



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-129

Application of the BOARD OF EDUCATION OF THE KATONAH LEWISBORO SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Daniel Petigrow, Esq.

Law Office of Peter D. Hoffman, PC, attorneys for respondents, by Peter D. Hoffman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for a portion of their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2017-18 and 2018-19 school years. The parents cross-appeal from the IHO's determination which denied their request for the full costs of the student's attendance at Winston Prep for the 2017-18 and 2018-19 school years. The appeal must be sustained. The cross-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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in detail. Briefly, in September 2015 the

parents placed the student at Winston Prep and the student has remained there since that time (see Parent Exs. X-BB; see also Dist. Ex. 26 at p. 1).¹

The CSE convened on April 28, 2017, to formulate the student's IEP for the 2017-18 school year (see Dist. Ex. 1 at pp. 1-17). Having found that the student remained eligible for special education as a student with an other health impairment, the CSE recommended that the student attend a district public school placement in a 15:1+1 special class for English language arts (ELA), math, social studies, science, and support and skills, and a small group reading class using Wilson methodology on alternate days, along with counseling services twice weekly (once in a group and once individually) and parent counseling and training services once monthly (id. at pp. 1, 13, 17; see Dist. Ex. 6 at p. 1).² According to meeting information summary attached to the IEP, the parents' attorney "rejected" the CSE's recommendations and "reserve[d] [the parents'] right to a private placement" (Dist. Ex. 1 at p. 4).

The CSE convened on April 20, 2018, to formulate the student's IEP for the 2018-19 school year (see Dist. Ex. 2 at pp. 1-23). Compared to the April 2017 IEP, the April 2018 CSE recommended the small group reading class on a daily basis (and removed the reference to Wilson methodology) and, rather than a special class for science, recommended integrated co-teaching (ICT) services (compare Dist. Ex. 2 at pp. 1, 19, 23, with Dist. Ex. 1 at pp. 1, 13, 17). According to the meeting information summary, the parents' attorney "reject[ed] the IEP" on behalf of the parents, "reserve[d] the right for reimbursement," and indicated a desire to "reconvene after the results of an [independent educational evaluation (IEE)]" (Dist. Ex. 2 at p. 6). In a letter dated August 10, 2017, but received by the district on August 15, 2018, the parents notified the district that they disagreed with the IEP developed for the student for the 2018-19 school year and that they intended to unilaterally place the student at Winston Prep for the 2018-19 school year at district expense (Dist. Ex. 32; see Dist. Ex. 33). The district acknowledged receipt of this letter, in a letter dated August 15, 2018, and invited the parents to contact the CSE if they wanted to schedule a CSE meeting to discuss their concerns (Dist. Ex. 33).

In a due process complaint notice, dated April 26, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (see IHO Ex. I at pp. 1-13).

An impartial hearing convened on October 23, 2019, and concluded on March 4, 2020, after nine days of proceedings (Tr. pp. 1-1162).³ In a decision dated June 24, 2020, the IHO determined that the April 2017 and April 2018 CSEs did not engage in impermissible

¹ The Commissioner of Education has not approved Winston Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² The student's eligibility for special education and related services as a student with an other health impairment is not in dispute in this proceeding (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ In addition, according to the IHO's decision, the IHO held a prehearing conference with the parties on June 5, 2019 and "status conferences" on July 30 and September 3, 2019 (IHO Decision at p. 1); however, a transcript or a written summary of the prehearing conference was not made a part of the hearing record as required by State regulation (see 8 NYCRR 200.5[j][3][xi]).

predetermination, considered sufficient evaluative information, appropriately deemed a classroom behavior plan sufficient to address the student's behavior needs, and recommended an appropriate program and placement for the student, including a 15:1+1 special class and a specialized reading class, but "failed to discuss or draft meaningful goals" and that this "marginalized the Parents' participation in this component of the proceedings" but did not represent "a substantial violation of the District's mandate" (IHO Decision at pp. 32-47, 54-55 [emphasis in the original]). The IHO concluded that, based on this, the District "fell short of its mandate to provide [the student] with FAPE" (*id.* at p. 55). The IHO found that Winston Prep was an appropriate unilateral placement for the student for the 2017-18 and 2018-19 school years (*id.* at pp. 47-50). Next, the IHO found that equitable considerations warranted a reduction of any tuition award (*id.* at pp. 50-54). For relief, the IHO found that the parents were entitled to a total of \$10,000 toward the tuition at Winston Prep for the 2018-19 and 2019-20 school years, representing a "drastically reduced" amount due to the "remaining elements of the District's program," which she found were appropriate for the student, as well as "various equitable factors" (*id.* at p. 55).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues raised in the district's request for review and the parents' answer and cross-appeal is also presumed and will not be recited in detail here. Briefly, the district appeals the IHO's determination that it failed to offer the student a FAPE for the 2017-18 and 2018-19 school years, alleging that the IHO erred in determining that the district prevented the parents from meaningfully participating in the development of annual goals for the student at the April 2017 and April 2018 CSE meetings and that the April 2017 and April 2018 CSEs failed to develop meaningful and measurable annual goals to address the student's needs. The district also argues that the IHO erred in determining that Winston Prep was appropriate to address the student's needs. As for equitable considerations, the district argues that the IHO erred in not denying the parents' request for tuition reimbursement in its entirety.

In an answer and cross-appeal, the parents respond to the district's request for review and interpose a cross-appeal alleging that the IHO erred by "fail[ing] to address at all whether the testimony of District teacher witnesses . . . w[as] retrospective," by failing to find that the district predetermined the student's programs and placements for the 2017-18 and 2018-19 school years, and by reducing the total amount of tuition to be reimbursed based on findings that the programs offered by the district were only partially inappropriate and on equitable considerations.

