



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-114

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

Appearances:

Thivierge & Rothberg, P.C., attorneys for petitioners, by Randi M. Rothberg, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail M. Eckstein, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered the student an appropriate educational program and denied their request to be reimbursed for their son's tuition costs at the Pathway Study Center, Inc. (Pathway) for the 2018-19 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of this matter is presumed and will not be recited in detail. Briefly, during the 2017-18 school year the student attended first grade in a "mainstream class" at a nonpublic school, after which time he was "recommended [for] a more intense program" (Parent Ex. F at p. 1). The parent referred the student for a reevaluation due to his overall academic delays and social/emotional "issues," and the district's July 2017 psychoeducational evaluation report reflected parent reports that the student had processing difficulties and benefited from working with his "SETSS" provider (*id.*).¹ The

¹ The term "SETSS" refers to special education teacher support services (see Parent Ex. B at p. 15).

parents unilaterally placed the student at Pathway in September 2017 and he attended school there for the 2017-18 school year (Parent Ex. A at p. 3).²

On May 25, 2018, a CSE convened to develop the student's IEP for the 2018-19 school year (Parent Ex. B). Having determined that the student was eligible for special education and related services as a student with a speech or language impairment, the May 2018 CSE recommended that the student receive a 10-month school year program consisting of 35 periods per week of integrated co-teaching (ICT) services, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at pp. 1, 10, 14).³ In addition, the May 2018 CSE recommended daily use of an FM unit, several supports and strategies to address the student's management needs, 14 annual goals, testing accommodations for State and local tests, and special transportation services (id. at pp. 4-11, 13).

In a prior written notice dated June 12, 2018, the district informed the parents of the recommendations from the May 25, 2018 CSE meeting for the 2018-19 school year, which were based on a November 15, 2017 speech-language report, a May 9, 2018 auditory processing evaluation report, and a May 25, 2018 teacher report (Dist. Ex. 4 at p. 1).⁴

In a school location letter dated June 12, 2018, the district informed the parents of the public school to which the student was assigned to attend for the 2018-19 school year (Parent Ex. C at p. 1).

In a letter dated July 20, 2018, the parents informed the district that after receiving the school location letter, they called the assigned school to set up a visit and were told the school was closed for the summer, and further, that if they visited in September 2018, it would not be a good representation of the school "right away" (Parent Ex. D at p. 2). The parents indicated that when the assigned school reopened in the fall, they intended to follow up to set up a visit for an appropriate time (id.). In addition, the parents advised the district that until they were able to set up a visit to learn more about the program and assigned school, they intended to continue to send the student to Pathway for the 2018-19 school year, and that they reserved the right to look to the district for "the tuition, costs, and expenses of [the student's] program and services" and that wherever the student attended school, they would accept the special education transportation in the student's IEP (id. at p. 3). The student attended Pathway starting September 2018 (see Parent Exs. E at p. 2; H at p. 1).

² The Commissioner of Education has not approved Pathway as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute on appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

⁴ The speech-language report, teacher report, and auditory processing evaluation report referenced in the June 2018 prior written notice were not included in the hearing record (see Parent Exs. A-N; Dist. Exs. 1-5).

In a letter dated September 14, 2018, the parents informed the district that the student's mother visited the assigned school earlier in the month and met with the assistant principal who showed her "the third grade ICT classroom identified" as the student's placement (Parent Ex. E at p. 1). The parents indicated that given the student's difficulties, the student needed a smaller more intensive program (id. at p. 2). The parents also noted concerns, including that 500 students attended the school, the ICT classroom currently had 31 students in it and the instruction was geared for a third grade level, the students in the classroom sometimes grouped with another classroom for mainstreaming, and approximately 90 to 100 students ate together in the cafeteria at the same time (id. at pp. 1, 2). According to the parents, the assigned public school would have been overwhelming for the student and it would not have met the student's needs; therefore, they declined a spot for the student at the assigned public school (id. at p. 2). Further, the parents notified the district that they intended to continue sending the student to Pathway for the 2018-19 school year, and that they reserved the right to look to the district for the tuition, costs, and expenses of the student's program and services and would accept the special education transportation indicated in his IEP (id. at pp. 2-3).

A. Due Process Complaint Notice

In a due process complaint notice dated May 1, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A). The allegations included that the May 2018 CSE was not properly composed as it did not include a regular education teacher, the district failed to conduct a functional behavioral assessment (FBA) of the student and develop a behavioral intervention plan (BIP) despite the student's known behavioral issues, and the CSE failed to consider the full continuum of programming—including any class smaller than 12 students—or a program similar to the one he was receiving at Pathway (id. at p. 3). Further, the parents asserted that the CSE failed to meaningfully consider the requests and recommendations of the parents and Pathway staff in the development of the student's IEP, and that the proposed IEP was reflective of "impermissible policy and predetermination, elevated over [the student's] individual educational needs" (id. at p. 4).

