



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-026

**Application of a STUDENT WITH A DISABILITY, by her 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:**

Cleary Gottlieb Steen & Hamilton LLP, attorneys for petitioner, Lisa M. Schweitzer, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Ilana Eck, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at a nonpublic school (NPS 1) for the 2016-17 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**

At the time of the hearing, the student was attending NPS 1 (Tr. pp. 244-45; see Parent Ex. H). The hearing record reflects that the student received a diagnosis of congenital cytomegalovirus (CMV) after birth, which resulted in brain injury, and further diagnoses of microcephaly, hearing loss, spastic quadriplegia, seizure disorder and cerebral palsy (Tr. pp. 263-64; Parent Exs. C at p. 1; L at p. 1; Dist. Exs. 3 at p. 1; 6 at p. 1; 7 at p. 3; 8 at p. 1; 9 at p. 1; 10 at p. 1). The student is non-ambulatory and nonverbal (Parent Ex. C at p. 1; Dist. Ex. 3 at p. 1). The student was also described as highly sociable and inquisitive, and able to communicate using a variety of nonverbal means such as eye gaze, reaching, vocalizations, facial expressions, and communication switches (Parent Ex. C at p. 1; Dist. Exs. 6 at p. 1; 7 at p. 4).

For the 2015-16 school year, the student had been parentally placed at a different NPS (NPS 2) (Parent Ex. C at p. 1; Dist. Ex. 8 at p. 1). A CSE convened on June 9, 2016 to develop an IEP for the 2016-17 school year (Parent Ex. C at p. 28). The June 2016 IEP developed by the CSE determined that the student was eligible for special education and related services as a student with a traumatic brain injury and recommended 12-month services in a 6:1+1 special class in a specialized school with the related services of five individual speech-language therapy sessions per week for 60 minutes each, three individual occupational therapy (OT) sessions per week for 60 minutes each, five individual physical therapy (PT) sessions per week for 60 minutes each, and five individual hearing education services sessions per week for 60 minutes each (*id.* at pp. 1, 24-25).<sup>1</sup> The CSE further recommended supplementary aids and services of a full time 1:1 health paraprofessional, a full time 1:1 transportation paraprofessional, and a dynamic display speech generating device (SGD) (*id.* at p. 25).

On May 27, 2016, the parent executed an enrollment contract for the student's attendance at NPS 1 for the 2016-17 12-month school year (Parent Ex. H).<sup>2</sup> The district sent a school location letter to the parent on June 9, 2016, which identified the particular public school site to which the district assigned the student for the 2016-17 school year (Dist. Ex. 5). On June 11, 2016, the district provided the parent with prior written notice of its recommendation summarizing the recommended services for the 2016-17 school year (Dist. Ex. 4).

By letter dated June 21, 2016, the parent notified the district that she believed the June 2016 CSE recommended an inappropriate placement, and that the district did not select an appropriate assigned public school (Parent Ex. J at pp. 1-2). The parent indicated that she agreed that the student needed a small classroom with a "high student to adult ratio;" however, based on her review of the district's description of its 6:1+1 classes, she felt that the description of students intended for a 6:1+1 district classroom was not similar to how the student was described in her IEP (*id.* at p. 1). The parent informed the district that she visited the assigned school on June 20, 2016 and learned that although the school had a few 6:1+1 classrooms, all of them were attended by ambulatory students with classifications of autism (*id.* at pp. 1-2).<sup>3</sup> The parent also expressed concern that the assigned school could not implement the June 2016 IEP because related services were provided in 20 or 30 minute sessions, while the student's IEP mandated 60-minute sessions, and because the assigned school did not offer conductive education (*id.* at p. 2).<sup>4</sup> For those reasons,

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<sup>1</sup> The hearing record indicates that the student's brain injury resulted from congenital CMV (Dist. Ex. 7 at p. 3). Although the student's eligibility for special education programs and services as a student with a traumatic brain injury is not in dispute in this proceeding, congenital conditions are listed as exceptions to the regulatory definitions (34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

<sup>2</sup> The Commissioner of Education has not approved NPS 1 as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

<sup>3</sup> The parent testified that she visited the assigned school site on two occasions (Tr. p. 233). The June 20, 2016 visit is the only date indicated in the letter (Parent Ex. J at p. 1).

<sup>4</sup> During the hearing, the parent testified that the student had been participating in conductive education for approximately five years (Tr. p. 232). The student's conductive education provider at NPS 1 described conductive education as "a holistic approach to habilitation or rehabilitation" and further testified that it is intended to "develop the process of active learning" and improve the student's motor skills and problem-solving abilities to increase independence (Tr. pp. 508-09; *see* Parent Ex. E at p. 1).

the parent notified the district that she would be unilaterally enrolling the student in NPS 1 for the 12-month 2016-17 school year and seeking tuition reimbursement (id.). The parent also indicated that in order for the student to attend NPS 1, she required related service authorizations (RSAs) from the district for the student's related services, as well as a 1:1 health paraprofessional and a 1:1 transportation paraprofessional (id.).

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

By amended due process complaint notice dated August 1, 2016, the parent alleged that the district failed to offer the student a FAPE for the 2016-17 school year (Parent Ex. G).<sup>5</sup> In particular, the parent agreed with the June 2016 CSE to the extent that the student required "a small classroom with a high student to adult ratio," but believed the student would not have been grouped appropriately in a district 6:1+1 classroom because the student did not match the district's documentation describing the types of students intended for a 6:1+1 classroom (id. at pp. 2-3). The parent also contended that the assigned public school would not have been able to implement the IEP because the students in the classes the parent observed during her visit had "significantly different physical, communication and social needs than [the student]," the parent was informed related services at the school are typically provided in 20-30 minute sessions rather than 60-minute sessions as recommended in the June 2016 IEP, and the school "could not meet the three conductive education goals stated on [the student's] IEP" because it did not have conductive education (id. at p. 3). The parent further asserted that NPS 1 is an appropriate placement and invoked pendency rights associated with a prior unappealed IHO decision (id. at p. 4). The parent requested that the district provide RSAs for hearing education services, OT, PT, speech-language therapy, and a transportation paraprofessional (id. at p. 5). As relief, the parent requested funding of the student's tuition at NPS 1 and the provision of related services and a transportation paraprofessional by the district at NPS 1 for the 2016-17 school year (id.).

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

A hearing to determine the student's pendency placement was held on July 26, 2016 (Tr. pp. 1-19). During the hearing, the district did not object to the parent's request for pendency (Tr. pp. 7-15). By decision dated July 26, 2016, the IHO issued an interim order on pendency finding that the student's pendency placement was NPS 1 and included the related service of speech-language therapy (Interim IHO Decision at p. 1). The IHO ordered the district to provide direct payment or reimbursement of the student's tuition at NPS 1 and four individual speech-language therapy sessions per week for 30 minutes each at school, during the pendency of the proceeding (id.).