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Endrew F., 137 S. Ct. at 1001 [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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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]).⁴

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. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require that a cross-appeal "clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f]). Tethered closely to this requirement is the State regulation which mandates that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.8[c][2]). "[A]ny issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not

⁴ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In the present matter, the parents do not interpose a cross-appeal challenging the IHO's findings that the April 2017 and April 2018 CSEs considered sufficient evaluative information, appropriately deemed a classroom behavior plan sufficient to address the student's behavior needs, and recommended an appropriate program and placement for the student including a 15:1+1 special class along with a specialized reading class (see IHO Decision at pp. 32-38, 41-44). Although the parents in their answer and cross-appeal appear to interpret the IHO's decision as having found the program and placement recommendations in the April 2017 and April 2018 IEPs to be inappropriate (see Answer & Cross-Appeal at pp. 2, 3), the IHO was unambiguous in her findings on these issues (see IHO Decision at pp. 34-38, 43-44). Further, the parents go on to cross-appeal from the IHO's reduction of the tuition reimbursement award based on the determination that the IEPs were "only partially inappropriate" and that the district "did not entirely fail in its mandate" to offer the student a FAPE for the 2017-18 and 2018-19 school years, but do not challenge the findings underlying the determination that the IEPs were "partially" appropriate (Answer & Cross-Appeal at pp. 5, 6).

The parents do appeal the IHO's "fail[ure] to address at all whether the testimony of District teacher witnesses . . . w[as] retrospective" (Answer & Cross-Appeal at pp. 6, 8). The Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Here, the parents do not identify which findings of the IHO were impermissibly based on retrospective testimony or argue that the findings made by the IHO were not supported by sufficient permissible evidence (see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86 [2d Cir. July 24, 2013] [noting that the inquiry should focus not on whether the IHO or SRO "relied on impermissible retrospective evidence, but whether sufficient permissible evidence, relied on . . . , supports the . . . conclusion that the IEP offered [the student] a reasonable prospect of educational benefits"]).⁵ Accordingly, the parents allegations

⁵ The parents allege that testimony of the eighth grade special education teacher for the classroom proposed for the student to attend for the 2017-18 school year was retrospective but do not point to any portion of the IHO's decision where such testimony was cited or relied upon (see Answer & Cross-Appeal at p. 8). In alleging that "[t]he IHO relied upon impermissible testimony" of the ninth grade special education teacher for the classroom proposed for the student to attend for the 2018-19 school year, the parents cited several pages of the IHO's decision (see Answer & Cross-Appeal at p. 8, citing IHO Decision at pp. 12-15, 17, 35, 43-44, 52); however, review of the pages cited by the parents reveals that the IHO summarized the teacher's testimony but did not explicitly rely on it in reaching his determinations that the program and placement set forth in the April 2018 IEP were appropriate (see IHO Decision at pp. 12-15, 43-44).

relating to retrospective testimony are insufficient to raise specific findings of the IHO for review on appeal.

Based on the foregoing, the parent has not appealed the IHO's findings regarding the sufficiency of the evaluative information, the student's need for an FBA or a BIP, and the appropriateness of the recommended program and placement, which findings were adverse to the parents (see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). Therefore, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. April 2017 CSE and IEP

1. Parent Participation and Predetermination

The district argues that the IHO erred in finding that the April 2017 CSE's lack of in-depth discussion of annual goals amounted to a procedural violation. In addition, on appeal, the parents argue that the IHO erred in finding that the CSE did not predetermine the student's program and placement.

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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "[a] professional disagreement is not an IDEA violation"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; 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"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful 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). Moreover, "the 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] [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], 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]).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Initially, with regard to predetermination, the IHO found that:

At the outset, the 2017-2018 IEP provided additional counseling in order to facilitate [the student's] ability to navigate the District's larger educational environment. Exh. 1 at 13. Moreover, a plan for [the student] to articulate into a mainstream science classroom was broken down into a two-step process in which [the student's] assignment to a 15:1+1 science class would be re-evaluated at a later time for possible re-assignment to a mainstream class. In response to [the student's] interest in developing meaningful friendships, a new goal was additionally drafted. In fact, [the eighth grade district special education teacher] testified that the CSE meeting was "long," a conclusion borne out by the Parents' tapes of both CSE proceedings. Tr. at 340: Exhs. A, B. Indeed, the record supports a finding that both CSE meetings were thorough and all-encompassing. The Parents had every opportunity to share their concerns with District personnel and did so. Consistent with the IDEA's clear preference for furnishing services within the least restrictive environment, the District continued to recommend placement within its own high school. . . . The District offered an array of modifications and accommodations to facilitate a mainstream placement. Nevertheless, the Parents objected to several of the CSE's key suggestions; to wit: the assignment of a paraprofessional, an individualized BIP and the Wilson reading program. This does not equate with predetermination.

(IHO Decision at pp. 46-47 [internal footnote omitted]). The parents' appeal of the IHO's determination does not address any of these findings; instead, the parents argue that

predetermination was established because the programs and placements recommended for the student "were very similar from year to year" (as well as the annual goals) and that the April 2017 CSE failed to "address goals" (Answer & Cross-Appeal at pp. 7-8). First, there is no authority for the proposition that the relative consistency of a CSE's recommendations for a student over time amounts to predetermination, particularly if, as here, there is no allegation that the student's needs changed significantly over the course of the school years and the CSE adjusted the recommendations for the student compared to the year prior (see A.R. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 6251196, at *13 [S.D.N.Y. Nov. 21, 2019] [finding that "[s]imilarities' between IEPs are not a basis for finding them to be inappropriate, particularly when, as here, District representatives, Plaintiffs, and [nonpublic school] staff all participated in extensive discussions at the . . . CSE meeting leading up to the IEP recommendation"]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *3 [S.D.N.Y. Feb. 24, 2017] ["That the Department's placement recommendation was consistent across school years is not objectionable, especially where the IEP reflects the CSE's consideration of alternative placements, as it does here"]). Here, a comparison of the student's May 2, 2016 IEP developed for the 2016-17 school year and the April 2017 IEP reflects that the April 2017 CSE made changes to address the student's needs, including adding a special class for science in lieu of the support of a teaching assistant in the regular education classroom, as well as adding a special class for "support and skills" (compare Dist. Ex. 1 at p. 13, with Dist. Ex. 6 at p. 10). Changes in the student's annual goals are discussed further below.