Regarding the content of the May 2018 IEP, the parents asserted that the present levels of performance and management needs were insufficient, and the IEP lacked sufficient behavioral supports and supports for the student's anxiety (Parent Ex. A at pp. 3-4). Further, the parents argued that the IEP lacked sufficient annual goals and that many of the annual goals were vague, not objectively measurable, and/or inappropriate for the student, and lacked short-term objectives (id. at p. 4). As for the placement recommendation, the parents alleged that "an ICT class" would not provide the student with the level of individualized support and instruction, including small group instruction, that the student needed, nor was it tailored to meet the student's needs (id.). Additionally, the recommended ICT program would not be sufficiently supportive given the student's anxiety, difficulty with abstract thinking and attention, and social and behavior difficulties, and would not be able to fulfill all of the student's identified management needs (id.). The parents also claimed that the CSE failed to recommend parent counseling and training, the IEP lacked supports for school personnel and sufficient supports, services, and accommodations for the student, as well as promotion criteria (id.). In addition, regarding the assigned public school, the parents repeated the concerns raised in their September 2018 letter, asserting that the school did not have an appropriate class grouping for the student, it could not provide sufficient

supports and it would be too overwhelming for the student and, also, that the student needed a smaller setting (compare Parent Ex. A at pp. 5-6, with Parent Ex. E at pp. 1, 2).

As relief, the parents requested an order directing the district to reimburse or directly fund the tuition, costs, and expenses of the student's placement at Pathway for the 2018-19 school year (Parent Ex. A at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 7, 2020 and concluded on February 5, 2021 after eight days of proceedings (Tr. pp. 1-345). In a decision dated April 7, 2021, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2018-19 school year (IHO Decision at pp. 19, 21).⁵ Specifically, the IHO determined that the evidence in the hearing record did not provide a basis to conclude that the failure of the May 2018 CSE to include a regular education teacher resulted in a procedural violation that denied the student a FAPE (id. at pp. 16-17). She next determined that the recommendation for ICT services along with counseling, OT, speech-language therapy, and an FM unit was designed to address the student's needs in the least restrictive environment (LRE) (id. at p. 17). The IHO credited the testimony of a district witness who described the evaluative information upon which the CSE relied, how the CSE's recommendations met the student's needs, and how the parent and private school representative participated during the CSE meeting (id. at pp. 17-18). The IHO discussed the student's academic present levels of performance and found that speech-language assessment results accurately revealed the student's language and auditory processing deficits which were reflected in the May 2018 IEP and were addressed through the FM unit and speech-language goals (id. at p. 18). In the decision, the IHO relayed the CSE's consideration of other programs prior to recommending ICT services and referred to testimony about the assigned public school site (id. at pp. 18-19). The IHO concluded that the district met its burden to show that the recommendation for ICT and related services was sufficient to meet the student's needs and provide him with academic benefit; as such, the IHO found that the district offered the student a FAPE for the 2018-19 school year (id. at p. 19).

The IHO went on to determine that the parents had met their burden to show that Pathway "could be an appropriate placement for the [s]tudent" and would have met the student's needs (IHO Decision at pp. 19-20). Additionally, the IHO found that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (id. at pp. 20-21). However, as the IHO found that the district offered the student a FAPE, she denied the parents' request for reimbursement or direct payment of the student's tuition at Pathway for the 2018-19 school year and dismissed the parents' due process complaint notice with prejudice (id. at pp. 21-22). The IHO also noted that if the parents were entitled to funding for the unilateral placement, the cost of tuition would have to be reduced so that it only covered the secular portion of the student's education (id.).

⁵ The Office of State Review received two IHO decisions dated April 7, 2021, an original IHO Decision and a "corrected" IHO Decision which amended the parents' exhibit list to include Parent Exhibit N. Neither IHO decision is paginated, but for the purposes of this decision, the pages of the original decision will be cited by reference to their consecutive pagination, with the cover page as page "1" (see IHO Decision at pp. 1-26).

IV. Appeal for State-Level Review

On appeal, the parents allege that the IHO erred in finding that the district met its burden of proving that the recommended program was sufficient to meet the student's needs. More specifically, the parents assert that the IHO erred in finding that the May 2018 IEP was appropriate despite the CSE's failure to consider appropriate evaluative information and develop "accurate information" about the student. The parents also assert that the IHO erred by determining that the lack of a regular education teacher at the CSE meeting did not deprive the student of a FAPE or the parents' meaningful participation. The parents further assert that the student's annual goals were not developed at the CSE meeting and did not address certain areas of deficits. With respect to the recommended program, the parents allege that the district lacked "evaluative justification for recommending" ICT services, that testimony from the district witness did not support the recommendation, and that the IEP lacked sufficient management needs to address the student's deficits. Additionally, the parents contend that the district predetermined the student's program. Further, the parents allege that the district "failed to carry its burden that the recommended [assigned public] school placement could implement [the student's] IEP." Lastly, the parents argue that the IHO properly found that Pathway was an appropriate unilateral placement for the student; however, the parents disagree with the IHO's notation that the cost of the student's tuition would need to be reduced. The parents request reversal of the IHO's determination that the district offered the student a FAPE and an order directing the district to reimburse or directly fund the student's tuition at Pathway for the 2018-19 school year.