A pre-hearing conference was held on August 22, 2016 (Tr. pp. 20-24). The impartial hearing began on October 14, 2016, and concluded on December 20, 2016, after five hearing dates (Tr. pp. 25-644). In a decision dated February 13, 2017, the IHO found that the district offered the student a FAPE for the 2016-17 school year (IHO Dec. at p. 17). The IHO addressed each of the parent's contentions raised in the amended due process complaint notice and found each of them to be without merit (id. at pp. 18-22). After stating that it was not necessary to determine whether the parent's unilateral placement of the student at NPS 1 was appropriate, the IHO

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<sup>5</sup> The parent originally submitted a due process complaint notice dated July 6, 2016 (Parent Ex. A).

indicated three concerns relating to NPS 1 (id. at p. 22). The IHO noted that NPS 1 did not have a nurse on staff, which she believed compromised the student's safety; explained that NPS 1 did not implement conductive education according to the standards included in the hearing record and that the record did not demonstrate conductive education was "having a positive effect" on the student; and questioned why NPS 1 required RSAs to cover the cost of related services (id.). Lastly, the IHO determined that the parent did not demonstrate her entitlement to prospective payment of the student's tuition and found that the parent had no intention of considering a public school placement given the date she signed the NPS 1 enrollment contract and she did not offer evidence of her household income (id.).

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

The parent appeals and alleges that the IHO erred by finding that the district's assigned school was capable of implementing the June 2016 IEP. Specifically, the parent alleges the IHO erred in finding that the student would have been grouped with functionally similar peers at the assigned school. In addition, the parent argues that the assigned school did not offer conductive education, which the parent contends was incorporated within the June 2016 IEP and, thus, the IEP required the use of that particular methodology. The parent contends that the IHO erred in finding that the student did not require conductive education and that the district could have implemented the conductive education goals included in the June 2014 IEP through OT and PT. The parent further asserts that the IHO reached improper conclusions regarding conductive education because the IHO improperly accepted and relied on documents submitted by the district, which the parent seeks to counter on appeal through the submission of additional evidence. Specifically, the parent alleges that the IHO erred by allowing the district to cross-examine her witness from NPS 1 with documents not admitted into evidence until much later. The IHO then impermissibly admitted those documents into evidence and improperly relied on them in making her findings of fact. The parent included four additional exhibits with her request for review to rebut the improper evidence admitted during the hearing. The parent contends that the IHO improperly relied on retrospective testimony in determining that the district's assigned school was capable of implementing the conductive education goals included in the June 2016 IEP.

With regard to the unilateral placement of the student, the parent contends that NPS 1 was appropriate and that the IHO made several incorrect conclusions and held the parent to a higher standard than the law permits. She further argues that NPS 1 was capable of implementing the student's June 2016 IEP, that the student made progress during the 2016-17 school year, and that the IHO made impermissible findings about and relied on a misunderstanding of conductive education.

The parent also claims that the IHO, in concluding that equitable considerations did not favor the parent, failed to consider the parent's cooperation with the district's CSE, her timely notice to the district of her decision to unilaterally place the student, and her willingness to consider the district's recommended placement. The parent argues that the IHO relied on a single factor in her determination and ignored the parent's evidence that she visited the assigned school twice and that the enrollment contract had a release clause if the parent accepted the district's recommended program and placement. As such, the parent argues that equitable considerations are in her favor.

As relief, the parent requests that the IHO's decision be reversed. The parent seeks a determination that the district denied the student a FAPE for the 2016-17 school year, that the student's unilateral placement was appropriate, and that equitable considerations weigh in her favor. The parent further requests an award of direct payment or reimbursement of the student's cost of attendance at NPS 1.

In an answer, the district responds to the parent's allegations with admissions and denials, and argues that the IHO's decision should be upheld in its entirety. The district contends that conductive education goals were included in the June 2016 IEP because the student's placement at the time of the CSE meeting used that terminology to describe its adapted physical education program. The district argues that the assigned school was appropriate because the student would have been grouped with peers with similar needs and academic functioning levels. The district also maintains that a seat was available for the student and the assigned school was capable of implementing the June 2016 IEP. The district alleges that the conductive education goals on the student's IEP were related to exercise and motor planning that would be implemented by a teacher, a paraprofessional, an occupational therapist and/or a physical therapist at the assigned school. The district claims that the IHO did not rely on retrospective evidence and objects to the parent's offer of additional evidence. The district further argues that the parent's witness from NPS 1 testified that she did not use any special equipment with the student when providing conductive education, and was not certified or educated in the U.S. The district also alleges that the parent's assigned school claims are speculative because the parent signed the NPS 1 enrollment contract before receiving a school location letter from the district.

The district also alleges that the parent's unilateral placement was not appropriate because the student was not receiving related services according to the June 2016 IEP, NPS 1 did not have a nurse on staff, and the student's paraprofessional was not trained to address the student's health and management needs. The district also contends that NPS 1 was not capable of implementing the IEP and that the only related services the student received were pursuant to the IHO's interim order on pendency. Lastly, the district agrees with the IHO that the parent did not offer any proof of her inability to pay the student's attendance costs at NPS 1 and requests that the IHO's decision be affirmed.

In a reply, the parent responds to the district's defenses. The parent alleges that because the district did not raise an equitable considerations defense, the district has conceded that equitable considerations are in her favor. The parent also contends that the district, in defending the assigned school's ability to implement the conductive education goals, concedes that conductive education was required by the June 2016 IEP. Additionally, the parent argues that the district has raised additional claims related to the parent's unilateral placement that were not addressed in the request for review and responds to them.

## **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, 180-83, 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).

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]). 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 Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. \_\_\_, 2017 WL 1066260, at \*11-\*12 [Mar. 22, 2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]).

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]), 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).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

According to the parent, the IHO erred in allowing the district to cross-examine the parent's witness using documents that were not yet admitted into evidence and further erred in allowing those documents into evidence after the conclusion of witness testimony. The parent further alleges the IHO relied on this improper evidence to make incorrect conclusions about conductive education. In order to remedy this, the parent offers four additional exhibits which she argues is rebuttal evidence to counter the improper evidence admitted during the hearing. The district objects to the consideration of the parent's additional documentary evidence, on the ground that it was available at the time of the hearing.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F.

Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

On December 20, 2016, the parties convened "for the sole purpose of the [d]istrict's request to offer some exhibits in rebuttal to the [p]arent's witness" on conductive education (Tr. p. 612). These are the exhibits that the parent alleges were improperly admitted into evidence by the IHO. The hearing record reveals that both parties were given the opportunity to argue for or against admission of the district's exhibits (Tr. pp. 613-30). The attorney for the parent objected to all of the proffered exhibits at that time and the IHO agreed with her regarding two of them.<sup>6</sup> Additionally, the IHO reiterated that when she agreed to allow the district's attorney to offer rebuttal exhibits on an additional hearing date, she also gave the parent's attorney the opportunity to offer her own rebuttal exhibits, which the parent's attorney declined to do (Tr. pp. 619-20).