As for the April 2017 CSE's discussion of annual goals, the IHO held that "although an audiotape of the CSE proceedings indicate[d] that the CSE did, in fact refer to the student's goals," the district members of the CSE presented the goals "in a 'fait accompli' manner with little interchange, if any, between CSE members" (IHO Decision at p. 39).

The hearing record reveals that the parents attended the April 2017 CSE meeting, along with legal counsel (Dist. Ex. 1 at p. 1).⁶ In addition, the student's Winston Prep "Focus" teacher for the 2016-17 school year participated at the April 2017 CSE meeting via telephone and discussed areas she "worked on" with the student that year (decoding and encoding skills, improving written output, social skills) and described his then-current program (id.).⁷ The Focus teacher stated that the student "struggle[d] with big picture versus details" (especially with comprehension of fine details) and that, while he understood what he was reading, he was not "always able to provide a more detailed analysis of the information" (id. at p. 2). Additionally, the Focus teacher stated that the student could "struggle with impulse control" and needed to be better able to self-monitor this and added that Winston Prep staff had been focusing on how the student

⁶ In listening to and comparing the audio recordings with the comments documented within the meeting information sections of the April 2017 and April 2018 IEPs, I find that the meeting information summaries accurately captured and reflected the content of those audio recordings and what transpired at the CSE meetings (compare Parent Ex. A, with Dist. Ex. 1 at pp. 1-4, and Parent Ex. B, with Dist. Ex. 2 at pp. 1-6). Accordingly, for ease of reference, the meeting information summaries are generally cited in this decision instead of the audio recordings.

⁷ According to the evidence in the hearing record, at Winston Prep a Focus teacher acted as a "point person" or "team leader" for a particular student and met with that student one-on-one for a focus session once a day to address areas that the student was "most challenged by" and communicated with the student's family and team of teachers (see Tr. pp. 540-41, 748-49, 1026-27, 1093-95; Dist. Ex. 1 at p. 1).

could best function in the group (id.). Socially, the Focus teacher described the student as "very friendly" but noted that social situations could be difficult for him (id.). Next, the Focus teacher discussed and identified the student's continuing need for support in written output, decoding and encoding, and meta-cognitive skills "in terms of better understanding himself as a learner" (id.).

Based on the information shared during the meeting, the school psychologist identified the areas she might work on with the student in the coming year including interacting appropriately when frustrated, managing social situations, and working on interactions with other students (Dist. Ex. 1 at p. 2). During the CSE meeting, it was further discussed that reading comprehension and abstract math skills would need to be addressed in the April 2017 IEP (id. at p. 3).

The annual goals for the student's IEP were then "reviewed and updated" (Dist. Ex. 1 at p. 3). The director of special services who served as the CSE chairperson at the April 2017 and April 2018 CSE meetings (director of special services) testified about the specific goals and how they aligned with the student's needs in a manner consistent with the presentation of the goals at the April 2017 CSE meeting (see Tr. pp. 60-65; see also Parent Ex. A). Rather than being a "fait accompli" recitation of goals (see IHO Decision at p. 39), the audio recording of the CSE meeting reflects that the director of special services presented his view of what goals would address the student's needs as described during the meeting and no member of the CSE including the parents offered a different view or objected to the director's characterization (see Parent Ex. A). At the impartial hearing, the student's mother testified that the annual goals were discussed at the CSE meeting yet stated that she had "no opinion about those goals" and that she did not "believe that [she] agreed with them" (Tr. pp. 590-91). While the IDEA requires the district to provide parents an opportunity to participate in the development of their child's IEP, the district cannot be faulted if the parents don't offer input on every aspect of the IEP discussed at a CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]).

Overall, during the April 2017 meeting, the parents raised concerns regarding, among other things, the fidelity with which the assistive technology consultation had been implemented in the past, the reward system that the eighth grade special education teacher described as part of the classroom behavior management plan, the larger ratios of the classes and the size of the district school, and that an assigned teaching assistant could "stigmatize" the student (see Dist. Ex. 1 at p. 3). The director of special services testified that he believed that the April 2017 IEP addressed much of the parents' input noting that the student's social adjustment and his ability to successfully interact with peers were concerns of the parents and that the IEP included annual goals to address those needs (Tr. p. 152; see Dist. Ex. 1 at pp. 10, 12-13). Also, at the April 2017 CSE meeting, the parent shared that the student had shown improvement in dealing with his homework and that he had become more self-sufficient (Dist. Ex. 1 at p. 2). The study skills annual goal involving homework included on the April 2017 IEP was modified to state that the student would "independently" prioritize and complete his nightly homework, a change from the student's previous IEP (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 6 at p. 8).

Based on the foregoing, the evidence in the hearing record shows that the annual goals were addressed at the April 2017 CSE and that the parents attended and actively participated in the meeting. Moreover, as discussed below, the annual goals were appropriate to meet the student's needs. Accordingly, the evidence in the hearing record does not support a finding that the district denied the parents meaningful participation at the April 2017 CSE meeting or that the district failed

to have an open mind with respect to the development of the annual goals included in the April 2017 IEP.