In an answer, the district denies the parents' allegations set forth in the request for review and requests dismissal of the parents' appeal. Specifically, the district asserts that the IHO properly found that the student was offered a FAPE because the recommended program, including ICT and related services, was sufficient to meet the student's needs and provide him with academic benefit. The district argues that the CSE relied on sufficient evaluative data, which established that the student would benefit from being in a mainstream classroom given his average test results, and that the recommended related services and management strategies would have addressed the student's other needs. Next, the district asserts that the IHO properly found that the recommended annual goals were appropriate and measurable, that the parents' claims regarding improper CSE composition were not supported by the evidence in the hearing record, and that the parents' predetermination and lack of participation allegations were belied by their active participation at the CSE meeting and the CSE's consideration of other programs for the student. Finally, the district contends that the parents' argument that the district failed to demonstrate that the assigned public school could implement the student's IEP "is of no moment" because that claim is speculative as the student did not attend the recommended program. As such, the district requests that the IHO's decision be affirmed.

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]).⁶

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. May 2018 CSE Process

1. May 2018 CSE Composition and Parent Participation

On appeal, the parents assert that the IHO erred in finding that the district's failure to properly compose the CSE did not deprive the student of a FAPE. The parents specifically assert that the May 2018 CSE was not properly composed because it failed to include a regular education

⁶ 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).

teacher despite recommending ICT services in a general education classroom. The parents further argue that the CSE failed to meaningfully consider the parent's concerns that an ICT classroom was too large for the student to learn in, which denied the parents meaningful participation in the collaborative process.

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

As determined by the IHO, the May 2018 CSE did not include the presence of a regular education teacher (IHO Decision at pp. 16-17). Accordingly, this constitutes a procedural violation, requiring a determination as to whether the absence of a regular education teacher at the May 2018 CSE meeting significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The parents contend that they raised concerns during the May 2018 CSE meeting that the ICT class was too large for the student and that the student needed additional supports (Req. for Rev. ¶¶16, 29; see Tr. p. 296). According to the parents, no one was able "to alleviate those concerns and explain what, if any, program modifications, interventions, and supports would be available to address [the student's] needs" (Req. for Rev. ¶29). Upon review, the hearing record does not support this contention.

The school psychologist who attended the May 2018 CSE meeting and served as the district representative testified that she was licensed as a regular education history teacher for grades 9-12, and that in addition to herself, participants at the meeting included the parent, the speech-language pathologist from Pathway who served as a Pathway representative, and a district special education teacher (Tr. pp. 39-41, 52-55, 138, 223; Parent Ex. B at p. 17). The school psychologist testified that during the course of her career she had worked in an elementary school setting with students in ICT settings (Tr. pp. 56-57). Additionally, as discussed further below, the May 2018 CSE had a teacher progress report that provided information to the CSE about the student's academic and social performance, and the CSE identified that his academic and communication deficits may affect his "learning in a general education curriculum due to difficulty answering comprehension questions, abstract concepts and intelligibility" (Parent Ex. B at pp. 2, 3, 4).

The speech-language pathologist from Pathway testified that at the May 2018 CSE meeting, both she and the parent talked about the student's academic goals and the social and emotional challenges the student faced including his rigidity, inflexibility, and difficulty with transitioning, and that the district CSE members "wrote notes and asked questions" (Tr. pp. 223-25, 228). During the discussion of the student's placement, the speech-language pathologist

testified that she and the parent "vehemently disagreed" with the recommendation for ICT services because of the physical class size (Tr. pp. 233-34).

In addition, the May 2018 IEP reflected the parents' concerns including that the student had difficulty with abstract reasoning and concepts, staying on task with math computations, copying letters from the board, writing a sentence independently, and processing information, as well as that he presented with poor motor skills (Parent Ex. B at p. 2). In addition, the IEP reflected that the parent expressed concern that the student struggled with understanding social cues, had difficulty maintaining interactions with peers, and required adult support to encourage him to participate in a group activity, as well as expressing concern about OT (*id.* at p. 3). The May 2018 IEP noted that the student's teacher from Pathway had expressed concerns regarding the student lacking "stranger danger" and approaching any adults; and that the student parallel played with peers, watched others play, but did not join his peers (*id.*).

As indicated above, the May 2018 CSE recommended 35 periods of ICT services per week, with counseling, OT and speech-language therapy, as well as the use of an FM unit for the 2018-19 school year (Parent Ex. B at p. 10). According to the May 2018 IEP, the CSE considered other service options for the student including SETSS and a 12:1+1 special class in a community school (*id.* at p. 15). The May 2018 CSE rejected those options because it determined that SETSS would not address the student's needs and a 12:1+1 special class in a community school placement was too restrictive (*id.*). The speech-language pathologist from Pathway, who participated in the May 2018 CSE meeting, testified that the CSE discussed those options during the meeting and provided rationales for why they were ultimately not recommended (Tr. pp. 138-39, 234-35).

