students, with the opportunity to socialize with peers and learn grade-appropriate curriculum (Tr. pp. 14-16). He also noted that in the ICT setting, students had the advantage of small group instruction and that there was a special education teacher in the classroom for individuals who needed a modified curriculum (Tr. pp. 14-15).

Regarding the parties' claims surrounding the recommended classroom ratio, the student's mother testified that the July 2015 CSE discussed "different levels" of special education; however, she suggested placement of the student in a 12:1 special class because of his "inability to kind of deal in a large group, and the fact that he needs a lot of prompts to stay on task." (see Tr. pp. 168-69; Dist. Ex. 1 at p. 13).[10] She maintained that the student could not attend a "25-kid class," and further noted that he was "in a place with even in a 10- or 12-kid class, [the student got] one-to-one kind of refocusing" (Tr. p. 169). The parents continue to advance this argument on appeal, and allege that even in a class of eight students, the student exhibited anxiety, attention difficulties, and verbal impulsivity. To the extent that the parents appear to equate the student's attention difficulties in a class of eight students with an inability to function in a class with a higher number of students, the hearing record lacks information that supports a finding that the student's inattentiveness and need for redirection would increase solely due to the presence of more students in the class.[11] Even assuming for the sake of argument that the student's attention difficulties would increase with the presence of more students in the classroom, a general education classroom with ICT services would be staffed by two teachers—similar to the student's classroom at Lang—and to offer more support and individualized attention to the student, the July 2015 CSE also recommended full-time group paraprofessional services (Tr. pp. 15, 37, 111; Dist. Ex. 1 at pp. 2-3, 8-9; Parent Ex. G at p. 3). More specifically, the July 2015 CSE recommended paraprofessional services for the student to support his ability to cope with his sensory regulation, cognitive weaknesses, and symptoms and struggles associated with his attention difficulties throughout the day, pursuant to teacher reports that the student required adult support, prompts, and redirection (compare Dist. Exs. 1 at pp. 2-3, with Dist. Ex. 4 at pp. 3, 4, 9, 11-13, 24, 26). Notwithstanding the parents' belief that the presence of a paraprofessional would be "a disaster" for the student because he understood "how the social world works, and he [could not] be in a class with a para," and he "[could not] have someone who [wa]s, you know, just standing over him and trying to get

[10] To the extent the parents requested that the student be placed with "gifted" students "who [we]re also really smart…, but also have some issues," the hearing record shows that the student's program of a general education classroom with ICT services provided opportunities for the student to interact with "kids at [the student's] cognitive level, "to learn "grade appropriate curriculum," as well as interact with other students with disabilities (Tr. pp. 14, 170).

[11] Rather, the hearing record suggests the student has not had the opportunity to receive instruction in a class of more than 10-12 students (Parent Ex. G at p. 3; see Tr. pp. 97, 146).

him to pay attention," the student's mother further testified that the student "need[ed] teachers to redirect him when he need[ed] redirection," and that he needed and received "one-to-one kind of refocusing" at Lang (Tr. pp. 169-70).

Although the parents maintain that the student required a smaller class with more teacher supports and individualized attention than a general education classroom with ICT services could provide, they do not cite to any specific evidence in the hearing record to support their allegations. Rather, a review of the hearing record reveals that in accordance with teacher reports, the parents stated that the student required refocusing, prompts to stay on task, and 1:1 attention from a teacher in his then-current classroom setting, which the CSE included in the July 2015 IEP in the form of a regular education teacher, a special education teacher, paraprofessional services, and the provision of 1:1 conferencing (compare Tr. pp. 169-70, with Dist. Ex. 4 at pp. 3, 4, 9-13; Dist. Ex. 1 at pp. 3, 8-9). Furthermore, the July 2015 IEP reflected the parents' and teachers' concerns that the student's anxiety and attention affected his work output, and consequently, the July 2015 CSE incorporated strategies and supports to address these concerns, including movement breaks, role play, a multisensory approach, repetition, and checklists (Tr. pp. 34-39; compare Dist. Ex. 1 at pp. 2-3, with Dist. Ex. 4 at p. 3). To further address the student's attention and regulation difficulties, the July 2015 IEP also included individual sessions of speech-language therapy, OT, and counseling, in addition to annual goals to identify states of arousal when feeling challenged, learn to "wait, listen, think and respond" appropriately in class, ask for teacher assistance for challenging tasks, and identify feelings of anxiety and express those feelings appropriately (Dist. Ex. 1 at pp. 6-8). Finally, to address the student's weaknesses in fluency and processing speed, the July 2015 IEP included strategies such as extra time to complete tasks, the use of a calculator, and the use of technology, as well as paraprofessional and related services to support him (id. at pp. 1-3, 9). In view of the foregoing, the recommended program of a general education classroom with ICT, paraprofessional, and related services was responsive to the parents' concerns of having the student in a classroom with typical peers and peers with disabilities, as well as having staff available to assist and redirect the student when needed.

Based on the foregoing, and in light of the student's above average cognitive abilities and academic skills, the July 2015 CSE's recommendation of ICT services in a general education setting with related services and the support of a paraprofessional, was appropriate to meet the student's needs and reasonably calculated to enable the student to receive an educational benefit in the LRE.

D. Challenges to the Assigned Public School Site

The parents also allege that the assigned public school site was not appropriate to meet the student's needs. More specifically, they claim that school staff advised them that the school's ICT class was not appropriate for the student because the school's principal and school psychologist expressed concerns that the student would not be able to meet "academic demands in such a large environment" and indicated that the class was "too large and lively" (Pet. ¶¶73-80). As explained in greater detail below, the evidence in the hearing record does not support the parents' claims.

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., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL

1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[12] Since the R.E. decision, however, several courts—including the Second Circuit—have continued to wrestle with and define what constitutes permissible prospective challenges to an assigned public school site and a district's "capacity" to implement an IEP, as well as which party bears the burden of proof on this issue (see, e.g., M.O. v. New York City Dep't of Educ., 793 F.3d 236, 243-46 [2d S.D.N.Y. 2014]; J.M. v. New York City Dep't of Educ., 2016 WL 1092688, at *8-*11 [S.D.N.Y. Mar. 21, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *7-*12 [S.D.N.Y. Mar. 7, 2016]; C.S. v. New York City Dep't of Educ., 2016 WL 815235, at *6-*7 [S.D.N.Y. Feb. 29, 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *8-*9 [Feb. 24, 2016]; M.E. v. New York City Dep't of Educ., 2016 WL 703843, at *10-*14 [S.D.N.Y. Feb. 23, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5-*7 [S.D.N.Y. Feb. 11, 2016]; W.W. v. New York City Dep't of Educ., 2016 WL 502025, at *4-*8 [S.D.N.Y. Feb. 8, 2016]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *7 [S.D.N.Y. July 31, 2015]).

Here, the parents' objection that the classroom at the assigned public school site was too large was addressed above as a claim challenging the appropriateness of the IEP recommendation for ICT services and, as such, does not challenge the district's capacity to implement the student's IEP or directly contradict the IEP. Therefore, it is not a permissible challenge to the district's ability to implement the IEP (see M.O., 793 F.3d at 245 [The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP"] Y.F., 2015 WL 4622500, at *7 [Such challenges must be "tethered" to actual mandates in the student's IEP]).

At the impartial hearing, the student's mother testified that during her September 2015 visit to the assigned public school site, the school principal showed her "the ICT class which had 27 children in it" and indicated that it "was a very lively bunch of kids, and it was a tough class" (Tr. p. 174). In a subsequent conversation with the student's mother, the school psychologist further described the class as "very large," and "kind of a tough group, a lively group" (Tr. pp. 176-78).[13] According to the student's mother, the school psychologist "was very concerned about [the student] not being able meet the academic demands in such a large environment" (id.).

In addressing the parents' objections to the assigned public school site at the impartial hearing, the district presented testimony from the school psychologist at the assigned school (see

[12] 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 deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

[13] To the extent that the parents' claim relates to the functional grouping of the of the students in the class, this claim is also inherently speculative, as there is no guarantee as to the composition of the class the student would have attended (see J.C., 643 Fed. App'x at 33 [noting that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible"]; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]).

Tr. pp. 50-73). While the school psychologist could not exactly recall advising the student's mother that the proposed classroom contained students with "a wide range of disabilities," she conceded that "it was likely true" that she made this statement (Tr. pp. 58-59). Likewise, the school psychologist admitted that it was "likely" that she characterized the students in the proposed classroom as "lively" (Tr. p. 59). However, to the extent that the parents claim that the school psychologist indicated that the student's enrollment in the district would be "a huge jump" for the student, the school psychologist explained that she advised the student's mother that should the student enroll in the district assigned public school, an ICT classroom was "a lot larger," and that needed to be taken into consideration to facilitate his transition (Tr. pp. 59-60). Moreover, notwithstanding the parents' allegation that the school psychologist had expressed concerns regarding whether the student would be able to meet the academic demands imposed on him in an ICT classroom, the school psychologist explained that while she did not "affirm" the student's mother's concerns, she "was just trying to sympathize and be empathetic to the [p]arent in regard to her concern about [the student's] potential difficulties transferring from a smaller class to a larger class" (Tr. pp. 61, 64-65). She further testified that the assigned public school site would be "cognizant" of the student's individual needs during the transition (Tr. pp. 69-70). Lastly, the school psychologist testified that she advised the student's mother that if the student's IEP recommended placement in an ICT classroom, then the assigned public school site could provide that to him (Tr. p. 56). She further testified that the assigned public school site would have been able to provide all the recommended programs and services on the student's July 2015 IEP (Tr. pp. 56-57).

As an additional challenge to the assigned public school site's ability to implement the student's IEP, the student's mother testified that the school principal expressed concern "that she didn't think that she could get [the student] a para right away" (Tr. p. 175). The student's mother explained that her understanding was that the proposed class did not have a paraprofessional available and that the paraprofessional was going to be specifically for the student (Tr. p. 190).[14] However, the fact that the school may not have yet arranged for group paraprofessional services in order to implement the student's IEP does not indicate that the school was incapable of doing so, or that the school would not have made arrangements for the student to receive paraprofessional services once he was enrolled in the school (see M.T. v. New York City Dept. of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016][testimony that parent was told school discourages one-on-one paras is not evidence school would not have implemented IEP]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. Appx. 80 [2d Cir. 2012][minor deviations from an IEP over a short period do not constitute a failure to implement a substantial portion of an IEP]). I further note that the parents rejected the July 2015 IEP on August 24, 2015 and in doing so informed the district that they were unilaterally placing the student at Lang "as of the first day of school for academic year 2015-2016" (Parent Ex. I at p. 1). The hearing record shows that the student attended Lang in September 2015 and although at that time the parent visited the assigned school cite, there is no indication in the hearing record that

[14] The parent also contends that the "health paraprofessional" recommended on the student's IEP was not the right kind of paraprofessional for the student (Pet. ¶70); however, while a health paraprofessional may not have been the right designation for this student, "health paraprofessional" is not a title designated by State regulations and there is no indication in the hearing record that the student required a paraprofessional with a specific skill set (see K.L. v. New York City Dep't of Educ., 530 Fed. Appx. 81, 85 [2d Cir. 2013] [no evidence assigned "crisis paraprofessional" could not perform the same functions as the "health paraprofessional" requested by parents]).

she indicated she would subsequently enroll the student in the public school, thereby triggering the district's duty to implement the July 2015 IEP (see Tr. p. 174; Parent Ex. H).

Therefore, the parents' challenges to the assigned public school site do not implicate the school's capacity to implement the IEP and, accordingly, they are speculative (see M.O., 793 F.3d at 245).

VII. Conclusion

In summary, a review of the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2015-16 school year. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether Lang was an appropriate unilateral placement or whether equitable considerations support the parents' claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 24 , 2017

CAROL H. HAUGE
STATE REVIEW OFFICER