2. Annual Goals

With respect to appropriateness of the annual goals in the April 2017 IEP, the IHO faulted the CSE for continuing goals in the areas of study skills, reading, writing, and math from the student's IEP for the 2016-17 school year; for developing broad goals that were insufficiently "specific[]"; for "rel[ying] upon the continuation of weekly benchmarks"; and for failing to include "meaningful criteria as to what [wa]s specifically being measured or taught" (IHO Decision at pp. 38-39). Overall, the IHO found the annual goals to be "poorly drafted, easily applicable to any student in [the student's] class and unquantifiable" (*id.* at p. 29). The IHO indicated that "the duplicative, virtually 'cut and paste' goals [we]re the lone defect in the District's 2017-2018 IEP" (*id.* at p. 40). On appeal, the district alleges that the IHO erred in finding that the annual goals in the April 2017 deprived the student a FAPE.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

First, with respect to the student's needs leading up to the April 2017 CSE meeting, available to the CSE was the student's winter 2017 progress report from Winston Prep (*see* Dist. Ex. 1 at p. 5; 9). The progress report noted that the student's teachers identified continuing needs in the following areas: homework planning; self-regulation and problem solving; applying correct use of grammar, punctuation, and spelling in his writing; expanding the length and variety of his written work; reading fluency; multiplication facts automaticity; solving word problems; problem solving and navigating social situations with peers; improving his self-awareness; and understanding the perspectives of others when social breakdowns occur (Dist. Ex. 9 at pp. 1-2). Further, as noted above, at the April 2017 CSE meeting, the student's Focus teacher discussed and identified the student's continuing need for support in written output, decoding and encoding, and meta-cognitive skills "in terms of better understanding himself as a learner" (Dist. Ex. 1 at p. 2).

The April 2017 IEP contained 13 annual goals including two study skills annual goals, three reading annual goals, two writing annual goals, three math annual goals, and three social/emotional annual goals (Dist. Ex.1 at pp. 11-13). The annual goals contained criteria to measure achievement (i.e., "80% success with moderate assistance over 2 weeks"; "75% success over 2 weeks"); methods of measuring progress (i.e., "[p]ortfolio materials"; "[r]ecorded

observations"; "[s]tructured interview"); and a schedule for when progress would be measured (i.e., "[b]y the end of each marking period"; "[e]very 4 weeks") (*id.*).⁸

Seven of the annual goals were carried over from the previous year's IEP verbatim (compare Dist. Ex. 1 at pp. 11-13, with Dist. Ex. 6 at pp. 8-10). Further, five annual goals included in the April 2017 IEP were similar to goals included in the May 2016 IEP but had added language and/or an increase in the criteria for mastery (compare Dist. Ex. 1 at pp. 11-13, with Dist. Ex. 6 at pp. 8-10).

Regarding math, the April 2017 IEP present levels of performance stated that the student exhibited greater difficulty remaining focused during class and needed prompting to look back at directions to be successful (Dist. Ex. 1 at p. 8). The April 2017 IEP noted that according to the student's teachers he demonstrated a strong understanding of foundational skills but that his Focus teacher mentioned that problem solving was still an area in which the student required specific support (*id.*). The IEP stated that the student continued to require strategies to assist with analyzing multi-step word problems, identifying operations, and identifying the sequential steps required to plan an approach for the solution (*id.* at pp. 8, 9). Reportedly, the student's math fluency had been targeted during the school year and, although improvement was noted in the student's basic multiplication facts, his progress had slowed as the levels had become more challenging (*id.* at p. 8). Carried over from the May 2016 IEP was an annual goal involving the use of inverse operations to solve one and two step equations algebraically (compare Dist. Ex. 1 at p. 12, with Dist. Ex. 6 at p. 9). Also, math annual goals involving solving multi-step problems and dividing fractions were carried over but had an increase in their evaluative criterion from 70% to 85% (compare Dist. Ex. 1 at p. 12, with Dist. Ex. 6 at p. 9). The director of special services testified that the benchmarks for success were increased given improvements indicated in the progress reports available to the CSE (Tr. pp. 63-64).

In the area of writing, the April 2017 IEP stated that the student had steadily improved in his ability to create sentences in isolation with correct grammar, punctuation, and spelling but struggled to apply those same skills to in paragraph or short-answer writing (Dist. Ex. 1 at p. 8). The April 2017 IEP also reported that the student had difficulty utilizing consistent verb tenses, was working to expand the length and variety of his sentences, and at the paragraph level, did not always independently include a clear introduction or concluding sentence (*id.* at pp. 8, 9). The CSE carried over a writing goal from the May 2016 IEP involving writing informational and explanatory text (compare Dist. Ex. 1 at p. 12, with Dist. Ex. 6 at p. 9). Another annual goal included on the April 2017 IEP was similar to a goal from the May 2016 IEP that involved planning and revising writing except that the success criteria was decreased from 80% success with moderate assistance to 75% without reference to assistance, and language and expectations were added to provide that the student would "use the writing processes of editing and reviewing or trying a new approach in assessing if audience and purpose have been adequately addressed

⁸ According to the director of special services, "[p]ortfolio materials would be examples of student work," "recorded observations" consisted of a teacher's recordings such as through a log with commentary about what the student was doing, and "structured interview" would be a discussion between the student and the provider to discuss and gauge where the student "might be at a given point in time with the goals and strategies [he] ha[d] been working on" (Tr. pp. 116-18). The director further testified that the reference to "behavior charting" as a method of measuring one of the reading goals "was a mistake in entry" (Tr. pp. 116-17; see Dist. Ex. 1 at p. 11).

utilizing a writing rubric to evaluate and quantify the editing and rewriting processes with audience and purpose as the focus" (compare Dist. Ex. 1 at p. 12, with Dist. Ex. 6 at p. 9). The director of special services testified that the specificity was added to the writing goal because "it seemed as if those were areas where some weaknesses were noted from the teacher reports" and further that the added reference to the use of a rubric "would be helpful in terms of having a standard to be able to follow" (Tr. p. 62).