Based on the above, although the May 2018 CSE did not include a regular education teacher, under the circumstances of this matter and as determined by the IHO, this procedural violation did not rise to the level of a denial of a FAPE (see DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]).

Additionally, although the parents disagreed with the CSE's recommendation for ICT services, as discussed above, the parents had the opportunity to present their concerns to the CSE and participate in the development of the student's program during the May 2018 CSE meeting. 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] ["Meaningful participation does not require deferral to parent choice"].⁷

2. Consideration and Sufficiency of Evaluative Information

On appeal the parents argue that the IHO erred in finding that the May 2018 IEP was appropriate despite the May 2018 CSE's failure to consider appropriate evaluative information, asserting that the CSE did not discuss any evaluations during the meeting, including an auditory processing evaluation. The parents further assert that the district's speech-language evaluation of the student was flawed.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or

⁷ Related to the parents' assertions regarding participation at the May 2018 CSE, the parents also allege that the IHO erred by failing to find that the May 2018 CSE predetermined the student's placement because it did not "meaningfully consider or discuss any program options other than ICT." For similar reasons as discussed above, the parents' predetermination claim is not supported by the hearing record. 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. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; 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] [alternation 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]).

developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In deciding whether the May 2018 CSE had sufficient evaluative information, the inquiry logically focuses on identifying what documents the CSE relied on to develop the IEP.

With respect to the evaluative information the May 2018 CSE relied on to develop the student's IEP for the 2018-19 school year, the May 2018 IEP indicated that the CSE considered a March 2015 "IESP," a July 21, 2017 psychoeducational evaluation report, a November 15, 2017 speech-language evaluation report, a 2018 teacher progress report, and input from the parent (Parent Ex. B at pp. 1-3).⁸ The school psychologist testified that although she did not have a clear memory of the meeting, in addition to the progress and evaluation reports, the CSE asked both the parent and the Pathway speech-language pathologist about their concerns regarding the student (Tr. pp. 45, 52).

Concerning the parents' assertion that the district's speech-language evaluation of the student was flawed because the Pathway speech-language pathologist had administered the same assessment to the student two days prior to the district's administration, consistent with the IHO findings, the evidence in the hearing record shows that both evaluations identified similar communication needs (IHO Decision at p. 18).⁹ Specifically, the May 2018 IEP reflected the district's speech-language evaluation results, present levels of speech-language performance, and student needs consistent with the parent's and the Pathway speech-language pathologist's testimony regarding the student's poor processing, difficulties with auditory processing, and comprehension deficits (compare Tr. pp. 144, 147-48, 299, with Parent Ex. B at pp. 1-2).

Further, the evidence in the hearing record shows that the parents' allegation that the May 2018 CSE did not discuss the auditory processing evaluation is without merit. The student's mother testified that the student was evaluated and subsequently received a diagnosis of an auditory processing disorder in May 2018 (Tr. pp. 288, 291-92). She also testified that she did not provide the May 2018 CSE with the auditory processing evaluation report as she had not received it at the time of the meeting, although she believed she had relayed the student's diagnosis to the CSE (Tr. p. 292).

Therefore, the evidence in the hearing record shows that the district met its burden of showing that the May 2018 CSE had adequate evaluative information about the student and, as

⁸ The term IESP refers to an individualized education services program (see Educ. Law §3602-c).

⁹ Despite the parents' claims about the sufficiency of the speech-language evaluation of the student, the report from the Pathway speech-language evaluation did not appear to be offered as evidence in this proceeding (see Parent Exs. A-N).

discussed further below, the evaluative information was set forth in the May 2018 IEP (see Parent Ex. B at pp. 1-3).

B. May 2018 IEP

1. Present Levels of Performance

I next turn to the May 2018 CSE's description of the student's present levels of performance. In addition to the parents' claims related to the evaluative information available to the May 2018 CSE, discussed above, the parents assert that the IEP "overstated the student's academic levels."

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

The May 2018 IEP present levels of performance reflected information attributed to the July 2017 psychoeducational evaluation, the November 2017 speech-language evaluation, the 2018 teacher progress report, and the March 2015 IESP, as well as additional teacher and parent comments (Parent Ex. B at pp. 1-3). Specifically, the May 2018 IEP indicated that according to the July 2017 psychoeducational evaluation, the student's full-scale IQ of 92 placed him in the average range of intellectual functioning and his verbal comprehension scale score of 89 and fluid reasoning scale score of 85 placed him in the low average range for logical thinking abilities (id. at p. 1). In addition, a large discrepancy was noted among particular abilities, suggesting personal strengths in short-term working memory (high average range) and quantitative fluid and visual perceptual reasoning (average range) (id.). The IEP noted that a personal weakness was identified in the student's nonverbal inferential type of thinking (solving matrixes) (very low range), and the student's ability to screen rote information with speed and accuracy was in the below average range (id.). Further, when the student was required to match rote information under time pressure, he completely deviated from instruction and it was not clear if he was unmotivated for that task (id.). The May 2018 IEP stated that "[s]uch scores rather predict inconsistent achievement," and that the student's "behavior most likely interfere[d] with his ability to show his full potential" (id.).