The district is correct that the parent's rebuttal exhibits were available at the time of the impartial hearing and the parent had the opportunity to present them for the IHO's consideration at that time (see Tr. pp. 619-20, 632). I decline to exercise my discretion to now admit such documents as evidence as they are also not necessary to render a decision in this matter.

## 2. Scope of Review

In her reply, the parent alleges that the district has raised three claims that are not addressed in the request for review. The parent also argues that the district has conceded that equitable considerations favor the parent because the district did not raise a specific equitable considerations defense.

As relevant herein, State regulation provides that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal," will be accepted or considered, except a reply to any claims raised for review by the answer that were not addressed in the request for review, or to any procedural defenses interposed in an answer, or to any additional documentary evidence served with the answer (8 NYCRR 279.6[a]).

The parent alleges that the district has changed its strategy in its answer and has focused on "three trivial details" to demonstrate that the student's unilateral placement was not appropriate (Reply ¶ 6). The three claims according to the parent are that NPS 1 does not have a nurse on staff, the paraprofessional at NPS 1 has no formal training in the areas of toileting, seizure disorder, or motor difficulties, and the student is not receiving all of the mandated services set forth in the June 2016 IEP (id.).

The parent's characterization of portions of the district's answer as claims not addressed in the request for review is not accurate. A review of the hearing record demonstrates that the district

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<sup>6</sup> The IHO declined to admit the district's exhibits R13 and R14, which were marked for identification, and admitted district exhibits 10-12 and 15-16 (Tr. p. 631). The exhibit list annexed to the IHO's findings of fact and decision correctly lists the exhibits admitted during the hearing; however, exhibits R13 and R14 for identification were included with the hearing record submitted to the Office of State Review. Notwithstanding the submission, only exhibits admitted into evidence by the IHO were considered as part of the review of the hearing record (8 NYCRR 279.12).

is arguing in support of specific factual findings and conclusions of law made by the IHO in her findings of fact and decision (compare IHO Decision at pp. 13-14, 17, 22; with Answer ¶¶ 30-32).

With regard to the parent's claim that the district did not raise a specific defense on the matter of equitable considerations, the hearing record reflects that the district argued in support of the IHO's findings of fact and decision. The IHO did not delineate a specific equitable considerations section of the decision; however, the IHO made a specific finding that the parent's failure to present evidence regarding her ability to pay the student's tuition at NPS 1 would have been a basis for denying the parent's request for direct funding of the student's tuition (IHO Decision at pp. 22-23). The district uses similar language from the IHO's decision on appeal as a basis for upholding the IHO's decision and accordingly, the district's argument in support of the IHO's finding is preserved on appeal.

The parent's reply is only considered to the extent that it addresses claims raised for review by the district's answer that were not addressed in the request for review.

### **B. June 2016 IEP Claims**

The IHO determined that the parent agreed with the recommended program, annual goals, and related services on the June 2016 IEP and limited her review to the parent's claims related to the assigned school's ability to implement the IEP (IHO Decision at p. 18). In its answer, the district asserted that the parent did not challenge the IHO's finding regarding the June 2016 IEP.

In her reply, the parent explains that she objects to the IHO's interpretation of the IEP, referencing her argument in her request for review that the IHO erred in finding that conductive education was not a part of the IEP (Reply ¶4; see Req. for Rev. ¶4.II, III). The parent also contends that her functional grouping claim included an alternative argument that the June 2016 IEP was not appropriate because it did not address the student's need to be grouped with students with similar physical challenges (see Parent Mem. of Law. At p. 20). To support this assertion, the parent cites to a footnote in her memorandum of law containing similar language as the reply (Mem. of Law n. 6 at p. 20).

It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8 [c][3], [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[b], [c]). Thus, any argument included solely within a memorandum of law has not been properly asserted. Additionally, arguments raised only in footnotes are insufficient to preserve an argument for review on appeal (see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003], quoting United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]).

While the parent is correct in that she raised an argument as to whether the June 2016 IEP required the use of conductive education to be implemented, the footnote within the parent's memorandum of law was not sufficient to recast her functional grouping claim as an IEP claim. Accordingly, it will not be considered as such and the parent's claims are fully addressed below within the context of an assigned school challenge.

## C. Challenges to the Assigned Public School Site

### 1. Functional Grouping

The parent objects to the functional grouping in the proposed 6:1+1 special class at the assigned school. The parent argues that the students in the proposed class had different physical, communication, and social needs from the student. In particular, the parent alleges that, during her visits to the assigned school site, the students in the 6:1+1 classrooms were ambulatory and had classifications of autism.<sup>7</sup> The parent was concerned that the student would feel left out during activities when the other students were moving around the classroom and further that the student might be injured during physical activities if another student "bumped into" her daughter's wheelchair (Tr. p. 242). The district argues and the IHO agreed that the student would have been grouped with students with similar needs, such as, acquiring language, use of an augmentative communication device and/or sign language, similar management needs, as well as similar academic functioning levels. As explained more fully below, a review of the evidence in the hearing record supports the IHO's conclusion that the student was appropriately functionally grouped in the proposed 6:1+1 classroom.

Initially, it is well settled that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement" (Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]). The IDEA provides that parents are entitled to participate in the decision-making process regarding the "educational placement" of the student (20 U.S.C. § 1414[e]), which the Second Circuit has interpreted to mean "the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see Luo v. Baldwin Union Free Sch. Dist., 2017 WL 391991 [2d Cir. Jan. 27, 2017]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; R.E., 694 F.3d at 191-92). The United States Education Department has explained that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]; see Letter to Veazy, 37 IDELR 10 [OSEP 2001] [stating that "the assignment of a particular school or classroom may be an administrative determination, provided that determination is consistent with the placement team's decision"]). Moreover, the "IDEA affords the parents no right to participate in the selection of [their] child's

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<sup>7</sup> In her due process complaint notice the parent alleged that the district's description of its 6:1+1 classes indicated that such classes were for students who exhibited behaviors that were "aggressive, self abusive or extremely withdrawn and with severe difficulties in the acquisition and generalization of language and social skill development" (Parent Ex. G at pp. 2-3). The IHO dismissed this claim as speculative because the parent did not observe any students in the proposed classroom who were aggressive or self-abusive (IHO Decision at p. 18). The IHO also dismissed the parent's claim that the assigned school would not have provided the related services as set forth on the June 2016 IEP (id. at p. 19). The parent has not appealed from the IHO's findings regarding these claims and they are final and binding and will not be addressed (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]).

classmates" (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*11 [S.D.N.Y. Feb. 20, 2013]).

With regard to the parent's argument that the student would not be appropriately grouped with the other students in the proposed 6:1+1 classroom, State regulations require that for instructional purposes, students in special classes must be grouped with students having similar individual needs (8 NYCRR 200.1[uu], [ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 126). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students with respect to their "levels of academic or educational achievement and learning characteristics"; "levels of social development"; "levels of physical development"; and "the management needs of the students in the classroom" (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of individual students should be considered to ensure each student the opportunity to benefit, although neither may be the sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students grouped together may vary, the modifications, adaptations, and other resources needed by any student may not "consistently detract from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][3][iv]; see 8 NYCRR 200.1[ww][3][ii] ["the instruction required to meet the individual needs of any one student in the group shall not consistently detract from the instruction provided other students in the group"]).

While the adequacy of the evaluative information and the present levels of performance as described in the June 9, 2016 IEP is not in dispute in this matter, a discussion of the student's skills and needs is relevant to the determination of whether the student would be suitably grouped for instructional purposes in the proposed 6:1+1 classroom. On March 26, 2015, a psychologist from NPS 2 conducted a psychological evaluation of the student (Dist. Ex. 7). Although due to her motor and communication limitations the student could not offer responses during the administration of formal cognitive and academic achievement measurements, nonetheless the evaluator reported scores which indicated to the evaluator that the student exhibited "a profound and generalized deficit of intellectual functioning" and academic skills within the very low range of functioning (id. at pp. 5-7). With respect to adaptive behavior, the student's composite standard score indicated low general adaptive functioning (id. at pp. 7-8). According to parent and teacher reports, the evaluator described the student as unable to self-soothe or entertain herself and needing support in all activities (id. at p. 4). By observation, the evaluator reported that the student communicated with eye gaze, facial expressions, gestures/reaching and vocalizations during the evaluation (id.). The evaluator noted that the student used forced-choice or pictures to communicate, and needed maximal prompting and assistance to communicate (id.). The student was also reportedly highly distractible despite being in a quiet room with her paraprofessional and the evaluator (id.). The student required constant redirection and maximal assurance and assistance from her paraprofessional to maintain focus and engage in testing (id.). In summary, the evaluator recommended that the student be placed in a 6:1+1 classroom and be provided with the support of a 1:1 health paraprofessional and a 1:1 transportation paraprofessional (id. at p. 10).

The June 2016 IEP included information from a March 2016 NPS 2 report about the student's present levels of performance and progress (compare Dist. Ex. 9 at pp. 1-13, with Parent Ex. C at pp. 1-13).

The June 2016 IEP reflected that NPS 2 provided information regarding the student's academic functioning (compare Dist. Ex. 9 at pp. 1-2, with Parent Ex. C at pp. 1-2). The IEP indicated that the student made gains in many areas of academic achievement throughout the 2015-16 school year—including literacy and math—and demonstrated potential to continue to make gains given the appropriate supports (Parent Ex. C at p. 2). The student's level of focus throughout academic sessions increased dramatically when sign language was incorporated with instruction (id.). The IEP further described the student as severely impaired in the areas of cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, information processing, and speech (id.). Notwithstanding, the IEP also indicated that the student demonstrated intellectual and cognitive potential to learn and excel, but her "progress is dictated by her physical health and well-being" (id.).

In the area of literacy, the IEP indicated that the student was working on identifying common sight words and answering comprehension questions following texts up to a first grade level (Parent Ex. C at p. 2). The student had reportedly made progress toward prior literacy goals of identifying 15 sight words out of a field of three, and demonstrating understanding of who, what, where questions at a minimum of a first grade level (id.). The IEP reflected recommendations that the student continue to work toward identifying sight words up to a primer level, with support from short texts and sign language, as well as working toward answering closed-ended "wh- questions" following texts up to a second grade level (id.).

At the time of the June 2016 CSE meeting, according to the IEP the student was working toward symbol and quantity identification as well as solving simple addition problems given manipulatives and moderate support in mathematics (Parent Ex. C at p. 2). The student had reportedly made progress toward a prior math goal of increasing her ability to solve simple addition problems with the use of manipulatives for numbers up to 10 (id.). The IEP again noted that the student benefited from the use of motivating manipulatives and sign language when counting or presenting number symbols to ensure understanding and by asking the student to "reach" for the correct answer (id.).

Turning to the student's communication skills, the June 2016 IEP described the student as highly sociable, inquisitive, and able to communicate basic wants, needs, emotions, and opinions on a consistent basis utilizing nonverbal methods of communication (Parent Ex. C at p. 1). The IEP reflected reports that the student produced open vowel sounds, smiled and looked at different people in order to initiate interactions or conversations with the provider or other conversational partners, or to request routines and activities that she enjoyed by using communication symbols or an SGD with multimodal, multisensory prompts, and sign language (id. at p. 3). The student demonstrated the ability to engage in conversational turn taking, respond to "wh-questions" in routine conversations, and express yes or no answers by using "her best 'yes' smile" or "deny/reject" and by using symbols or reaching toward "the one she wants" (id.). The student demonstrated understanding of words as a part of a sentence, completed sentences on a black velcro board by adding missing words, and recognized written words from a field of two by directly reaching towards the targeted word (id.). According to the IEP, the student understood one step verbal commands when presented with visual cues and aided by sign language (id.). With regard to oral motor functioning and feeding skills, although "g-tube dependent," she tolerated pureed food, and the student's goal was to improve to the point of safely consuming approved textures (id.). The IEP indicated that the student was also working on increasing the overall

strength, coordination, and mobility of oral motor muscles, to improve her execution of voluntary movements necessary for the production of open vowel speech sounds (id.).

Information from the hearing education section of the March 2016 NPS 2 report reflected in the June 2016 IEP indicated that using sign language in combination with the student's other means of nonverbal communication improved her focus and comprehension and ability to process questions (compare Dist. Ex. 9 at p. 4, with Parent Ex. C at p. 4). The student demonstrated the ability to respond to greetings and "how are you" with consistent accuracy, although it was noted that she typically responded with the same one-word answer (Parent Ex. C at p. 4). According to the IEP, with the use of sign language, pictures and symbols, and materials created by the hearing education provider, the student incorporated more expressions of feelings, identified the numbers 1 through 10, and read, retained and comprehended "beginning sight words" (id.).

The June 2016 IEP indicated that in order to make progress and prevent regression, the student required highly structured, "specialized settings" consisting of no more than six students, and "highly individualized attention and support, via small class size and continual adult supervision via a 1:1 paraprofessional throughout the duration of the school day" (Parent Ex. C at pp. 2, 5, 7). To address the student's significant academic needs, the IEP provided direct instruction, intense repetition of learning concepts, repeated exposure to learning objectives, multisensory supports, sensory breaks during instruction, and repeated directions (id. at p. 5). The IEP also indicated that the student required scaffolding during instruction, a modified environment that reduced visual and auditory distractions, and constant praise and frequent redirection to attend to academic tasks (id. at pp. 2, 5). According to the IEP, the student was motivated by social grouping; however, in academic settings, the student required 1:1 instruction due to her distractibility in a group (id. at p. 7). The student benefitted from a small group setting that allowed her to practice appropriate and reciprocal conversational skills, and increase functional communication skills (id.).