With respect to reading, the April 2017 IEP indicated that the student was using classroom strategies to develop and support his higher critical thinking skills (Dist. Ex. 1 at p. 8). The IEP noted that with support the student's ability to infer information while reading was developing and through previewing unfamiliar words located in texts and novels the student's vocabulary had improved (id.). The student could miss critical information when he was disengaged (id.). According to the April 2017 IEP, due to his impulsivity, the student had difficulty spelling homonyms because he would write the first version that he thought of instead of using context clues (id.). The IEP stated that the student was steadily improving his reading fluency yet often read in a monotonous and choppy voice, continued to need to address decoding skills, and struggled with big picture versus details, especially with the comprehension of fine details (id. at pp. 8, 9). Reading annual goals carried over from the May 2016 IEP targeted the use of explicit text-based evidence and summarizing the text distinct from personal opinions or judgments (compare Dist. Ex. 1 at pp. 11-12, with Dist. Ex. 6 at pp. 8-9). One annual goal involving reading fluently with accuracy and appropriate rate was carried over but changed the content level from seventh grade to eight grade literature text (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 6 at p. 8). The director of special services testified that grade level content was adjusted so that the student would be able to use texts from eight grade to work on the goal (Tr. p. 61). He further testified that "based upon the input that [the CSE] received, the other reading goals . . . needed to stay the same" (id.).

Looking at study skills, the April 2017 IEP stated that the student benefitted from an organizational system to ensure he had materials necessary to complete academic tasks (Dist. Ex. 1 at p. 9). The IEP stated that the student could be an enthusiastic and passionate participant in classroom discussions but that his impulsivity could make it difficult for him to understand when he made an off-topic comment or connection; his output improved when directions were explicitly stated and expectations modeled (id.). The IEP noted that the student continued to need support in the areas of impulsivity in academic and social situations, self-advocacy, meta-cognitive skills, understanding himself as a learner, and in perseverance when topics were not of personal interest (id.). One goal continued from the May 2016 IEP involved establishing and following a study schedule (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 6 at p. 8). The other study skills annual goal involved prioritizing and completing homework and, compared to the May 2016 IEP, language was added indicating the student would work toward the annual goal "independently" and increasing the evaluative criterion from 75% to 80% (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 6 at p. 8). The director of special services testified that, based upon input "from the school," the CSE "felt that the study skills really needed to continue" (Tr. p. 60).

With respect to social development, the April 2017 IEP present levels of performance described the student as "very friendly" but indicated that he could experience challenges in reading social situations and interactions with his peers and was prone to social misunderstanding (Dist. Ex. 1 at p. 9). With regard to the student's social needs, the IEP stated that the student needed

to continue to lessen impulsivity in social situations and to enhance his peer interactions and his development and understanding of social cues (id.). The April 2017 IEP included parent reports that the student's self-esteem as a learner had greatly improved but that she felt this area needed continued enhancement (id. at p. 10). The IEP noted that at times the student presented as disconnected from peers and required prompting and support to maintain attention and focus during his weekly social group (id.). According to the IEP, the student was more successful in social situations when he identified a specific goal to work on prior to his social group (id.). The student was challenged to understand the perspective of others when social breakdowns occurred (id.). Carried over from the May 2016 IEP were two social/emotional annual goals addressing the student's ability to identify coping skills to maintain acceptable school behavior and identify response options to social situations, possible consequences, and favorable outcomes (compare Dist. Ex. 1 at pp. 12-13, with Dist. Ex. 6 at pp. 9-10). Further, compared to the May 2016 IEP, the April 2017 CSE did not carry over an annual goal involving identifying positive qualities and added a new annual goal involving fostering and maintaining two positive relationships with peers (compare Dist. Ex. 1 at pp. 12-13, with Dist. Ex. 6 at p. 9). The director of special services testified that the new goal regarding relationships with peers was added based on comments "in the teacher reports" as well as from the Focus teacher during the April 2017 CSE meeting that the student "very much wants to have meaningful friendships and that he sometimes has difficulty navigating certain social situations, [and] misreading certain social cues" (Tr. p. 65).

The carry-over of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; [i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years.]" (P.C., 232 F. Supp. 3d at 413-15, quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at *15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student's] progress and updated evaluative information"]). Here, while the IHO's concern with the April 2017 CSE's decision to carry over several of the student's annual goals from the IEP for the 2016-17 school year is not unwarranted, a review of the annual goals as compared to the present levels of performance in the April 2018 IEP demonstrates that the goals aligned with the student's identified needs (compare Dist. Ex. 1 at pp. 7-9, with Dist. Ex. 1 at pp. 11-13). The decision to maintain goals from the year prior was explained because the student had continuing needs in these areas, and the evidence in the hearing record, including the information from Winston Prep, supports that perspective (see Tr. pp. 60-65; Dist. Exs. 1 at pp. 1-2, 8-10; 9 at pp. 1-2).⁹ Moreover, as the student attended Winston Prep for the 2016-17 school year, this is not an instance where the

⁹ Indeed, in a similar manner, the Focus teacher testified that during the 2016-17 school year the Winston Prep staff continued to address many of the same challenges that the student experienced during the prior year as it was determined that a lot of those skills still needed to be addressed (Tr. pp. 1044-48). The Focus teacher testified that the student did make progress toward the goals worked on at Winston Prep during the 2016-17 school year yet acknowledged at hearing that at the end of the 2016-17 school year the student continued to struggle in a number of areas and did not achieve all of his goals in the areas of writing, reading, math, and social skills and that, therefore, Winston Prep recommended the same annual goals for the following year (Tr. pp. 1065-70, 1078-79).

school district already had the opportunity to work on the particular annual goals with the student and carried them over even though the student did not achieve them.