With respect to the student's performance on the November 2017 administration of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), the May 2018 IEP noted that his core language score was in the below average/mild range, receptive language index was in the low/moderate range, expressive language index was in the average range, and language structure index was in below average/mild range (Parent Ex. B at pp. 1, 2). According to information included in the IEP, the student presented with a mild-moderate receptive and expressive disorder, as well as a mild speech sound disorder (id. at p. 2). The IEP indicated that the administration of the CELF-5 to the student revealed language processing difficulties with

deficits in understanding grammatical rules at the sentence level, formulating complete accurate spoken sentences, and interpreting spoken directives (id.). Further, the IEP stated that those skills related to classroom activities in that they were emphasized when describing stories or events, learning vocabulary, and following academic instruction (id.). In addition, the IEP indicated that informal testing and an administration of the School-Age Language Assessment Measures (SLAM) to the student revealed deficits in narrative generation skills and difficulties in comprehending story elements, inferencing skills, predicting outcomes, and with theory of mind (id.). The student's strengths were noted in his picture card sequencing skills (id.). The IEP stated that the student demonstrated phoneme distortions of an interdental lisp on sibilant phonemes at the word level, in consonant clusters, and during discourse but that his speech intelligibility was not impacted (id.). The student's fluency skills and vocal parameters were within normal limits, and in sum, test results appeared congruous with teacher and parental report (id.). The IEP stated that the student was struggling academically with difficulties in curriculum-based instruction including auditory comprehension skills (id.).

The May 2018 IEP indicated that, according to a 2018 teacher progress report, the student was estimated to be on a first-grade level in mathematics, had a good memory, and had difficulty with abstract reasoning and concepts (Parent Ex. B at p. 2). In addition, the IEP noted that the student required support to stay on task with math computations, had mastered basic addition and subtraction calculation skills, and with support, solved word problems (id.). The IEP indicated that the student was "reading on a G level book" which was "estimated to be on a first grade level," demonstrated relative strength in reading sight words, and was missing the necessary phonics rules and word attack skills (id.). Further, the student presented with poor motor skills, demonstrated difficulty copying letters from the board, and was unable to write a sentence independently (id.). According to the IEP, the student had difficulty processing information, required simple instruction, visual support, and related support to process information (id.). In addition, the IEP indicated that the student's oral language was likewise affected, in that the student had difficulty understanding cause and effect when reading a passage, and he struggled with identifying the main idea and with critical why questions (id.). The IEP noted that regarding reading, the teacher estimated that the student's skills fell within the end of second grade level in decoding and comprehension, and in mathematics, he was within the second grade level in calculations and math problem solving (id.). The IEP indicated that according to the July 2017 psychoeducational evaluation, academically, the student demonstrated average skills for basic reading and basic mathematics, and his decoding skills were considered a personal strength falling within the high average range (id.). Further, the IEP noted that the student's personal weaknesses were in reading comprehension, math problem solving, and written expression skills (id.).

With respect to social development, the May 2018 IEP indicated that the teacher reported that the student presented as an anxious student, that he required support to self-regulate and remain safe, and that he was eager to please (Parent Ex. B at p. 3). The IEP stated that the student required a structured system to support his difficulty with attending and self-regulating, and that the student's mother noted that he had a difficult time following directions and occasionally had meltdowns and tantrums (id.). In addition, the IEP indicated that the student suffered from anxiety and became overwhelmed when tasks were challenging, that he required routine to feel safe, and that he enjoyed playing with his peers interactively (id.). Further, according to the IEP, the student responded well to structure, encouragement, and praise, struggled with understanding social cues, had difficulty maintaining interaction with peers, and needed adult support to encourage him to

participate in group activities (id.). The IEP reflected teacher reports that the student lacked "stranger danger," approached any adults, and exhibited parallel play or watched peers play, but did not join his peers (id.).

With respect to physical development, the May 2018 IEP indicated that "[a]t a recent conference" the student's mother reported that the student was healthy, very athletic, happy, and liked to play basketball and swim (Parent Ex. B at p. 3). The IEP stated that previous reports indicated that the student was in good health, and that he had his hearing evaluated, which was found to be within normal limits (id.). Based on a March 2015 IESP, the IEP noted that the student hopped, jumped, threw, and kicked a ball, demonstrated poor body awareness, and reacted slowly to stimuli (id.). The student demonstrated delayed fine motor skills and poor tracing skills and required verbal prompts to hold a crayon with tripod grasp and hold scissors correctly (id.). The IEP indicated that the student defaulted to a left, fist-d palm grasp during writing tasks and needed hand over hand facilitation, and that he demonstrated a great deal of difficulty with motor planning with the open/close motion of his feet on a hopscotch map even with visual demonstration and repeated tries (id.). The student demonstrated difficulty maintaining focus, staying on task when working on a desktop activity, was very easily distracted, and demonstrated a short attention span (id.). "Occupational therapy" was noted on the IEP as a parental concern (id.).