In the area of social development, the June 2016 IEP described the student as very friendly and social, preferring to be around other people (Parent Ex. C at p. 6). According to the IEP, the student interacted with both adults and peers, and expressed happiness and preferences through appropriate facial gestures and body language such as smiling, laughing, and reaching for others or objects (id. at p. 7). When upset, the student indicated "so by crying, making distressed sounds or looking away" (id.). The IEP also noted that the student expressed disappointment or frustration if unable to participate in group or preferred activities by crying, but was easily redirected (id.). The IEP further indicated that the student had demonstrated increased ability to initiate, reciprocate, and take turns in a group activity (id. at p. 6).

The June 2016 IEP included the student's present levels of performance as reported by the conductive education section of the March 2016 NPS 2 report, which generally described the student's ability to physically achieve and maintain desired positions (i.e., criss-cross sitting, quadruped) and improve voluntary movement (i.e., rolling, stepping, grasping) and head control (compare Dist. Ex. 9 at pp. 2-3, with Parent Ex. C at pp. 2-3). The IEP indicated that the student had made progress in some areas of her conductive education goals, however due to spasticity the student "could not manage to reach all of them" (Parent Ex. C at p. 2). When sitting and when laying in supine, the student's "tone appears to be low in her trunk and high in her extremities" (id.). The IEP also reflected that the student presented with poor head control when sitting and

when in a standing position, and that in these positions "[h]er lower extremities are in flexion, hips are tight, ankles rotate inwards. In prone her upper and lower extremities are flexed. She presents with a hip and knee contracture caused by her muscle tone" (*id.*). The student required arm gaiters and maximal assistance to push herself up into a quadruped position, "however flexion remains in wrists, elbows and shoulders" (*id.*). When in a standing position, the student tiptoed and her steps were described as "very small" with an uneven gait (*id.* at p. 3). When engaged in stepping, the student required maximal assistance to bear weight and to keep her upper body upright and in midline (*id.*). At the time of the June 9, 2016 CSE meeting, the student was able to take four steps with the help of a ladder-back chair and maximal assistance (*id.*). According to the IEP, the student did not initiate rolling, but with maximal assistance she was able to roll onto her side from both prone and supine positions (*id.*). The student found it challenging to reach for objects and to grasp and release them with proper palmar grasp, and required hand-over-hand assistance when holding onto objects (*id.*). The IEP noted that due to her age, continued growth and extremely high muscle tone, the student required spasticity management to prevent further contractures developing in her joints (*id.* at p. 5).

Concerning the student's levels of physical development, the June 2016 IEP reflected parent reports that the student used a variety of equipment such as a wheelchair, a stander, an adaptive bicycle, and an SGD, and was in the process of obtaining a gait trainer (Parent Ex. C at pp. 7, 8). According to the IEP, the student used a wheelchair as her primary means of mobility, which she did not propel without assistance, as well as specific equipment to assist her with standing and gait training activities (*id.* at pp. 8, 10). The IEP described in extensive detail the student's ability to perform and sustain a variety of movement activities such as rolling, lifting her head, sitting, and standing, many of which required assistance (*id.* at pp. 10-11).

The June 2016 IEP reflected details regarding the student's muscle tone, and difficulty coordinating grasp and release patterns consistently, and maintaining her head in a midline position and an upright sitting posture (Parent Ex. C at p. 8). According to the IEP, the results of an administration of a sensory profile indicated that the areas of concern included the student's attentional responses and sensitivity to sensory input (e.g., difficulty paying attention within the classroom setting and difficulty tolerating grooming tasks), although she responded well to vestibular and auditory input (*id.*).<sup>8</sup> The IEP characterized the student's occasional non-purposeful vocalizations or crying during less preferred classroom tasks as "mild difficulty with self-regulation" (*id.*). According to measures of adaptive behavior and functioning, the student required significant support for functional communication, including communicating basic needs/wants, and manipulation with movement, such as fine motor skills (*id.* at p. 9). The IEP further indicated that the student required maximum assistance from caregivers for feeding and dressing (*id.*).

According to the June 2016 IEP, the student presented with highly intensive management needs requiring a high degree of individualized attention and intervention to maintain her basic physical well-being throughout the day (Parent Ex. C at p. 11). The student was also described as fully dependent in all domains of mobility requiring one to one assistance with feeding, and

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<sup>8</sup> According to the June 2016 IEP, the Sensory Profile 2, which was described as a questionnaire completed by a caregiver and scored by a clinician, was used to assess the student's sensory processing skills (Parent Ex. C at p. 8). The IEP does not indicate which caregiver completed the questionnaire (*id.*).

activities of daily living (ADLs), and two-person assistance with physical transfers (*id.*). The student's IEP management needs included an extensive list of requirements related to her physical positioning, feeding, hearing aid use, and need for multisensory instruction, sensory regulation strategies, ADL assistance, and specific equipment (*id.* at p. 12).

Contrary to the parent's concerns that the student would not be appropriately functionally grouped in the proposed 6:1+1 classroom, a review of the hearing record supports the district's assertion that the student's functional levels and needs were similar to those of the other students in the class. The assistant principal of the assigned public school site was familiar with the requirements of the student's June 2016 IEP, and testified to the school's capacity to fully implement the IEP (Tr. pp. 170-72). The assistant principal explained how the school would have provided for the student's needs, affirming the availability of a seat in the 6:1+1 class as of the start of the 12-month school year, and the provision of 1:1 health paraprofessional services, an SGD, and the recommended related services in specified locations and at the appropriate frequency and duration as identified in the IEP (Tr. pp. 172-73). Throughout a detailed recitation of the management need requirements of the IEP, the assistant principal testified that the school would have been able to meet the student's needs (Tr. pp. 173-82, 185).

When asked if the students in the proposed class had "similar academic and emotional needs" as the student, the assistant principal reviewed the June 2016 IEP before responding, and then highlighted similarities between the student's then-current functioning and that of potential classmates (Tr. pp. 182-85). According to the assistant principal, there were students in the class who, like the student, were nonverbal and used communication devices and sign language (Tr. pp. 184-86). The assistant principal also stated there were students who employed eye gaze and facial expressions to participate in lessons and express preferences (Tr. pp. 184-85). The assistant principal explained that some of the students used objects, pictures of objects, and symbols, in addition to communication switches (Tr. p. 185).

Academically, the assistant principal indicated that "many" of the students in the proposed class were "working at pre-primer, primer, and 1st grade levels," which was consistent with the student's academic functioning level per the June 2016 IEP, which described the student as "working on identifying words at the pre-primer level" and answering who, what, where questions (Tr. pp. 186-87; Parent Ex. C at pp. 2, 29). Other similar instructional strategies and accommodations shared by students in the proposed assigned school class and the student included the beneficial use of manipulatives, frequent praise, and repetition of concepts related to math to support student learning (Tr. pp. 187-89).

Although she acknowledged that all the other students in the proposed class at her school had been classified as students with autism, and that all were ambulatory, the assistant principal averred that the proposed assigned school would have been appropriate for the student and it would have been capable of fully implementing the recommended program (Tr. pp. 193, 195-97). The physical development of students placed together for purposes of special education "may vary, provided that each student is provided appropriate opportunities to benefit from ... instruction" (8 NYCRR 200.6[a][3][iii]). A student's physical needs "shall be considered prior to determining placement to assure access to appropriate program," but "shall not be the sole basis for determining placement" (*id.*). The parent's concerns regarding the student's physical needs is understandable; however, the student's physical development and physical needs are not such that placement in the

proposed 6:1+1 classroom would have been inappropriate considering the student was provided with continual adult supervision via a 1:1 paraprofessional throughout the duration of the school day (Parent Ex. C at pp. 12, 25).

In view of the foregoing, the hearing record supports the IHO's determination that the student would have been suitably grouped for instruction with students with similar needs in the proposed 6:1+1 classroom. Additionally, despite the parent's claims that the IHO ignored significant differences in functioning between the student and her potential peers, the hearing record reflects that the other students in the proposed 6:1+1 classroom had similar special education needs to the student, such that the student would have been appropriately grouped within the classroom for purposes of receiving specially designed instruction (see E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435-36 [S.D.N.Y. 2010] [noting that the question is not "whether this was the best possible group of children with whom [the student] could have been placed," but whether the students had similar needs with respect to the provision of special education], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; see also Walczak, 142 F.3d at 133-34; E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at \*6-\*8 [S.D.N.Y. June 10, 2016]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 589-90 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*24-\*25 [S.D.N.Y. Mar. 15, 2013]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*12 [S.D.N.Y. Sept. 29, 2012]).

## **2. Implementation of Conductive Education Goals**

The parent alleges that because the June 2016 IEP included goals written by the student's 2015-16 conductive education provider from NPS 2, the district is required to implement those goals using the conductive education methodology. The district contends that the conductive education goals were included in the June 2016 IEP because NPS 2 referred to its APE program as conductive education.

With regard to the parent's claims herein, the issues are whether the June 2016 IEP adopted conductive education, and, if so, could the assigned public school site implement the June 2016 IEP, including those goals designated as conductive education goals, without having a conductive education provider on staff.

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at \*16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]). However, the Second Circuit has hesitated to find an IEP substantively adequate "when the reports and evaluative materials present at the CSE meeting

yield a clear consensus" regarding methodology, and the CSE did not sufficiently explain why the recommended program would be appropriate absent the designation of that methodology on the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

Additionally, courts have been divided on the impact of a CSE adopting annual goals from private progress reports or evaluations and including them on a student's IEP without specifically adopting the methodology used in the private school. In one case, the Second Circuit remanded a matter back to an SRO to assess whether an IEP that included goals with methodology-specific terminology was likely to produce progress toward those goals without the use of that particular methodology (E.H. v. New York City Dep't of Educ., 611 Fed.Appx. 728, 731-32 [2d Cir. 2015]). In F.B. v. New York City Department of Education, 132 F. Supp. 3d 522, 550-51 (S.D.N.Y. 2015), cited by the parent in support of her argument that the June 2016 IEP adopted the conductive education methodology used at NPS 2, a district court concluded that an IEP adopted a methodology by listing goals that referenced terminology from that specific methodology; and that the teacher in the proposed placement could not have implemented those goals because she testified she was unfamiliar with the terminology. But other courts within the Second Circuit have concluded that goals which incorporate some terminology or jargon specific to a methodology can nonetheless be implemented without the use of a specific methodology when such terms have a "relatively common meaning" that would not "prevent a teacher or therapist from implementing the [IEP's] goals" (G.S. v. New York City Dep't of Educ., 2016 WL 5107039 \*11 [S.D.N.Y. September 19, 2016]; [quoting T.C. v. New York City Dep't of Educ., 2016 WL 1261137 \*14 [S.D.N.Y. March 30, 2016]).

In N.B. v. New York City Dep't of Educ., the district court stated that courts have disagreed "as to whether an IEP's incorporation of [methodology]-specific goals acts as an implicit adoption of [] methodology; the current and better view is that it does... [w]hat distinguishes this case... is [the lack of] non-speculative evidence that [the assigned school] could not have implemented the IEP's [methodology]-specific goals and objectives" (2016 WL 5816925 \*6 [S.D.N.Y. September 29, 2016]). Rather, "[t]estimony that a school did not exclusively use one methodology but instead would individualize its methods for a given student supports rather than undermines [the school's] ability to implement [the] IEP. This is not a case, [like] F.B. where the assigned teacher specifically disclaimed any ability to implement [methodology]-specific goals" (N.B., 2016 WL 5816925 at \*6; citing F.B., 132 F. Supp. 3d at 551).

Before reaching whether the IEP adopted conductive education as a method of instruction and whether the IEP could have been implemented without staff trained in conductive education, a discussion of how conductive education is portrayed in the hearing record is warranted.

According to the NPS 1 program description, conductive education was developed to establish a method for teaching children with motor disorders to find "new paths to achieve functional movement" (Parent Ex. F at p. 2). Further, it stated that conductive education supports student learning by "integrating movement with communicative, cognitive and sensory learning" (id.). The NPS 1 administrator described conductive education as a "form of education" (Tr. p. 389). When asked about her understanding and implementation of conductive education, the NPS 1 conductive education provider (the conductor) testified that conductive education was "a holistic approach to habilitation or rehabilitation," to improving the student's motor skills (Tr. pp. 508-09; see Tr. pp. 512, 514, 516). The conductor elaborated that conductive education fosters active

learning, by teaching students to "take ownership and responsibility for their own learning and . . . setting their own goals and being active in the acquisition of those goals" (Tr. pp. 509-10). Although conductive education targets the development of oral, fine, and gross motor skills, and the program is intended to foster each student's ability to "combine skills" to enhance self-help and personal care abilities, the focus of conductive education is not "necessarily" on teaching "whole functional skills" (Tr. pp. 510-11).

During conductive education sessions, the components of any given motor skill are identified and taught in a series of "programs," or series of tasks that develop prerequisite skills for the larger motor skill (Tr. pp. 511, 514-15). For example, according to the conductor, for the skill of ambulation, she would compose a detailed series of tasks related to the challenges a student would face in terms of ambulating (Tr. pp. 514-15). The conductor further explained that throughout the session, the student would practice these tasks, first during the laying program, then during the sitting program, and again, during the standing and walking program (Tr. pp. 515-16).

While leading a student through task practice, the conductor explained that she would accompany "manual facilitation" of a student's movements with a rhythmic repetition of verbalizations of the task's steps, which she termed "rhythmical intention" (Tr. pp. 518-21). The conductor stressed that she expected verbal students to repeat the verbalizations as a sign of active engagement, but, as in this case, when a student was nonverbal, the conductor reported she engaged in language play, and recited both parts (Tr. pp. 518-21). According to the conductor, the repetition of rhythmical intentions during a conductive education session, facilitated "the process of neuroplasticity," which she further explained meant a student was making "a conscious decision to do something" (Tr. pp. 515-16, 521). In addition, the conductor asserted that engaging the student in this process resulted in "retraining the brain, rewiring the brain" (Tr. pp. 521-22).

While the parent contends that the June 2016 CSE adopted the conductive education methodology and a significant portion of the hearing record focused on it, a review of the June 2016 IEP shows that conductive education is only a small part of the IEP (see GB v. New York City Dept. of Educ., 145 F. Supp. 3d 230, 256 [S.D.N.Y. 2015][the use of methodological specific language in 5 of the IEPs 40 short term objectives would not have resulted in a denial of a FAPE]). The June 2016 IEP included approximately nineteen annual goals and 48 short-term objectives across multiple domains, titled literacy, math, speech, hearing education, PT, OT, and conductive education (Parent Ex. C at pp. 15-25).<sup>9</sup> Of these, three annual goals containing eight short-term objectives were labeled "conductive education" (id. at pp. 16-17).<sup>10</sup> While the annual goals were labeled as "conductive education" goals, the only language in the goals or short-term objectives which could be considered associated with conductive education was a description of the role of a "conductor" in one-short term objective, and that the student's progress towards meeting the annual goals was to be evaluated daily by a "[conductive education] teacher's observation, performance assessment, [and] checklist" (id.). Considering the limited nature of the use of language related to

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<sup>9</sup> Four of the student's goals were taken from the March 2016 NPS 2 report section entitled "Individualized Healthcare Plan" and included strategies and services to prevent aspiration, injury, risk to skin integrity, and dehydration (compare Dist. Ex. 9 at p. 23, with Parent Ex. C at pp. 23-24).

<sup>10</sup> The district special education teacher testified that the CSE labeled the annual goals as conductive education because that is how NPS 2 described its physical education program (Tr. p. 137).

conductive education, although three annual goals were labeled "conductive education," the June 2016 IEP did not necessarily adopt the use of conductive education methodology.

Nevertheless, even if the June 2016 IEP did adopt conductive education as a method for instructing the student with respect to the three annual goals labeled as conductive education goals, a careful review of the record provides evidence of considerable overlap in the focus of the conductive education, PT, and OT goals designed for the student, especially when considering the totality of the student's physical/motor needs as comprehensively described in the June 2016 IEP (Parent Ex. C at pp. 2-3, 5, 7-10, 16-17, 20-22).

According to the district special education teacher who participated in the June 2016 CSE, the conductive education goals were "directed in how [the student] uses her body and moves her body" (Tr. p. 102). More specifically, the three conductive education goals focused on the student's needs related to lower extremity spasticity, her emerging ability to grasp and release objects, and the limited functionality of her upper and lower extremities, all of which are generally consistent with the needs identified in the PT and OT portions of the June 2016 IEP (compare Tr. pp. 201-02, with Parent Ex. C at pp. 8, 10, 16-17). All conductive education, PT, and OT goals included criteria by which to determine achievement, the method by which progress would be measured, and a schedule for assessing progress (Parent Ex. C at pp. 16-17, 20-22). The conductive education annual goals were to be evaluated daily by a "[conductive education] teacher's observation, performance assessment, [and] checklist" (id. at p. 16-17).

The first conductive education annual goal and its associated short-term objectives targeted the need to reduce the student's lower extremity spasticity through a series of passive and active exercises (Parent Ex. C at p. 16). The first short-term objective called for the student to engage in sit ups while holding onto a variety of objects or the hands of the conductive education provider (id. at pp. 16-17). The second short-term objective required the student to repeatedly alternate extending one leg, while flexing the other, for up to two minutes per leg (id. at p. 16). The third short-term objective required the student to "learn to maintain a symmetrical position in criss-cross sitting with arm gaiters" for up to five minutes, while keeping her head in midline without assistance (id.). Finally, the fourth short-term objective intended the student to lay in a supine position, and wearing arm gaiters, keep her arms at her side, legs extended and head in midline position for up to three minutes (id.).

The second goal labeled as conductive education, focused on developing the strength of the student's ability to grasp and release objects with "proper palmer grasp" while provided with minimal facilitation and while wearing arm gaiters (Parent Ex. C at p. 16). Short-term objectives addressed the student's need to move her fingers while grasping and releasing objects, and throughout the duration of the task, maintain "a proper palmer grasp" while keeping "wrists in neutral" (id.).

The third goal designated as conductive education was dedicated to improving the student's ability to use both upper and lower extremities during gross motor activities, with minimal manual facilitation (Parent Ex. C at p. 17). An associated short-term objective called for the student to transition from sitting to standing, when provided with "manual facilitation" at her knees and shoulders, verbal cues, and while wearing arm gaiters and holding onto a ladder (id.). A second short-term objective required the student to "maintain a symmetrical sitting position" on a bench

for one minute, when provided with minimal assistance, and wearing arm gaiters and "holding onto a ladderback chair" (id.).

The June 2016 IEP also included two PT goals and six short-term objects, as well as three OT goals and eight short-term objectives that address many of the needs cited in the conductive education goals and short-term objectives (Parent Ex. C. at pp. 16-17, 20-22). Each PT and OT goal identified a functional application of the targeted skills in the student's daily life, and all five are responsive to and consistent with motor needs reported by 2015-16 NPS 2 providers and reflected in the IEP (Dist. Ex. 9 at pp. 20-22; Parent Ex. C at pp. 2, 20-22).

The first PT goal addressed the student's ability to sit on a bench with minimal trunk support while maintaining her head in a neutral position, with an overarching intention to enhance the student's ability to participate in classroom activities more effectively (Tr. p. 106; Parent Ex. C at p. 20). Each of the three short-term objectives increased the expected duration of the student's ability to sustain the sitting position with her head in midline position, from 30 seconds at the first benchmark, to 40 seconds at the second benchmark, and 50 seconds at the third benchmark (Parent Ex. C at p. 20). While the language of the PT goal and short-term objectives may vary somewhat from that of the third conductive education goal (second short-term objective), both goals sought to build the student's ability to maintain a stable sitting position on a bench with her head in midline (id. at pp. 17, 20).

The second PT goal focused on improving the student's mobility with the use of a Rifton Gait trainer, while provided with minimal support; short-term objectives offered intermediary benchmarks for the student to attain while working toward goal achievement (Parent Ex. C at pp. 20-21). Specifically, while using the gait trainer, the first benchmark states the student will be able to walk 150 feet, "making active alternating steps, independent push-off, and with minimal assistance to maneuver the walker" (id. at p. 20). Successive benchmarks are for the student to extend the distance from 150 feet, to 200 feet, and finally to 300 feet, with the same terms for success (id. at pp. 20-21). In keeping with the third conductive education goal which intended to increase the student's functional use of her lower extremities, the PT goal required the student to also do that, but instead of using a ladder-back chair and arm gaiters, the student was afforded the support of an "assistive walking device" to aid her in walking with greater independence (Tr. p. 464; Parent Ex. C at pp. 17, 20-21).

The June 2016 IEP also incorporated an OT goal that centered on improving the student's purposeful reaching within the context of age-appropriate activities, such as self-care and play, in an effort to increase the functional use of her upper extremities (Tr. pp. 106-07; Parent Ex. C at p. 21). The OT goal identified three short-term objectives that call for the student to apply these skills in a variety of ways, such as reaching for craft supplies or another desired object, as well as rolling a ball (Parent Ex. C at p. 21). A second OT goal focused on building the student's tolerance for and participation in self-grooming and hygiene, including such activities as face washing, hair and tooth brushing, and grasping and releasing a wash cloth or paper towel, "given moderate assistance and moderate verbal/visual/tactile cues" (id. at pp. 21-22). Similar to the conductive education goal targeting the student's ability to grasp and release, the two OT goals and their associated short-term objectives foster the student's purposeful use of reaching, as well as grasping and releasing objects in preparation for face wiping (id. at pp. 16, 21-22).

The third OT goal is responsive to repeated statements included in the June 2016 IEP present levels of performance regarding the student's difficulty with managing head and trunk control (Parent Ex. C at pp. 2-3, 8, 10). Within the context of age-appropriate activities, the OT goal is to improve head/trunk control to increase independence and improve posture (Tr. pp. 106-07; Parent Ex. C at p. 22). One short-term objective called for the student to maintain her "head/neck in co-activated upright position for 3-5 minutes during self-care activities . . . given moderate assistance and moderate verbal/visual/tactile cues" (Parent Ex. C at p. 22). A second short-term objective requires the student to "visually locate and reach for 1-2 panel switch" to express choices while maintaining upright posture in her wheelchair, given the same support as listed for the preceding short-term objective (id.).

The hearing record indicates that conductive education appears throughout the June 2016 IEPs description of the student's present levels of performance as a heading above information supplied by the 2015-16 NPS 2 report (Parent Ex. C at pp. 2-3, 4, 5). Three annual goals are included on the IEP that specify the use of conductive education to the extent that the goals would be measured by a "[conductive education] teacher," with one short-term objective indicating in part the participation of a "conductor" during the activity (Parent Ex. C at pp. 16-17).<sup>11</sup> However, comparison of the June 2016 IEP annual goals and short-term objectives labeled physical therapy, occupational therapy, and conductive education shows that overall they were designed to improve the student's gross and fine motor skills, and other than reference to measurement by a conductive education teacher, the annual goals labeled conductive education do not contain language unique to conductive education (Parent Ex. C at pp. 16-17, 20-22). As the motor skills to be addressed in the annual goals do not contain conductive education-specific language, the hearing record supports the IHO's finding that these annual goals and short-term objectives could have been implemented by the student's related service providers (IHO Decision at p. 20; see Tr. pp. 201-03).

Additionally, as detailed above, the hearing record reveals significant overlap of services, with the student's providers addressing many of the same needs and working on the same skills. Even in cases where an IEP includes methodology-specific terminology, the question of whether an IEP is appropriate turns on "whether the IEP as a whole—and in particular, the goals incorporating [methodology]-related terminology—was likely to produce progress for [the student] absent use of [the] methodology " (T.C., 2016 WL 4449791 at \*26; citing E.H. 611 Fed.Appx. at 731; see Application of the Dep't of Educ., Appeal No. 16-057)). In this case, the hearing record supports a finding that the aspects of the student's needs addressed by the conductive education goals were also addressed in the annual goals related to OT and PT; therefore, any implementation failure limited solely to the three goals denominated in the IEP as "conductive education" would not result in a denial of FAPE.

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<sup>11</sup> Some of the conductive education short-term objectives refer to equipment including arm and leg gaiters, and a ladderback chair (Parent Ex. C at pp. 16-17). The NPS 1 conductive educator testified that although conductive educators may use some of that equipment, there is no specific equipment that is unique to conductive education (Tr. pp. 507, 555-56).

#### **D. Equitable Considerations- Appropriate Standard**

While not required because she determined that the district had offered the student a FAPE for the 2016-17 school year, the IHO nevertheless discussed in her decision the parent's actions before receiving a school location letter and also the lack of evidence relative to the parent's ability to pay. The IHO found that the parent failed to meet her burden "under Carter" [sic] (IHO Decision at p. 22). The parent argues that the IHO relied on a single factor in her determination and failed to consider her cooperation with the district's CSE, timely notice to the district of her intent to seek tuition reimbursement, her visits to the assigned school site, and that she could be released from the NPS 1 enrollment contract if she accepted an offer from the district. The parent also alleges that the district conceded that equitable considerations were in her favor because they did not raise a specific defense to the contrary.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [noting that "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]; see L.K. v. New York City Dep't of Educ., 2017 WL 219103, at \*2 [2d Cir. Jan. 19, 2017]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland Sch. Dist., 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

It is not necessary to determine whether equitable considerations favor the parent because I agree with the IHO that the district offered the student a FAPE for the 2016-17 school year. Nevertheless, the hearing record reflects that the IHO relied on irrelevant information and applied an incorrect standard when determining that the parent did not demonstrate an entitlement to direct funding of the student's cost of attendance at the NPS.

The IHO identified two reasons for denying the parent's request. She noted that the parent signed the NPS 1 enrollment contract in May 2016 before visiting the assigned school site in June 2016 and found therefore that the parent "had no intention of considering the public school placement" (IHO Decision at p. 22). The IHO then indicated that the parent had offered no proof relative to her ability to pay.<sup>12</sup> In its answer, the district also argued that the parent offered no evidence of her income in support of her request that the IHO's decision be affirmed.

The hearing record reflects that the parent cooperated with the CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). The parent notified the district in writing that she rejected the IEP, visited the assigned school, and was unilaterally enrolling the student in NPS 1 on June 21, 2016 (Parent Ex. J). The parent also advised the district that she agreed with the special class recommendation and program recommendations, but objected to the potential grouping of the student with peers that she believed were dissimilar and, in addition, asserted that the assigned school could not implement the student's conductive education goals. Accordingly, the IHO's determination that the parent failed to meet her burden must be reversed. Notwithstanding the above, no relief is in order because I have determined that the district offered the student a FAPE for the 2016-17 school year.

## **VII. Conclusion**

As discussed above, the parent's argument that the student was denied a FAPE because the district's assigned school did not offer conductive education or have staff available at its assigned school who were trained in conductive education is without merit. Even if the student received educational benefits from instruction at NPS 2 using conductive education, absent any evidence in the hearing record that the student required that methodology to receive educational benefits, the district is not constrained in the choice of methodologies it may implement, much less limited to the specific methodology used by NPS 2. Following a thorough review of the hearing record, detailed above, the annual goals included in the June 2016 IEP sufficiently overlapped with the

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<sup>12</sup> While the parent's ability to pay tuition does not factor into the balancing of equitable considerations it does factor into whether direct retroactive payment of the student's tuition at NPS 1 is an available remedy (see Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011])["[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief").

annual goals labeled as conductive education goals so that by implementing the annual goals designated as OT and PT goals, the student's need areas would have been addressed. Additionally, the goals could have been implemented by the student's related service providers. Further, the student would have been appropriately grouped with similarly functioning peers at the assigned school.

I have considered the parent's remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
June 1, 2017**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**