Based on the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the annual goals in the April 2017 IEP were inappropriate and that, as a result, the district did "not entirely" meet its obligation to offer the student a FAPE for the 2017-18 school year.

C. April 2018 CSE and IEP

1. Parent Participation and Predetermination

Similar to the 2017-18 school year, the district argues that the IHO erred in finding that the April 2018 CSE's lack of an in-depth discussion of annual goals amounted to a procedural violation. Further, the parents again allege that the IHO erred in finding that the CSE did not predetermine the student's program and placement.

As noted above, the IHO made several findings of fact to support her determination that the CSEs did not engage in impermissible predetermination in developing the student's IEPs (see IHO Decision at pp. 46-47). Specific to the April 2018 CSE meeting, the IHO found as follows:

During the 2018-2019 CSE convene, the record is clear that several modifications, accommodations and classroom options were discussed with the Parents and later added to the student's IEP. These included the addition of daily reading classes, the recommendation for a co-taught science class and mandated Parent communication. Although the assignment of a one-to-one paraprofessional was offered, the Parents again objected to both that and the use of an individualized BIP. In addition, a referral for an auditory processing consultation was recommended. Enriched modifications included the use of books on tape and aural reading support. With the exception of [the student's] goals, the Parents had a full and fair opportunity to discuss their son's educational planning and they did so. Given the guidelines articulated above, I find no evidence of predetermination.

(id. at p. 47).

Rather than alleging error with these factual determinations, the parents argue that the April 2018 CSE's predetermination of the student's IEP was established by evidence that the recommended program and placement were similar to years prior, that at the time of the meeting, the ninth grade special education teacher "kn[ew] that she would be the classroom teacher" for the 2018-19 school year, and that the goals remained consistent and were not discussed (Answer & Cross-Appeal at pp. 7-8). First, as noted above, the similarity of the program and placement alone does not establish predetermination, particularly since the April 2018 CSE adjusted the recommendations for the student compared to the year prior, as the IHO noted (see IHO Decision at p. 47). Specifically, a comparison of the student's April 2017 IEP and the April 2018 IEP reflects that the April 2018 CSE made changes to address the student's needs and the parents' concerns,

including increasing the frequency of the special reading class to once daily, adding ICT services for science in lieu of a special class, adding provision for weekly feedback from the "support teacher" to the student's parents, and, for accommodations, adding audio books and consultations to determine the student's need for an FM system (compare Dist. Ex. 2 at pp. 19-20, with Dist. Ex. 1 at pp. 13-14). As for the ninth-grade special education teacher's alleged advanced knowledge that she would be assigned as the student's teacher, she testified that she learned that the student might be in her class when the parent was arranging to observe the classroom (Tr. pp. 392-93, 395, 424). According to the student's mother, that visit took place "after the CSE meeting in preparation for ninth grade" (Tr. pp. 597-98, 619-20; see Tr. p. 424; Dist. Ex. 2 at p. 6); therefore, to the extent the visit took place after the April 2018 CSE meeting, the teacher's knowledge that the student would be assigned to her classroom does not demonstrate that the CSE engaged in predetermination. Moreover, the anticipation of which staff might be assigned to teach the student, on its own, would not amount to predetermination as long as the CSE maintained an open mind regarding the student's program and placement (see T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9). Changes in the student's annual goals are discussed further below. I now turn to the discussions had during the April 2018 CSE meeting as relevant to the district's appeal and the parents' cross-appeal.

While the specific annual goals included in the April 2018 IEP were not discussed, the hearing record shows that the April 2018 CSE meeting included discussions regarding the student's areas of continuing need. The evidence in the hearing record reveals that the parents attended the April 2018 CSE meeting along with legal counsel (Dist. Ex. 2 at p. 1). In addition, the Winston Prep dean of students, a private psychiatrist, and a private educational consultant participated for portions of the meeting in order to provide the CSE with information about the student's then-current needs and progress made during the 2017-18 school year (id.). The director of special services noted that the members of the team had received all reports, along with the evaluations, in advance of the April 2018 CSE meeting (id.).

At the April 2018 CSE meeting, the Winston Prep dean of students stated that over the last few years the student had made significant gains and noted that the student was more confident, had become more independent with his homework, and had become more self-aware and increased his ability to socialize (Dist. Ex. 2 at p. 1). Reportedly, the student had made progress in his academic classes, including math (Algebra I), history, and science (id. at p. 2). The dean of students noted that in literature class the student participated with prompting and required encouragement to fully engage in the literature (id.). According to the dean of students, the student's attention waivered throughout the school day and he benefitted from teacher prompts (id.).

The dean of students stated that writing was one area where the student's development was "ongoing" and that he continued to need support achieving cohesiveness in his written work and making sure that his sentences were grammatically correct (Dist. Ex. 2 at p. 2). The dean of students reported that the student's greatest continuing needs were in the areas of time management, correctly attending to directions and expectations, and slowing down to focus on the important details of a given task (id. at pp. 1-2).

During the April 2018 CSE meeting, it was noted that math fluency and inferential reading comprehension were areas requiring special education (Dist. Ex. 2 at p. 2). The dean of students

also identified writing, decoding skills, reading fluency and accuracy, and cohesiveness of written work as areas of continued need (id.). With respect to social skills, the dean of students stated that the student needed to better navigate cooperative learning situations with peers and improve his self-monitoring of off-topic comments (id.). According to the meeting information summary attached to the April 2018 IEP, "[u]pdated goals w[ould] address these areas" (id.).

The student's private psychiatrist participated in the CSE meeting and shared information about the student's "psychopharmacological management" and his diagnosis of attention deficit hyperactivity disorder (Dist. Ex. 2 at p. 2).