As discussed above, the present levels of performance in the May 2018 IEP included test results and narrative information from the documents the CSE had available at the time, as well as teacher and parent reported information (Parent Ex. B at pp. 1-3). The hearing record lacks evidence to support the parents' claims that the CSE failed to develop accurate present levels of performance, that the IEP did not include relevant evaluative information about the student, or that the IEP reflected unreliable test results. Specifically, the IHO noted that the present levels of performance in the May 2018 IEP indicated that the student struggled with processing information, required related support to process information, and his oral language skills were also affected, which, as discussed above, was consistent with testimony from the parent and the Pathway speech-language pathologist (IHO Decision at p. 18; see Tr. pp. 144, 147-48, 299). Further, the IHO noted that according to the July 2017 psychoeducational evaluation, the student earned an average score on measures of word reading, reading comprehension, and math problem solving and his scores were on the first and second grade levels at that time, consistent with the Pathway speech-language pathologist's testimony that although the student was at an instructional functional level of second grade for reading and math, his processing skills and ability to make use of that information were not at a second grade level (IHO Decision at p. 18). In addition, while the parents assert that the IEP "overstated the student's academic levels," such an assertion is against the weight evidence in the hearing record; rather, the May 2018 IEP accurately reflected information from the July 2017 psychoeducational evaluation report (compare Parent Ex. B at pp. 1-2, with Parent Ex. F at pp. 3-6). Additionally, even if the student achieved scores on the academic achievement measures of the psychoeducational evaluation that were higher than his classroom performance, the IEP also reflected the 2018 teacher progress report that the student's math and reading skills were on a first grade level, he had difficulty with abstract reasoning and concepts, was missing phonic rules and word attack skills, and had difficulty with writing, processing information, and with oral language skills (Parent Ex. B at pp. 1-2). Based on the foregoing, review of the hearing record does not support the parents' claims regarding the May 2018 IEP present levels of performance and does not provide a basis to overturn the IHO's finding on this issue.

2. Annual Goals

On appeal the parents allege that the IHO erred in finding that the May 2018 IEP annual goals were appropriate for the student and assert that the annual goals were not developed during the CSE meeting, which deprived the parents of the opportunity to meaningfully participate, that the OT annual goals did not address several areas of need, and that, overall, the annual goals failed to address several areas of the student's deficits including his rigidity.

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

The May 2018 CSE developed 13 annual goals to address the student's needs for the 2018-19 school year (Parent Ex. B at pp. 5-9). One speech-language annual goal targeted the student's need to improve receptive language skills by retaining and interpreting auditory information while another annual goal targeted the student's need to improve receptive language skills by accurately responding to simple "wh" and yes/no questions (id. p. 6). An additional speech-language annual goal targeted the student's need to generate a narrative regarding the content of an age level text by producing a summary, while another annual goal targeted his need to improve expressive language skills by creating age-appropriate complex and expanded sentences (id.). One English language arts (ELA) annual goal targeted the student's need to ask and answer "wh" questions in order to demonstrate his understanding of key details in a text, and another ELA annual goal focused on the student's need to know and apply phonics and word analysis skills to decode words (id. at p. 7). A mathematics annual goal targeted using addition and subtraction to solve one and two-step word problems, while another math annual goal focused on using addition to find the total number of objects arranged in rectangular arrays and to write an equation to express the total (id.). Further, the CSE developed a writing annual goal targeting writing complete sentences including proper punctuation and capitalization using peer partnership/teacher support/checklist (id. at p. 8). Counseling annual goals focused on having the student remain on task, and accurately identify feelings and appropriate coping strategies when presented with real or imagined situations (id.). One OT annual goal targeted fine motor activity specific to the student moving his body smoothly in a regulated manner for a designated amount of time (id. at pp. 8-9). Another OT annual goal targeted improving the student's graphomotor skills with proper top to bottom letter formation, adequate spacing between words, and adequate pencil pressure with no more than two visual cues (id. at p. 9). In addition, a third OT annual goal targeted improving the student's self-regulation by having the student choose a strategy from a visual chart to use independently (id.).

The parents claim that the annual goals were not appropriate, that the OT goals failed to address several areas of the student's needs and that, overall, the annual goals did not address the student's rigidity. However, review of the May 2018 IEP shows that the CSE developed annual goals that addressed the student's needs as reflected in the present levels of performance. For

example, to address the student's language processing difficulties and difficulty formulating complete, accurate spoken sentences, the CSE developed annual goals to improve the student's ability to retain and interpret auditory information and answer simple questions, as well as to generate narratives and age-appropriate complex sentences (compare Parent Ex. B at p. 2, with Parent Ex. B at p. 6).¹⁰ To address the student's below grade level reading, math, and written language skills, the May 2018 CSE developed annual goals to improve the student's ability to demonstrate understanding of key details in text, his phonics and word analysis skills, his addition and subtraction computation skills, his ability to solve word problems, and his ability to write complete sentences (compare Parent Ex. B at p. 2, with Parent Ex. B at pp. 7-8). In addition, the OT goals addressed the student's needs as indicated in the present levels of function with regard to his delayed fine motor skills and difficulty with motor planning (compare Parent Ex. B at p. 3, with Parent Ex. B at pp. 8-9).

With respect to the parents' claim that May 2018 IEP annual goals failed to address the student's rigidity, to the extent that the IEP did not include every particular annual goal the parents may have desired, I note that an IEP does not need to identify annual goals for every one of a student's deficits in order to offer a FAPE (see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *14 (S.D.N.Y. Sept. 27, 2013), aff'd, 589 Fed. App'x 572 (2d Cir. Oct. 29, 2014). Additionally, while not specifically mentioning rigidity, the IEP included an annual goal to develop the student's ability to identify feelings and appropriate coping strategies in both real or imagined situations (Parent Ex. B at p. 8). Further, the IEP provided one 30-minute session per week of counseling services in a group setting (id. at p. 10).

Next, the parents assert that the annual goals were not developed during the May 2018 CSE meeting. However, even if the annual goals were finalized after the CSE meeting, this type of process has been found to be permissible so long as it does not seriously infringe on the parent's opportunity to participate in the meeting (S.B. v. New York City Dep't of Educ., 2015 WL 3919116, at *6-*7 [S.D.N.Y. June 25, 2015]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]).

The district school psychologist who attended the May 2018 CSE meeting testified that the annual goals were developed from the progress reports that were provided to the CSE, and that they were based on the concerns of the parents and teachers as well as the information obtained from documentation such as the speech-language evaluation and the psychoeducational evaluation (Tr. p. 45). For example, the school psychologist noted that one of the mathematics annual goals was based on results from the psychoeducational evaluation which indicated that the student's math problem solving was at the low end of the average range (Tr. pp. 58-59; see Parent Exs. B at p. 7; F at p. 4). The Pathway speech-language pathologist testified that her role at the CSE meeting was to, in part, "develop IEP goals," and that she and the parent discussed the student's Pathway academic goals and the social/emotional "challenges he was faced with" while the district members

¹⁰ In conjunction with annual goals to improve the student's processing skills, those needs were also specifically addressed by the May 2018 CSE's recommendation for an FM unit, individual and group speech-language therapy, and management needs including use of visuals, repetition/paraphrasing of directions, gestures, preview/review, and verbal cues (Tr. pp. 49-50; Parent Ex. B at pp. 4, 10).

of the CSE "wrote notes and asked questions," but that "no goals were developed" at the CSE meeting (Tr. pp. 223-24, 228).

Based on the above, the parent and the Pathway speech-language pathologist were afforded the opportunity to discuss their view of the student's needs and then-current goals, and review of the May 2018 IEP annual goals shows that they were developed based on the student's needs reflected in the IEP present levels of performance, parent and teacher input, and evaluative information available at the time (Tr. pp. 45, 224-25; Parent Ex. B at pp. 1-9). Therefore, the evidence in the hearing record supports the IHO's finding that the May 2018 IEP annual goals were appropriate and there is no basis to find a denial of FAPE based on the development of the annual goals.

3. ICT Services

The parents allege that the IHO erred in finding that the district met its burden of proving that it recommended a placement that was sufficient to meet the student's needs; specifically, the parents assert that the evaluative information available to the May 2018 CSE did not justify the recommendation for ICT services and that the May 2018 IEP lacked sufficient management needs to address the student's deficits.

ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], [available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf](http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf)).

As the IHO noted, the May 2018 CSE considered and rejected several programs before deciding on ICT services, including: SETSS, which would not have addressed the student's needs, and a 12:1+1 special class in a community school, which would have been too restrictive for the student (IHO Decision at p. 18; Parent Ex. B at pp. 10, 15). The district school psychologist testified that the May 2018 CSE recommended ICT services to provide the student with the opportunity to participate with peers in the general education mainstream setting "and in essence," the least restrictive environment (Tr. pp. 47-48). She opined that ICT services would have benefited the student because he would have had the opportunity to model after students in a mainstream environment and in turn, "to work to his optimal best" alongside his peers, who were similar to the student with regard to his academic strengths and needs (Tr. pp. 48-49, 50). According to the school psychologist, the CSE recommended ICT services and related services primarily because the student exhibited average cognitive skills, which indicated that he had the ability to learn, and his academic profile indicated that he had the capacity to move forward academically (Tr. pp. 49, 50). Additionally, she stated that the ICT classroom not only had a general education teacher, but also a special education teacher who would have "address[ed] the deficits that [the student] may have [had], or the needs that he may have [had] in the classroom at that moment" (Tr. pp. 50-51). Further, the school psychologist stated that the CSE recommended the ICT program because, although the student did not have a "wide range of needs," he "ha[d] difficulty with certain aspects of learning, including abstract reasoning and math computation,"

and having the special education teacher there would have addressed those needs (see Tr. pp. 64-67; Parent Ex. B at p. 2).

In conjunction with the ICT services, the May 2018 CSE also recommended that the student receive related services (Parent Ex. B at p. 10). Specifically, to address his deficits in speech-language and processing, the CSE recommended that the student receive speech-language therapy for three 30-minute sessions per week (Tr. pp. 49-50; Parent Ex. B at p. 10). Additionally, the school psychologist testified that the occupational therapist would have been able to address the student's motor skill needs, and counseling services would have addressed the student's anxiety (Tr. pp. 49-50). The May 2018 CSE recommended that the student receive two 30-minute sessions per week of OT and one 30-minute session per week of counseling (Parent Ex. B at p. 10).

Regarding the parents' claim that the May 2018 IEP lacked sufficient management needs to address the student's deficits, the May 2018 CSE determined that the student may benefit from strategies such as using visuals, repeating phrases or paraphrasing directions to assist in comprehension, modeling language, retelling and predicting activities, prompting/restating, using gestures when instructing or giving directions, reviewing and repeating, previewing vocabulary, and using verbal cues (Parent Ex. B at p. 4). The school psychologist testified that based on the concerns discussed during the May 2018 CSE meeting, the management strategies recommended on the IEP were "in order for [the student] to perform appropriately throughout the school day" (see Tr. p. 46; Parent Ex. B at pp. 1-4). Further, the school psychologist stated that the management needs could be used by both classroom teachers and related service providers, and that they were indicated on the IEP to address those areas that were denoted in the psychoeducational evaluation (Tr. pp. 46, 74).

Based on the above evidence, the hearing record provides no reason to depart from the IHO's finding that the recommended program, including of ICT and related services, in conjunction with the management needs included in the May 2018 IEP, were sufficient to meet the student's needs and provide him with educational benefit (IHO Decision at p. 19).

C. Assigned Public School Site

On appeal, the parents argue that the district failed to prove that the public school the student was assigned to attend for the 2018-19 school year was capable of implementing the student's IEP. According to the parents, the district witnesses either did not have personal knowledge of the class proposed for the student or only provided general information about the school and not specifics of the proposed class. As such, the parents asserted that the assigned school "did not meet [the student's] needs and could not provide him with the individualized support and breakdown of instruction he required."

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to

implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct 29, 2014]).¹¹ However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5).

Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Initially, the parents do not assert a specific allegation on appeal as to how the assigned public school would be unable to implement the May 2018 IEP. Instead, the parents argue that the district did not prove that the assigned school could implement the IEP because one district witness was not yet working at the assigned school during the 2018-19 school year and the other

¹¹ The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

witness did not recall giving the parent a tour of the school or the specifics as to the class the student would have attended (Req. for Rev. ¶¶ 36-39; see Tr. pp. 116-18). However, the allegations contained in the due process complaint notice appear to be related to the grouping of the student with other students with similar needs (Parent Ex. A at pp. 5-6; see Parent Ex. E), accordingly, they are not the type of nonspeculative allegations envisioned by the Second Circuit in assessing a parents' challenges to an assigned school (see J.C. v New York City Dep't of Educ., 643 Fed.Appx. 31, 33 [2d Cir. March 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP" (quoting R.E., 694 F.3d at 195))].¹²

Additionally, the district representative who attended the May 2018 CSE meeting testified that her "team" did not "make a recommendation for a particular site or a school" and that they were only responsible for making the "programmatic" and related services recommendations (Tr. p. 49). The assistant principal for the public school the student was assigned to attend during the 2018-19 school year (assistant principal) testified that the student would have been able to receive ICT services at the assigned public school (Tr. pp. 98-100). The assistant principal testified that there was an "ICT class" just for third graders, the range of academic abilities would not be more than "two years behind," and that the teachers were provided professional development in differentiated instruction which met the students' needs at their level and made the academic curriculum accessible for all students in the class (Tr. pp. 101, 103).¹³ Further, the assistant principal stated that the student's related services of counseling, OT, and speech-language therapy were all available at the assigned public school during the 2018-19 school year; and that he would have received an FM unit at the school (Tr. pp. 104-05). In addition, the assistant principal reported that the student's testing accommodations as well as strategies to address his management needs were available at the assigned public school (Tr. pp. 105-06). Further, the assistant principal testified that at the assigned public school the teachers used beginning of the year student assessments to group the students according to skill level (Tr. p. 113). This "flexible grouping" was assessed on an ongoing basis to determine whether a student needed reteaching or a different support to master skills (Tr. pp. 113-14).

Given the above discussion, despite it being ultimately speculative as the student did not attend the district's program, the hearing record does not contain evidence to indicate that the assigned school could not implement the student's May 2018 IEP or that he would not have received the individualized instruction and support, as recommended in the May 2018 IEP, to meet his needs during the 2018-19 school year.

¹² The parents' remaining allegation that the assigned school "did not meet [the student's] needs and could not provide him with the individualized support and breakdown of instruction he required" is really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]). Accordingly, it will not be addressed.

¹³ The student would have been entering third grade for the 2018-19 school year (see Parent Ex. F at p. 1).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Pathway was an appropriate unilateral placement or whether equitable considerations weigh in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 19, 2021**

**STEVEN KROLAK
STATE REVIEW OFFICER**