Next, the educational consultant, who conducted an observation of the student in January 2018 and produced an April 2018 independent educational review, participated at the April 2018 CSE meeting and her report was made available to members of the CSE (Dist. Ex. 2 at p. 2; see Dist. Ex. 26). The consultant stated that the student continued to have executive functioning deficits and organizational needs (Dist. Ex. 2 at p. 3). She also stated that annual goals for the student for the 2018-19 school year should address self-monitoring, keeping himself on track, and completing work independently (id.).

The parents shared the student's successes at Winston Prep, discussed his improvement in receiving feedback, and shared concerns regarding how the student would function in a "regular" public school and how he would successfully transition back to public school (Dist. Ex. 2 at pp. 2-4). When asked by district staff, during the April 2018 CSE meeting, to share her perspective regarding the student's continuing social skill needs, the student's mother identified the student's day-to-day interaction with other students and his interpretation of social cues and signals (id. at p. 4).

The audio recording of the April 2018 CSE meeting ended before the meeting was complete (compare Parent Ex. B, with Dist. Ex. 2 at pp. 1-6); however, the meeting information summary attached to the IEP also does not reflect a discussion of the specific annual goals to be included in the IEP (see Dist. Ex. 2 at pp. 4-6). The school psychologist acknowledged at the impartial hearing that, while specific annual goals were not reviewed, the "goal areas" were discussed at the April 2018 CSE meeting, including areas related to "social decision making, social skills, [and] math fluency" (Tr. pp. 486-87). The parent testified that she did not recall whether the annual goals were discussed at the April 2018 CSE meeting and stated, "I don't think we ever got there . . . no goals" (Tr. p. 617).

Here, while the evidence in the hearing record suggests that the annual goals ultimately included in the April 2018 IEP may not have been discussed during the April 2018 CSE meeting, the weight of the evidence in the hearing record indicates that because the parents attended the April 2018 CSE meeting (with counsel) and participated in the meeting—and as discussed more fully below, the annual goals were appropriate to meet the student's needs—any failure to discuss the particular annual goals included in the April 2018 IEP at the CSE meeting did not significantly impede the parents' opportunity to participate in the development of the student's IEP or demonstrate that the district failed to have an open mind with respect to the annual goals (see E.A.M., 2012 WL 4571794, at * 8 [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

2. Annual Goals

With respect to appropriateness of the annual goals in the April 2018 IEP, the IHO took issue with the continuation of annual goals in the areas of study skills, reading, writing, and math from the student's prior IEPs (IHO Decision at pp. 45-46). The IHO acknowledged that it was "surely not uncommon for some students to struggle from year to year with the same issues" but that "the wide repetition of IEP goals from year to year should signal educators to reassess, redraft and re-define educational objectives and student needs" (*id.* at p. 45). The IHO found that the April 2018 CSE's continuation of goals from the prior IEPs was "'reflexive' and automatic" (*id.*). On appeal, the district alleges that the IHO erred in finding that the annual goals in the April 2018 deprived the student a FAPE.

The director testified that the CSE had quite a bit of documentation from Winston Prep, from evaluations, and from parental input, which was translated into annual goals (Tr. pp. 90-91). The April 2018 CSE had available to it a winter 2017 progress report from Winston Prep (*see* Dist. Ex. 2 at p. 5; 27). The progress report described the student's continuing needs in time management, problem solving, organization, developing self-awareness, considering situational context during social conversations, reading fluency, and math fluency in the area of multiplication (Dist. Ex. 27 at pp. 1-2). Further, as noted above, at the April 2018 CSE meeting the Winston Prep dean of students reported on additional areas of continuing need including time management, following all directions and correctly attending to the directions and expectations, slowing down to focus on the important details of a given task, cohesiveness of written pieces, decoding skills, reading fluency and accuracy, math fluency, navigating cooperative learning situations with peers, and self-monitoring of off-topic comments (Dist. Ex. 2 at p. 2).

The April 2018 IEP contained 18 annual goals including seven study skills annual goals, three reading annual goals, two writing annual goals, three math annual goals, and three social/emotional/behavioral annual goals (Dist. Ex. 2 at pp. 16-18). Seven of the annual goals were carried over from the previous IEP verbatim and four more were carried over with slight modifications to address the student's grade level and/or progress (*compare* Dist. Ex. 2 at pp. 16-18, *with* Dist. Ex. 1 at pp. 11-13). The April 2018 IEP included seven new goals that had not been included in the April 2017 IEP (*compare* Dist. Ex. 2 at pp. 16-18, *with* Dist. Ex. 1 at pp. 11-13). Overall, a review of the annual goals included in the April 2018 IEP reveals that they addressed the areas of the student's identified needs.

Regarding math, the April 2018 IEP present levels of performance stated that the student displayed weaknesses in areas of math facts fluency and applied problems and noted that the student's progress in the area of math fluency in multiplication had been slow (Dist. Ex. 2 at p. 12). The CSE again carried over the annual goal involving the use of inverse operations to solve one and two step equations algebraically (*compare* Dist. Ex. 2 at p. 18, *with* Dist. Ex. 1 at p. 12). A math annual goal involving multi-step problems was also carried over but adjusted to include language requiring the student to locate key words "given the grade 9 Math curriculum" (*compare* Dist. Ex. 2 at p. 18, *with* Dist. Ex. 1 at p. 12). Further, the April 2018 IEP included a new annual goal involving the student's accuracy and speed with basic multiplication facts (*compare* Dist. Ex. 2 at p. 18, *with* Dist. Ex. 1 at p. 12). The director of special services testified that there was reference in the Winston Prep winter 2018 progress report regarding automaticity for multiplication facts and so the CSE added an annual goal to address that need (Tr. p. 94).

In the area of writing, the April 2018 IEP noted reports of the student's increased willingness to review and edit his work and stated that he benefitted from the creation of a detailed outline prior to drafting essays and written work and that he needed support with the cohesiveness of his written work with attention to grammatically correct sentence structure (Dist. Ex. 2 at pp. 12-13). The April 2018 IEP carried over both writing annual goals from the April 2017 IEP (involving writing with relevant content and the editing and rewriting process) but increased the criteria for achievement for the editing/rewriting goal from 75% to 80% (compare Dist. Ex. 2 at pp. 17-18, with Dist. Ex. 1 at p. 12). The director of special services testified that the increase in the evaluative criteria was in response to the gains the student had made in writing (Tr. pp. 92-93).

In the area of reading, the April 2018 IEP indicated that testing results found the student performing in the low average range in the areas of sentence reading fluency and passage comprehension (Dist. Ex. 2 at p. 13). The IEP also noted information from the Winston Prep winter 2018 progress report that the student exhibited greater skills in decoding and comprehension when reading high-interest materials and noted that his vocabulary has increased through pre-viewing unfamiliar terms (id.). The three reading annual goals included in the April 2018 IEP were the same or similar to those included in the April 2017 IEP (involving reading fluency, summarizing text, and citing textual evidence to support an analysis of the text) (compare Dist. Ex. 2 at p. 17, with Dist. Ex. 1 at pp. 11-12). According to the director of special services, the reading annual goals were changed to reflect that the literature and information text would be commensurate with his grade level (Tr. p. 91). Further, the reading annual goal involving providing text-based evidence included additional language requiring the student to "cite three examples of strong and thorough textual evidence that supports an analysis of what the text says explicitly as well as inferences drawn from the text" (compare Dist. Ex. 2 at p. 17, with Dist. Ex. 1 at p. 11).

The April 2018 IEP reported that the student required further support in the area of study skills including time management, problem solving, and overall organization and noted that the student benefitted from monitoring to ensure he attended to the correct directions and slowed down to focus on the important details of a given task (Dist. Ex. 2 at p. 13). The April 2018 IEP carried over the two study skills annual goals from the April 2017 IEP (involving prioritizing homework and establishing and following a study schedule) and included five new study skills goals (compare Dist. Ex. 2 at pp. 16-17, with Dist. Ex. 1 at p. 11). Regarding the five new study skills goals, the director of special education testified that it seemed important that the IEP be very specific about what the student needed to successfully navigate a public high school environment (Tr. pp. 90-91). The study skills annual goals added to the April 2018 IEP targeted organizing personal materials in a binder; using a daily planner; creating graphic organizers prior to beginning projects or complex tasks; learning and demonstrating new strategies for completing assignments, projects, and tests; and using graphic organizers to take written notes during class lessons across all academic settings (compare Dist. Ex. 2 at p. 17, with Dist. Ex. 1 at p. 11).

With respect to social development, the April 2018 IEP present levels of performance indicated that the student had developed strong friendships at Winston Prep but noted that the student could be sensitive to perceived slights among his peers and needed support in his ability to maintain sight of the bigger picture, take another's perspective, and practice flexible thinking during times of challenges (Dist. Ex. 2 at pp. 14-15). Reportedly, the student required support to breakdown those situations that caused him stress and develop coping strategies that could support

him in those moments (id. at p. 15). The April 2018 IEP indicated that the student continued to require support in identifying presenting problems, considering multiple causes and effects, and inferring what others may be thinking based on evidence (id. at p. 14). Parent input identified continuing needs in the areas of day-to-day interactions with peers and interpretation of social cues and signals (id. at p. 15). The April 2018 IEP included two of the same social/emotional annual goals from the April 2017 IEP (involving identifying coping skills to maintain acceptable behavior and identifying responses to hypothetical social situations) and one new goal (involving the use of positive strategies to resolve conflicts with peers or adults) (compare Dist. Ex. 2 at p. 18, with Dist. Ex. 1 at pp. 12-13). The school psychologist testified that within the Winston Prep winter 2018 progress report, the student's Focus teacher reported that the student felt stress and had difficulties coping at times and that, therefore, the school psychologist believed that the annual goal involving identifying coping skills to maintain acceptable school behavior continued to be appropriate (Tr. pp. 452-53). The director of special services also noted that there was a great deal of information about the student's ability to successfully navigate relationships and so the CSE highlighted that as an annual goal involving using positive strategies to resolve conflicts with peers or adults (Tr. p. 95).

Again, in this case, while many of the annual goals included in the April 2018 IEP were carried over from the prior IEP, a review of the hearing record demonstrates that the goals aligned with the student's needs and appropriately reflected the student's progress (compare Dist. Ex. 2 at pp. 11-15, with Dist. Ex. 2 at pp. 16-18), that the district had still not implemented the goals carried over from the prior IEPs given the parents' unilateral placement of the student at Winston Prep, and that information before the CSE described several of the student's areas of need as continuing relative to the prior school year (see Tr. pp. 90-95, 452-53; Dist. Exs. 2 at pp. 1-4, 12-15; 27 at pp. 1-2). Thus, the evidence in the hearing record does not support the IHO's conclusion that the annual goals in the April 2018 IEP were inappropriate and that, as a result, the district failed to fully meet its obligation to offer the student a FAPE for the 2018-19 school year.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record does not support the IHO's determination that the April 2017 and April 2018 CSE's lack of discussion of annual goals or the repetition of annual goals from prior IEPs resulted in a denial of a FAPE to the student. Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2017-18 and 2018-19 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Winston Prep was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 24, 2020, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2017-18 and 2018-19 school years and which ordered the district to reimburse the parents for a portion of the student's tuition at Winston Prep.

Dated: **Albany, New York**
 October 5, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER