



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 22-110

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

Law Offices of Irina Roller PLLC, attorneys for petitioners, by Irina Roller, Esq. and Benjamin J. Hinerfeld, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 appropriate educational programming and denied their request to be reimbursed for the costs of the student's tuition at the York Preparatory School (York Prep) for the 2021-22 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student presents as a "twice exceptional" student and has demonstrated above average intellectual skills with concerns noted in executive functioning, academic processing speeds, writing formulation, and anxiety (Parent Exs. D at pp. 2, 6, 10, 11; X ¶¶ 4-6).<sup>1</sup> The student has

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<sup>1</sup> Guidance regarding what are sometimes referred to a "twice exceptional" or gifted students from the United States Department of Education's Office of Special Education Programs (OSEP) reiterates that the IDEA is silent on the topic of gifted students, and "gifted" is not a qualifying disability requiring special education and related

also received a diagnosis of an attention deficit hyperactivity disorder (ADHD), an unspecified anxiety disorder, and a learning disorder with impairment in writing (Parent Exs. D at pp. 2, 10, 11; X at p. 2).

The student attended preschool at age two and a half years old and, at age three, results of a psychoeducational evaluation of the student indicated that she had "very advanced intellectual skills" (Parent Ex. D at p. 1). For kindergarten through the fourth grade, the student attended a district public school (*id.* at p. 2).<sup>2</sup> For fifth grade (2016-17 school year), the student began attending The Lang School (Lang), which according to a neuropsychological evaluation report "is a specialized school for twice-exceptional" students where she received counseling, pragmatic language support, and occupational therapy (OT) (*id.*).<sup>3</sup> While at Lang for sixth grade (2017-18 school year), the parents obtained a neuropsychological reevaluation of the student, which indicated that she demonstrated very superior intellectual skills with "persistent challenges" in executive functioning, academic processing speeds, writing formulation, and anxiety (Parent Exs. D at p. 2; S at p. 10).

The student continued her attendance at Lang through ninth grade (2020-21 school year) (Parent Ex. D at p. 2). The parents filed a due process complaint notice challenging the program the district offered to the student for the 2019-20 school year (Parent Ex. R at p. 1). On August 15, 2020, the IHO who presided over the 2019-20 proceeding found that the district failed to offer the student a free appropriate public education (FAPE), that Lang was an appropriate unilateral placement, and that the parents were entitled to tuition reimbursement for the student's attendance at Lang for the 2019-20 school year (*id.* at pp. 18, 20). The IHO also ordered the district to conduct a reevaluation of the student in all areas of her suspected disabilities not evaluated within the last two years, and to develop a new IEP for the student for the 2020-21 school year (*id.* at p. 20).

The parents obtained a private neuropsychological evaluation of the student that was conducted over several dates from May to September 2020, resulting in a report dated October 13, 2020 (Parent Ex. D). On March 7, 2021, the parents signed an enrollment contract with York Prep for the student's attendance during the 2021-22 school year (Parent Ex. H).<sup>4</sup> On March 24, 2021, a CSE convened for the student's annual review, and found the student eligible for special education as a student with an other health impairment (Dist. Ex. 2 at pp. 1, 28).<sup>5</sup> The March 2021

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services (see Letter to Anonymous, 55 IDELR 172 [OSEP 2010]). Thus, intellectually gifted students are not considered disabled solely on the basis of intellectual giftedness.

<sup>2</sup> During the third grade, the student received special education teacher support services (SETSS) pursuant to an IEP (Parent Ex. D at p. 2). In fourth grade, the student began "pharmacotherapy" to "assist with her overall functioning" (*id.*).

<sup>3</sup> The Commissioner of Education has not approved Lang as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>4</sup> The Commissioner of Education has not approved York Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>5</sup> The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

CSE recommended that the student receive integrated co-teaching (ICT) services in English language arts (ELA), math, social studies, and science as well as one 40-minute session per week of individual counseling (*id.* at p. 23). On April 14, 2021, the district sent the parents a prior written notice summarizing the recommendations of the March 2021 CSE along with a school location letter with the name and location of the public school site the student had been assigned to attend (Dist. Exs. 5; 6). On June 22, 2021, the parents and the interim acting principal of the assigned public school site conducted a meeting and took a virtual tour via Zoom (Tr. pp. 129-31, 251).

By letter dated August 24, 2021, the parents sent the district a notice of unilateral placement indicating that the March 2021 IEP failed to offer the student a FAPE and that the district failed to provide the parents with a school location letter offering the student a school placement for September 2021 (Parent Ex. B at pp. 1-2). The notice also informed the district that the student was to attend York Prep with Jump Start for the 2021-22 school year and that the parents would be seeking reimbursement for that unilateral placement (*id.* at p. 2).

The district sent the parents a second school location letter on August 26, 2021 identifying the same school as in the April 2021 school location letter (Dist. Exs. 6; 8).

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

In a due process complaint notice dated September 13, 2021, the parents alleged that the district failed to offer the student a FAPE for the 2021-22 school year on procedural and substantive grounds (Parent Ex. A at p. 4). Initially, the parents argued that the March 2021 CSE was unduly constituted because it failed to have all the required members at the CSE meeting (*id.* at pp. 5-6). More specifically, the parents argued the CSE did not include a special education teacher or district representative that met the necessary criteria (*id.* at p. 6). The parents further argued that the CSE did not include a general education teacher, despite recommending ICT services (*id.*). The parents also argued that the CSE did not include a certified social worker or school psychologist, despite recommending counseling services (*id.*). Additionally, the parents argued that the CSE lacked the necessary qualifications and/or credentials and failed to invite professionals to the CSE meeting who would have worked with or evaluated the student (*id.*). Next, the parents alleged that the CSE ignored their concerns and predetermined the student's program recommendation, thereby denying the parents meaningful participation in the student's educational process (*id.* at p. 4). The parents also alleged that the CSE failed to evaluate the student in all areas of suspected disability (*id.* at p. 6). Specifically, the parents argued that the CSE failed to conduct any evaluations or assessments, in direct violation of a previous directive from an IHO presiding over the impartial hearing regarding the student's 2019-20 school year (*id.*). The parents further argued that the CSE failed to conduct an assistive technology evaluation, a classroom observation, a social history evaluation, vocational assessments and that it did not collect adequate information about the student's learning, behavior, and social-emotional strengths and weaknesses to develop an appropriate IEP (*id.* at pp. 5-7). Next, the parents contended that the CSE failed to use meaningful assessments, communicate assessment results meaningfully, or utilize any of its own evaluations, assessments, or data in making its own recommendation (*id.* at p. 5).

Turning to the substantive allegations, the parents contended that the March 2021 IEP failed to sufficiently identify the student's present levels of performance (Parent Ex. A at p. 5).

Next, the parents asserted that the annual goals in the March 2021 IEP were not appropriate because they were too general and vague and not specific for the student (*id.* at p. 4). The parents further asserted that the annual goals failed to indicate baseline and target grade levels of performance (*id.* at p. 5). The parents asserted that the methods of measuring achievement lacked specificity and annual goals were not measurable and not individualized to meet the student's needs (*id.*). In addition, the parents alleged that the March 2021 CSE's program recommendation of ICT services in a general education classroom was not appropriate for the student because the student required individualized attention and frequent redirection (*id.* at p. 4). The parents further alleged that the student required a small class and challenging learning environment (*id.*). Next, the parents argued that the assigned school was not appropriate because after the parents investigated the school, they determined it would not be appropriate for the student because the student would not be able to enroll in advanced placement classes and receive the supports and services identified in the IEP, executive functioning skills were taught during a two-week virtual skill development program in August, and foreign language instruction would have been a virtual class on Saturdays (*id.* at p. 8). The parents argued that the assigned school could not provide the student with specialized instruction, executive function instruction and supports, and accelerated subject matter courses commensurate with her intellect and could not implement the student's IEP (*id.*).

Turning to the student's unilateral placement, the parents alleged that York Prep was an appropriate unilateral placement because it was specifically designed to meet the student's unique needs in order for the student to make progress (Parent Ex. A at p. 9). The parents also alleged that equitable considerations weighed in their favor because they cooperated with the CSE and did not impede the CSE in offering the student a FAPE (*id.*).

As relief, the parents requested tuition reimbursement for the student's attendance at York Prep for the 2021-22 school year and reimbursement for private evaluations (Parent Ex. A at p. 11). With respect to pendency, the parents requested the student's placement at York Prep and argued that it was substantially similar to Lang, which was considered appropriate in an unappealed August 2020 IHO decision regarding the student's 2019-20 school year (*id.* at p. 9).

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

An impartial hearing convened on November 4, 2021 and concluded on May 18, 2022 after six days of proceedings (*see* Tr. pp 1-442). In a decision dated July 20, 2022, the IHO found that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at p. 43). Initially, the IHO found that the district committed several procedural due process violations, including, failing to "secure appropriate evaluations," failing to conduct a vocational assessment, and failing to have the necessary individuals at the CSE meeting (*id.* at p. 35). Notwithstanding, the IHO found that these procedural violations did not result in a denial of a FAPE because the district did not impede the student's right to a FAPE, impede the parents' opportunity to participate in the decision-making process regarding a FAPE, or cause a deprivation of educational benefits (*id.* at p. 36). Next, the IHO found that despite the parents' contention that their participation was impeded, the parents participated in the decision-making process because they attended the CSE meeting, provided the CSE with invaluable evaluative data, met the principal of the student's assigned school and further found the parents were given a full and fair opportunity to air their concerns and disagreements with the CSE (*id.*). The IHO also noted that although the district did not acquiesce to the parents' concerns, the district afforded the parents the appropriate level of

procedural due process rights (id.). Additionally, the IHO found that the district's failure to conduct evaluations of the student was substantially mitigated by the fact that the district had access to the private October 2020 neuropsychological evaluation report and the student's teacher, which provided the district with sufficient information to make its recommendation (id.). Next, the IHO found that the district did not impede the student's right to a FAPE because it considered all of the information provided by the student's neuropsychologist and other CSE participants and made detailed and appropriate recommendations (id. at pp. 36-37). The IHO also found that the IEP developed by the district took the concerns of the parents and CSE participants seriously and therefore did not "simply tr[y] to shoehorn the [s]tudent into a pre-determined placement" (id. at p. 37).

With regard to the substantive program recommendations, the IHO found that the district demonstrated that it provided the student with a FAPE because the management needs and accommodations in the March 2021 IEP were appropriate for the student and even endorsed by the parents' own witnesses (IHO Decision at p. 37). The IHO also noted that although the parents argued that the district failed to give a cogent and responsive reason for rejecting the recommendation in the private neuropsychological evaluation, it was the parents who rejected the recommendation for the same small, specialized school environment the student had at Lang (id.). Next, the IHO noted that although the parents disagreed with the district's recommended class which could potentially include up to 25 students, the parents ignored the fact that the principal testified that the student was offered an ICT classroom with 15-17 students, which was virtually identical to the setting in the parents' unilateral placement for the student at York Prep (id.). Additionally, according to the IHO the presence of a special education teacher would have reduced the student to teacher ratio in comparison to the parents' chosen placement, even if the class did have 25 students (id. at p. 8). The IHO also noted that to the extent that the student required additional support, the IEP included mandated counseling services once per week, which was also offered at York Prep (id.). With respect to the annual goals included in the March 2021 IEP, the IHO found that many of the goals were either directly or indirectly endorsed by the parents (id.). The IHO also found that many of the parents' complaints about the lack of ability to measure the student's progress towards the annual goals were unconvincing and that the goals in the IEP were not overly vague (id. at p. 39). The IHO further noted that although the parents expressed that the student needed explicit instruction with regard to achieving some math goals and effectuating her management needs, it was hard to ignore the fact that the student's core classes at York Prep were taught by a single general education teacher (id.). The IHO noted that although the parents indicated that ICT services were not an appropriate program for the student, few witnesses ventured a genuine attempt at addressing why that was the case (id. at p. 40). Additionally, the IHO noted that the parallels between what was offered by the district and what was offered by York Prep were "difficult to disregard" (id.). Next, the IHO was unconvinced that the student would get a higher level of executive functioning support at York Prep as the student's instruction could be matched if not far exceeded by the special education instructor who would have been in the student's classroom each day during every ICT class (id. at pp. 41-42).

With respect to the parents' argument that the assigned school could not implement the student's IEP, the IHO found that the principal at the assigned school made it quite clear that the assigned school was willing to be flexible to do whatever it took to develop a program for the student (IHO Decision at p. 42). The IHO also noted that when the parent was sent the school location letter again in August 2021, the parent did not reach out to the principal and "chose to

remain willfully ignorant" about the program at the assigned school (*id.* at p. 42). The IHO found that the assigned school would have been able to offer the student a challenging curriculum and that the availability of multiple advanced placement classes would have served the purpose of having the student placed with her intellectual and academic peers (*id.* at p. 43). The IHO found that the district offered the student a FAPE for the 2021-22 school year by developing an appropriate program for the student and that the assigned school would have been able to implement the student's IEP (*id.*). Accordingly, the IHO found it was not necessary to reach a determination of whether the unilateral placement was appropriate or equitable considerations weighed in the parents' favor (*id.*).

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

On appeal, the parents argue that the IHO erred in finding that the district offered the student a FAPE. More specifically, the parents argue that the IHO shifted the burden of proof in excusing the district's procedural violations. According to the parents the district's procedural violations included failing to conduct required evaluations, convening a CSE meeting without the participation of a school psychologist or a regular education teacher, and writing inappropriate social/emotional, academic, and post-secondary goals. The parents argue that, cumulatively, the identified procedural violations resulted in an inappropriate placement for the student and denied the parents sufficient information as to whether to accept the proposed placement. Next, the parents argue that the IHO erred by failing to make the district prove that the IEP and placement was appropriate for the student as the IHO repeatedly compared the IEP to the student's program at York Prep rather than evaluating the IEP's substance and merits. Additionally, the parents argue that the IHO impermissibly relied on retrospective testimony to rehabilitate the district's inadequate IEP, asserting that the testimony of the principal at the assigned school materially changed the district's offered program. The parents also argue that York Prep was an appropriate unilateral placement because it was individualized to address the student's needs and the student made progress. Lastly, the parents argue that equitable considerations weigh in their favor because they cooperated with the district and gave timely notice and did not impede the district's ability to develop a program for the student.

In an answer, the district generally argues to uphold the IHO's decision in its entirety. Initially, the district argues that the parents never indicated how the IHO shifted the burden of proof. The district also argues that the March 2021 CSE was properly constituted because it included all of the required participants under the IDEA. Next, the district acknowledges that it should have done its own evaluations, but agrees with the IHO that it had sufficient evaluative materials to make its recommendation. The district also argues that the IHO correctly found that the March 2021 IEP set forth measurable and detailed annual and secondary goals. The district asserts that the IHO did not use retrospective testimony to rehabilitate the March 2021 IEP. Lastly, the district argues that York Prep was not an appropriate unilateral placement for the student.

#### **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]).<sup>6</sup>

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**

As an initial matter, it is necessary to identify which of the parents' arguments are properly before me on appeal. State regulation governing practice before the Office of State Review requires that the 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

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<sup>6</sup> 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).

numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). 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]).

The parents have not challenged the IHO's finding that the parents participated in the decision making process during the development of the student's IEP. The parents also have not challenged the IHO's finding that the district did not predetermine the student's placement. As such, these findings have become final and binding on the parties and will not be reviewed on appeal (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]).

Additionally, the due process complaint notice raised issues that were not addressed by the IHO and have not been argued on appeal; for example, the parents have not asserted on appeal that the CSE did not include a special education teacher or a qualified district representative or that the March 2021 IEP failed to sufficiently identify the student's present levels of performance. State regulations require 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," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; 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]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Accordingly, the parents' claims raised in the due process complaint notice that were not addressed by the IHO and are not raised on appeal are deemed abandoned.

## **B. March 2021 CSE Process**

### **1. March 2021 CSE Composition**

On appeal, the parents argue that the lack of a school psychologist and regular education teacher at the March 2021 CSE meeting was a procedural violation that rose to the level of a denial of a FAPE.

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 Educ. Law § 4402[b][1][a]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). While not explicitly required in the IDEA, State law and

regulation also requires that a CSE include a school psychologist (Educ. Law § 4402[b][1][a][iv]; 8 NYCRR 200.3[a][1][iv]; see 20 U.S.C. § 1414[d][1][B]).

In the instant case, the March 2021 CSE meeting included the following participants: a district school psychologist who also served as the district representative, a district special education teacher, the parents, an educational advocate, and the student's ELA teacher/advisor from Lang (Tr. pp. 46-47; Dist. Ex. 2 at pp. 30-32).

Contrary to the parents' assertion, review of the hearing record indicates that a district school psychologist was present at the March 2021 CSE meeting and served in the role of a school psychologist and district representative (Tr. pp. 46-47; Dist. Ex. 2 at pp. 30-32). The representative of the school district may be "the same individual appointed as the special education teacher or the special education provider of the student or the school psychologist" (8 NYCRR 200.3[a][1][v]).

With regard to the parents' claim that the CSE failed to include a regular education teacher, a regular education teacher was a required member of the CSE as the CSE ultimately recommended placing the student in a regular education class with the support of ICT services (see 8 NYCRR 200.3[a][1][ii]).<sup>7</sup> According to the IDEA, the regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

The school psychologist testified that although she was "not a hundred percent sure" about the special education teacher's certification, she "believe[d] [the special education teacher] may also be certified in general ed," conceding that she was "not positive on that" (Tr. pp. 46-47). However, as the hearing record does not contain further evidence of the attendance of a regular education teacher at the March 2021 CSE meeting, the failure to include a regular education teacher at the March 2021 CSE meeting constitutes a procedural violation.

Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent.

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<sup>7</sup> According to State guidance, ICT services "means students are intentionally grouped together based on similarity of need for the purpose of receiving specially designed instruction in a general education class . . . [where the] general education teacher and a special education teacher share responsibility for the delivery of primary instruction, planning and evaluation for all students" (see "Continuum of Special Education Services for School-Age Students with Disabilities," Office of Special Education, at pp. 14-15 [rev. Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The parents contend that the district's procedural violations, including the lack of a regular education teacher at the March 2021 CSE meeting, denied them of the ability to decide whether to accept the proposed placement. Other than this brief assertion, there is no other arguments posed as to how the procedural violation either 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 (see Req. for Rev. at p. 3 see also 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). However, in their memorandum of law in support of their request for review, the parents expand on their more general assertions and claim that the lack of a regular education teacher at the CSE meeting denied the parents the ability to understand and scrutinize how the proposed district school placement would have implemented the recommended program (see Parent Mem. of Law at p. 5).

A factor to consider in determining whether the absence of a regular education teacher impeded the parents' participation in the CSE process to the extent it may have rose to the level of a denial of a FAPE is what the regular education teacher would have added to the discussion at the CSE meeting (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"]).

The district school psychologist testified that the parents expressed their concerns at the March 2021 CSE meeting, but agreed to visit the proposed school placement (Tr. p. 63-64).<sup>8</sup> The district school psychologist explained that the parents' concerns included that the class setting was too large, that the student might regress because the class was not homogenous, that the student would not be able to reach her potential, and that "sensory overload" would lead to anxiety (Tr. p. 63). Moreover, the student's father testified that the district school psychologist indicated during the March 2021 CSE meeting that the classes with ICT services would contain about 25 or possibly more students (Tr. p. 223). The parent further testified that they expressed their concerns to the district school psychologist at the CSE meeting indicating their belief that the student would be overwhelmed and shut down in a class of 25 or more students (Tr. p. 224). The parent also testified that the district school psychologist explained that a class of 15 students would not be appropriate for the student because the students in such a classroom in the district would be lower functioning intellectually than the student (Tr. p. 224; see Dist. Ex. 2 at p. 30). Additionally, the student's ELA teacher from Lang who participated at the March 2021 CSE meeting indicated that she was familiar with ICT class sizes and that she discussed her concerns with the CSE that and an ICT setting would potentially be too large for the student due to her social anxieties (Tr. pp. 410, 411, 416).

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<sup>8</sup> The March 2021 IEP also indicated that the parents expressed their concerns and agreed to visit any program recommended (Dist. Ex. 2 at p. 30).

According to the student's father's testimony by affidavit, the parents were surprised a regular education teacher was not at the March 2021 CSE meeting "who could address how [the student's] academic needs would really be met in that setting" (Parent Ex. Q at ¶16). The parent further testified that the parents communicated their concerns to the CSE and "expressed concerns about transitioning [the student] back to in person learning and . . . how that transition would work going into a public school setting" (*id.* at ¶¶ 17-18). According to the parent, the CSE understood the parents' concerns and informed them that they could investigate the public school prior to sending the student there (*id.* at ¶18). Prior to the end of the 2020-21 school year, the parents investigated the assigned school to see if it would be appropriate for the student; although the parents had additional concerns regarding the school after their investigation (which are discussed below), it appears that the parents were provided with the information that they were seeking (*id.* at ¶¶ 20-26).

Although the CSE did not include the participation of a regular education teacher, as discussed above, the parents were able to express their concerns and ask questions regarding the size of the classes where ICT services are delivered both during and after the conclusion of the March 2021 CSE meeting. Additionally, the district school psychologist was able to answer the parents' questions regarding the district's recommendation and to explain to the parent why she believed a general education setting with ICT services was more appropriate for the student, based on her academic abilities, than placement in a smaller, special class. Therefore, the evidence in the hearing record does not support a determination that the absence of a regular education teacher—although a procedural violation—impeded the student's right to a FAPE, 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 (*see J.F. v. New York City Dep't of Educ.*, 2012 WL 5984915, at \*7 [S.D.N.Y. Nov. 27, 2012] [concluding that the lack of a regular education teacher did not render an IEP inappropriate when there was no evidence of any concerns stated by the parent during the CSE meeting that required a regular education teacher to resolve]; *E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794, at \*6-\*7 [S.D.N.Y. Sept. 29, 2012]).

## **2. Sufficiency of Evaluative Information**

The parents argue that the district failed to conduct required evaluations and gather sufficient data to create an appropriate IEP. The IHO found that to the extent the district failed to conduct evaluations, this failure was mitigated by the fact that the district had access to sufficient information upon which to make its recommendation.

Pursuant to the IDEA, federal and State regulations, 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 must conduct one 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]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (*see* 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's

individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). 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]). An 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]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Insofar as the parents argue that the district failed to conduct any evaluations of the student, the hearing record supports the parents' assertion. As discussed above, the IHO in the prior proceeding, in an unappealed August 2020 IHO decision, directed the district to conduct a reevaluation of the student in all areas of her suspected disability (Parent Ex. R at p. 20). However, the district failed to conduct any evaluations. In fact, on appeal the district acknowledges that it "should have conducted its own evaluations" (Answer ¶ 14).

However, subsequent to the August 2020 IHO decision, the private neuropsychological evaluation of the student was completed and a report of the evaluation, dated October 13, 2020, was provided to the district (Parent Ex. D).

The school psychologist testified that in developing the student's IEP the CSE "[t]ook] the materials that we had" including the neuropsychological evaluation report, the school report, the student's report card, and the previous IEP (Tr. p. 51; see Dist. Exs. 2 at pp. 1-5; 5 at p. 2; 7 at p. 2). She further explained that the CSE, as a team, went through the student's present levels of performance and based on that discussion decided the student's management needs, what annual goals would be appropriate for the student to work on, the testing accommodations she required, and then the "recommendation page" based on that group discussion (Tr. pp. 51-52).

The March 2021 IEP contained cognitive and academic testing results, social/emotional functioning assessment results, as well as results from assessments in the domains of executive functioning including inhibition, sustained attention, working memory, and organization and planning, all gathered from the October 2020 neuropsychological evaluation (compare Dist. Ex. 2 at pp. 2-5, 9, with Parent Ex. D at pp. 4-9). Strengths were identified in the areas of verbal comprehension, fluid reasoning, visual spatial skills, reading comprehension, reading accuracy, and writing and sentence writing fluency (compare Dist. Ex. 2 at pp. 2, 4-5, with Parent Ex. D at pp. 4-5, 8-9). Needs were identified in the areas of adapting to situational changes and transitioning, inhibitory control, maintaining adequate attention, and anxiety which could affect

her flexibility, independence, and willingness to take risks, while relative weaknesses (generally all falling in the average ranges) were noted in the areas of processing speed, working memory, reading fluency, spelling, and math (compare Dist. Ex. 2 at pp. 3-5, 9, with Parent Ex. D at pp. 4, 6, 8-9). The IEP also reflected the October 2020 evaluation's findings that the student benefitted from and required individualized attention to help stay on task, to help scaffold and guide, and to organize her thoughts (compare Dist. Ex. 2 at pp. 7, 9, with Parent Ex. D at pp. 9-11).

The March 2021 IEP also included teacher reports that the student's fluency and reading comprehension were above grade level, her writing was at grade level with supports, and her math skills were at or above grade level (Dist. Ex. 2 at p. 1). The IEP reflected reports that the student was offered supports such as assignments broken down into smaller tasks, directions provided verbally and in written form, choices provided regarding work completion, multimodal support, and directions repeated and reframed; that she benefitted from wait time and extra time, repetition, and from checking of her work; and was working to better advocate for her needs (id. at p. 8). Additionally, the IEP indicated that the student demonstrated "civility and was a positive presence" in the school community, made improvement with revision to her work, had leadership skills and was a role model, had age-appropriate social relationships, and was working on advocating for her needs academically and had reportedly made improvements in this area (id. at pp. 6, 8).

Additionally, the March 2021 IEP included input from the parents that they saw her graduating from a four-year college and that the student had expressed interest in being a teacher, was "incredibly creative" and an avid reader, became anxious when distracted and that a small class size was helpful, struggled with some executive functioning skills in math, benefitted from being around peers with similar intellect, needed individualized support with open-ended assignments and getting started with assignments, and had previously received the diagnoses related to anxiety and sensory integration issues (Dist. Ex. 2 at pp. 7-9). The parent also shared that the student was very confident due to the supports she had received at her then-current school, and that the student had "thrived" with distance learning such that the parents were concerned that the student "may struggle when she returns to school" (id. at p. 8).

The student's academic performance, as reflected in the January 2021 Lang progress/report card, was included in the March 2021 IEP (compare Dist. Ex. 2 at pp. 1-2, 6-7, with Dist. Ex. 4 at pp. 1-24). Reportedly, the student met "nearly all (93%)" of the Algebra 2 standards at the independent level, demonstrated mastery of grammar and punctuation, translated her imagination effectively into her writing, worked "very hard" and volunteered to share her written work, and "singlehandedly" re-wrote the story of Pyramus and Thisbe into a shortened script for a class production (demonstrating comprehension of the anchor texts, character development, and a knowledge and understanding of a variety of techniques and genres) (compare Dist. Ex. 2 at pp. 6-7, with Dist. Ex. 4 at pp. 6, 13-14).

The school psychologist testified that there was no disagreement with respect to how the student was presenting cognitively and academically at the time of the March 2021 CSE meeting (Tr. p. 51).

Regarding the student's social development needs, the March 2021 IEP reflected information from the October 2020 neuropsychological evaluation report that the student was "prone to anxieties" and measures of aspects of the student's behavior and personality yielded

mildly elevated scores in the areas of anxiety, withdrawal, and attention problems (compare Dist. Ex. 2 at p. 9, with Parent Ex. D at p. 9). Additionally, self-report results reflected in the IEP indicated that the student experienced mild to moderate symptoms related to feelings of tension, separation anxiety, and performance fears; per parent and teacher reports, those anxieties could compound the student's executive functioning weaknesses, which impacted both her persistence and organizational planning skills (compare Dist. Ex. 2 at p. 9, with Parent Ex. D at p. 9). As to the student's physical development, the IEP indicated that the student had received a diagnosis of ADHD for which she received medication, and that overall, she was "physically healthy" (Dist. Ex. 2 at p. 10).

With respect to the district's failure to conduct a vocational assessment, as noted by the IHO, while the hearing record does not include such a report, the March 2021 IEP included evidence that planning for post-secondary transition services were initiated (see IHO Decision at p. 35; Dist. Ex. 2 at pp. 12, 26). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, 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 (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at \*8-\*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*11 [S.D.N.Y. Mar. 19, 2013]).

The school psychologist testified that there was no vocational assessment of the student, but that the vocational questions were asked of the parents during the CSE meeting and were included in the March 2021 IEP student strengths section as well as in the post-secondary and transition needs sections (Tr. pp. 86-87; see Dist. Ex. 2 at pp. 7, 12-13, 26). The school psychologist further explained that the district did not have the parents fill out the standard vocational assessment form prior to the meeting because during COVID "when we know that we

can get the same information right there in the IEP meeting," "unfortunately" a lot of "those assessments" were not administered (Tr. pp. 87-88). The school psychologist acknowledged that the student was not at the CSE meeting and that the district did not get information from the student regarding the vocational assessment (Tr. pp. 88-89).

Review of the March 2021 IEP reflects the parents' report regarding the student's leisure interests including reading, drawing, creative writing, swimming and assisting at a local school, that she participated in student government and assumed leadership roles with peers, and that she wanted to be a second-grade teacher (Dist. Ex. 2 at p. 7). Additionally, according to the IEP the parents could "see [the student] graduating from a four year college" (*id.*). The IEP included long term/post-secondary goals for the student in the areas of education and training (attending a four-year college with a focus on courses in elementary education) and employment (being employed as an elementary school teacher) (*id.* at p. 12). The CSE identified the student's transition needs as focusing on the student's course of study as it related to her transition to post-school activities and her need for continued support to manage her ADHD and her anxiety (*id.*).

Additionally, the March 2021 IEP included a coordinated set of transition activities (Dist. Ex. 2 at p. 26). With respect to instruction, related services and the development of employment and other post-secondary adult living objectives, the IEP noted that with counseling, the student would continue to develop her ability to increase attention and reduce anxiety in academic settings so as to "better cope with it when it occurs," to graduate from high school and attend a 4-year college, and to improve her ability to develop independent living skills and skills necessary to be employed as a teacher (*id.*). Regarding community experiences the March 2021 IEP stated that the student would research careers in education and look for opportunities in the community to volunteer or intern in education (*id.*).

Based on the evidence in the hearing record, although the district committed a procedural violation by not conducting a vocational assessment and the district did not conduct an evaluation after being ordered to do so in a prior proceeding, a review of the information in front of the March 2021 CSE shows that the CSE had sufficient evaluative information available from a variety of sources to develop the student's IEP for the 2021-22 school year, including the private October 2020 neuropsychological evaluation report, which the CSE considered and, in large part, incorporated into the March 2021 IEP.

### **3. Cumulative Procedural Violations**

According to the parents, the aforementioned procedural violations, cumulatively, constituted procedural violations that resulted in a failure to offer the student a FAPE.

Under some circumstances, the cumulative impact of procedural violations may result in a denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M., 845 F.3d at 541 [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

Having found that the above violations did not affect the substantive appropriateness of the March 2021 IEP or deprive the student of an educational benefit and did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, there is not a basis for finding that the violations would have cumulatively resulted in a denial of FAPE to the student (see A.M., 845 F.3d at 541).

### **C. March 2021 IEP**

#### **1. Annual Goals**

The parents argue that the IHO erred in finding that the March 2021 IEP annual goals were measurable and not vague. The parents further argue that the IEP contained inappropriate social/emotional, academic, and post-secondary goals.

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 March 2021 IEP included annual goals to address the student's identified areas of need including managing her anxiety, improving her self-advocacy skills, using coping strategies, demonstrating problem solving skills, and improving math and ELA skills (Dist. Ex. 2 at pp. 6-9, 13-22). Contrary to the parents' assertion that the annual goals were "unmeasurable," all of the annual goals included evaluative criteria (e.g., with 80 percent accuracy, 8/10 opportunities across 8 consecutive weeks), evaluation procedures (e.g., observations, check lists, performance assessment task), and schedules to measure progress (e.g., one time per quarter, one time per month) (id.).

With regard to the parents' contention that the annual goals failed to include a "baseline," the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable."

Regarding the academic annual goals, the school psychologist stated that, after the March 2021 CSE discussed the student's present levels of performance, they developed annual goals to help the student "be involved and progress . . . in the curriculum" (Tr. p. 56). She reported that in some cases the annual goals would have been taken off of the student's previous IEP and updated and adjusted by the CSE, which included the parents and the student's ELA teacher from Lang (Tr. p. 84). According to the school psychologist, the special education teacher wrote the academic

annual goals and discussed them with the parents and the rest of the CSE at the meeting, including going "over exactly what they're going to be" (Tr. p. 84; see Dist. Ex. 2 at p. 30).

To the extent that the parents assert on appeal that the March 2021 IEP academic annual goals did not address the student's specific math and ELA weaknesses identified in the March 2020 neuropsychological evaluation, an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). More specifically, the parents argue that the March 2021 math annual goals did not address the student's calculation and fluency weaknesses specifically identified in the October 2020 neuropsychological evaluation. According to the evaluation report, the student performed in the average range on math calculations and in the low average range on math fluency tasks, to which the evaluator stated that the student would "need additional time to complete math problems at school and on tests," an accommodation included in the IEP (Parent Ex. D at p. 9; Dist. Ex. 2 at pp. 25). Additionally, in conjunction with goals to use a variety of math "tools" to demonstrate understanding of novel math concepts, to support the student's math instruction in particular, the IEP provided one to one conferencing, math reference sheets and exemplars, repeated directions and checks for understanding, reminders to re-check work, and access to a calculator with graphing software (Dist. Ex. 2 at p. 10, 17, 18).

With respect to the parents' arguments regarding the student's ELA annual goals, specifically that they were repetitive and failed to address her "somewhat weak" spelling skills—which were in the average range according to the October 2020 neuropsychologist's report—the March 2021 CSE developed goals for the student to produce clear and coherent writing with appropriate development, organization and style; strengthen her writing using planning, revising, editing and re-writing; and the use of text evidence to support her analysis (Parent Ex. D at p. 9; Dist. Ex. 2 at pp. 19, 21). Additionally, the CSE identified the student's need for graphic organizers and outlines for writing/editing checklists, extended time for writing, one-to-one conferencing for writing, breaking tasks into steps, scaffolding, and access to a computer for longer written assignments (Dist. Ex. 2 at p. 10).

Next, the March 2021 IEP included four annual goals to address the student's social/emotional needs, including using taught self-regulation/coping strategies, identifying situations that could be anxiety provoking and using appropriate coping strategies, demonstrating problem solving skills and flexible thinking in social scenarios, and developing coping strategies to improve the student's ability to attend to academics (Dist. Ex. 2 at pp. 9, 14-16, 22). Additionally, the CSE identified management strategies to support the student's social/emotional and executive functioning needs that included breaking tasks into steps, scaffolding, on-task focusing prompts, use of a planner and organizational checklists, preview of changes in routine, visual aids, frequent check-ins, positive praise and encouragement, redirection and refocusing, and providing choices of different ways to complete an assignment (id. at p. 10). Further, the CSE recommended that the student receive one 40-minute session per week of counseling services, and that the social/emotional annual goals be measured by the student's counseling provider or teacher (id. at pp. 14-16, 22, 23).

With respect to the parents' assertion on appeal that the March 2021 IEP post-secondary goals for the student were not individualized as a result of the district failing to conduct a vocational assessment, as discussed above, the CSE had information from the parents regarding the student's vocational plans, specifically, that her post-secondary goal was to attend a four-year college with a focus on courses in elementary education and be employed as an elementary school teacher (Dist. Ex. 2 at pp. 7, 12). The CSE identified the student's transition needs as focusing on the student's course of study as it relates to her transition to post-school activities and her need for continued support to manage her ADHD and her anxiety (*id.* at p. 12).

In light of the foregoing, I find there is no basis to overturn the IHO's finding that the student's annual goals were measurable and not overly vague, nor does the evidence in the hearing record support the parents' contention that the academic, social/emotional, and post-secondary goals were not appropriate to address the student's identified needs.

## **2. ICT Services**

On appeal, the parents argue that the IHO erred in determining that a program consisting of ICT services was appropriate for the student and assert that the recommended ICT program would not meet the student's academic and social needs. Further, the parents argue that a general education classroom with ICT services would be too big for the student and would not provide adequate support for the student.

As explained more fully below, a review of the evidence in the hearing record supports the IHO's finding that the March 2021 CSE's recommended program consisting of ICT services, counseling services, annual goals, and program supports and accommodations was reasonably calculated to enable the student to receive an educational benefit.

As discussed above, in reaching the decision to recommend ICT services for the student, the March 2021 CSE relied on the October 2020 neuropsychological evaluation report, a March 2021 teacher report, and a March 2021 report card as well as input from the parents and the student's ELA teacher from Lang (Dist. Exs. 2 at pp. 1-5, 30; 5 at p. 2; 7 at p. 2). The March 2021 CSE recommended 10 sessions per week of ICT services for the student in ELA, five sessions per week of ICT services each for math, social studies, and science, and one 40-minute session per week of individual counseling services (Dist. Ex. 2 at p. 23). The March 2021 IEP stated with the identified management needs, full-time instruction from a special educator delivered within a two-teacher class configuration, opportunities for instruction from a special educator and a small group setting, and the related service of counseling the student was expected to make progress (*id.* at p. 11).

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12

students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).<sup>9</sup>

With respect to the parents' concerns that the size of an ICT class would be too big for the student, the school psychologist testified to her understanding that approximately 20-25 students were in ICT classes, whereas according to the educational consultant, during the meeting with the assistant principal of the assigned school the parents were informed that the recommended ICT services would be provided in classes "of at least 25 or more students" (Tr. pp. 83, 97-98; Parent Ex. U ¶¶ 3, 10, 13d).<sup>10</sup>

The school psychologist testified that she did not ask anyone at the CSE meeting, such as the student's teacher or her parents, how many students were in the student's class and that she did not know the range of class sizes at Lang (Tr. pp. 82-83).<sup>11</sup> The school psychologist testified that "it wasn't discussed by anybody in the team that she was in a . . . small class" and she noted that the only time that class sizes were discussed was when the student's mother specifically stated that a small class size helped the student (Tr. pp. 91-92). The school psychologist testified that, at the March 2021 CSE meeting, the parents expressed concern regarding the number of students in ICT classes and that the setting was too large (Tr. pp. 97-98; see Dist. Ex. 2 at p. 30).

Despite the parents' concerns about the size of the ICT classes and the CSE's knowledge of the student's needs associated with anxiety and ADHD, the school psychologist testified that she was not concerned regarding the student's ability to adapt to an ICT class with 20 to 25 students because she believed, based on "what we heard" and on the growth that the student made in her current school, that she was ready to move into a larger setting with "the profile of an ICT class overall" (Tr. pp. 98-99).

Specifically, review of the Lang teacher report, which was relied on by the March 2021 CSE, provides evidence that the student was making progress, navigating socially, and working with a level of success independently (see Dist. Ex. 4). As of January 2021, the student had achieved a 3.94 grade point average (high honors), met "nearly all" of the Algebra 2 standards at the independent level, demonstrated mastery of grammar and punctuation, and "singlehandedly" re-wrote a story for a class production (id. at pp. 2, 6, 13-14).

The March 2021 IEP included school and teacher reporting that the student was a positive presence in the school community, participated each day and connected positively with peers, made improvements in self-advocacy, had shown a daily resilience and diligence in her work, had

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<sup>9</sup> The school psychologist testified that at most 40 percent of the students in a class where ICT services are delivered (ICT class) could have an IEP (Tr. p. 94).

<sup>10</sup> The parents correctly note that the IHO erred in citing to the retrospective testimony from the assigned school's principal with respect to the ICT classroom size during the 2021-22 school year (see IHO Decision at pp. 37-38; Tr. pp. 120, 122).

<sup>11</sup> The student's teacher testified that there were approximately five or six students in the student's classes at Lang (Tr. p. 419). In her written testimony the educational consultant stated that Lang had class sizes of about five to twelve students in most cases (Parent Ex. U ¶ 13b).

leadership skills and was a role model, was self-reflective, had age-appropriate social interactions, and was observed to have grown in her independence (Dist. Ex. 2 at pp. 6, 8).

In her written testimony, the student's Lang teacher for the 2020-21 school year, who attended the March 2021 CSE meeting, testified that the student thrived when she was given "creative freedom;" benefitted from chunking of lessons, support with her executive function skills, and individualized and differentiated instruction; and that social/emotional supports including time and space when necessary and a supportive educational setting were beneficial to the student's overall progress (Parent Ex. X ¶¶ 2-5, 7; Dist. Ex. 2 at p. 32). The Lang teacher also testified that she provided the CSE with information regarding the student's academic needs and functioning and reiterated that the student received a great deal of support including assignments broken down into smaller tasks, directions provided in both verbal and written formats, choices given for ways to complete work, multi modal support, self-regulation strategies, wait time, repetition in math, extra time, checking work, and support for self-advocacy (Parent Ex. X ¶ 9). The parent confirmed that the student's teacher from Lang reported at the March 2021 CSE meeting that the student was thriving "given the supports she was getting" (Tr. pp. 245-46).

As discussed above, the March 2021 IEP included a number of supports for the student such as organizational tools, extended time for writing, additional wait time to process questions, one-to-one conferencing, guided notes, specific tools for math and ELA, chunking of tasks, scaffolding, on-task focusing prompts, preview of changes in routine, visual aids, step-by-step instructions, frequent teacher check-ins, positive praise and encouragement, reminders and focusing prompts, and choices regarding ways to complete an assignment (Tr. pp. 53-55; Dist. Ex. 2 at pp. 10).

Review of the October 2020 neuropsychological evaluation report showed that the March 2021 CSE identified and addressed most of the neuropsychologist's recommendations including continued counseling services, time accommodations, use of technologies, separate location for testing, repeated directions, guided notes and reference sheets, and positive praise and encouragement (compare Dist. Ex. 2 at pp. 10, 23, 25, with Parent Ex. D at pp. 11-12). However, the October 2020 neuropsychological evaluation report also included a recommendation for a specific educational placement, recommending that the student attend:

a specialized school and small classroom environment for twice-exceptional learners. As such, she will need access to a challenging curriculum while also receiving support for her executive functioning and emotional health throughout the day. It is imperative that [the student] be placed in a class with peers who demonstrate similar levels of intelligence and serve as good role models. The curriculum should be challenging yet delivered at a slower pace.

(Parent Ex. D at p. 11).

The neuropsychologist, who conducted the evaluation resulting in the October 2020 neuropsychological evaluation report, testified that he did not believe the March 2021 CSE's recommendation for placement of the student in a general education class with ICT services was appropriate (Parent Ex. V at ¶15). However, the neuropsychologist did not repeat his

recommendation for placement in a small class in a specialized school; rather, the neuropsychologist testified that based on his understanding of ICT services, he did not believe ICT services would have provided the student "with the consistent support in a structured setting for her executive functioning and attentional weaknesses," reiterating that the student required "consistent support in a structured setting" and that the March 2021 IEP did not include "school-based executive functioning support during the school day," which the student required for managing organizational and task related responsibilities and for keeping her anxiety in check (*id.*). During cross-examination, the neuropsychologist explained that he was describing a need for ongoing executive functioning interventions with "a therapeutic component in terms of keeping [the student] encouraged and teaching her to self-advocate" (Tr. p. 353).

Initially, the student would have received support from a special education teacher in all of the student's core academic classes as part of the recommendation for ICT services. Additionally, as noted above, the March 2021 IEP included the support of counseling services along with management needs and annual goals directed at the student's needs in the areas of executive functioning and self-advocacy (Dist. Ex. 2 at pp. 9, 14-16, 22). Annual goals included working on using a taught regulation/coping strategy when faced with a frustrating or anxiety producing situation, learning to better self-advocate needs when having difficulty attending, anxiety, or confusion due to academics, and identifying anxiety producing situations and appropriate coping strategies or relaxation techniques (*id.* at pp. 14-15). Management needs included breaking tasks into steps, scaffolding, on-task focusing prompts, use of a planner and organizational checklists, preview of changes in routine, visual aids, frequent check-ins, positive praise and encouragement, redirection and refocusing, and providing choices of different ways to complete an assignment (*id.* at p. 10). Accordingly, based on the March 2021 IEP, the student would have received significant support directed at addressing her executive functioning needs provided by a special education teacher in her academic classes and through counseling services.

Additionally, the school psychologist testified that the March 2021 CSE considered other programs for the student including providing the student with special education teacher support services (SETSS), which she described as "very small group instruction" in the student's area of academic weakness and that they also talked about the student attending a 15:1 special class in a community school, but that the CSE determined that the student needed more intensive support than just SETSS and did not need such an intensive program as a 15:1 special class (Tr. p. 52).

The school psychologist shared her concerns with respect to the neuropsychologist's recommendation that the student attend a specialized school in a small class of students with "similar levels of intelligence," "because there's a lot of research and documentation out there" to support that learning in a heterogeneous environment "actually helps all students" (Tr. pp. 75-76). As to the parents' concerns at the March 2021 CSE meeting that an ICT class would be too large and the make up of the class was not "homogeneous," the school psychologist stated that part of the goal of the CSE when creating an IEP was to "make sure" the student was put into the least restrictive environment (LRE) in which the student could be successful and that she did not agree that isolating the student in a remote setting was the best way to "make her learn" (Tr. pp. 102-04). Rather, the documents the school psychologist reviewed indicated that, despite some challenges with attention and anxiety the student had potential, and the school psychologist opined that the program recommended would prepare the student to meet her vocational goals (*see* Tr. pp. 104-05). The school psychologist added that based on the CSE's discussion, it did not "seem that

putting [the student] into a more restrictive environment with 15 students and one teacher was appropriate to meet her needs" and opined that with the student's "attention" and "anxiety," having two teachers in the classroom would better meet her needs (Tr. pp. 92-93).

As a final note, it is worth explaining that, while the private neuropsychologist was not obligated to consider the student's LRE in recommending a placement for the student and the parent's desire for the student to be placed in a smaller setting with more individualized attention is understandable, the CSE was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student, and, accordingly, it was reasonable for the CSE to reject a special class placement for the student based on her academic ability, concerns that a special class placement would be too restrictive for the student, and the view that the student's executive functioning needs could be addressed through counseling and the support of a special education teacher withing the student's academic classes. Given that a student's recommended program must also be provided in the LRE, the CSE should not be faulted in making LRE considerations a part of the CSE's deliberations (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, 489 F.3d at 108; Walczak, 142 F.3d at 132).

Based on the above, the hearing record supports finding that the recommended program, including ICT services in conjunction with counseling services and the identified annual goals and management needs directed at the student's executive functioning deficits, would have enabled the student to receive an educational benefit within the student's LRE.

#### **D. Assigned School**

On appeal, the parents argue that the assigned school would not have been able to implement the March 2021 IEP. In their memorandum of law, the parents expand on their allegation and assert that the assigned school would not have been able to implement the following for the student: ICT services in a geometry class; ICT services in an advanced placement biology class; executive functioning instruction throughout the school year; ten periods per week of ELA; and foreign language instruction during the school day (Parent Mem. of Law at pp. 17-18).

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" (id. 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]).<sup>12</sup> However, a district's assignment of a student to a particular public school site must be made in conformance with the

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<sup>12</sup> 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]).

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. Dec. 30, 2015]). Such 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., 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. 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]).

The student's father testified that, when the parents investigated the assigned school, they were told that advanced placement classes were not available in an ICT format and that in order to participate in ICT classes the student would have to receive SETSS which were not recommended for the student in the March 2021 IEP (Parent Ex. Q at ¶¶ 22-23). The father also testified that the school could not implement the IEP because an ICT class was not available for geometry, the math class the student would have been in (id. at ¶ 24). The parent testified that he was told by the principal that the student would need to be placed in an advanced placement biology class for science and that because an ICT class was not available in the school for advanced placement biology, the student would receive SETSS for that class (Tr. p. 230). Additionally, according to the student's father, the parents were also informed that teaching of executive functioning skills took place during a two-week virtual skills development program in August and that classroom teachers then reinforced those skills (Parent Ex. Q at ¶ 25).

Initially, most of the parent's allegations are not permissible challenges to the appropriateness of the March 2021 IEP because they were not sufficiently tethered to the requirements of the IEP (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP;

in other words, if the student ought to be placed in a school with particular characteristics, programs or services, then they should be set forth in the IEP and may not be raised as a challenge to the school placement"). The March 2021 IEP recommended a general education classroom with the support of ICT services and did not specifically direct that the student must be in advanced placement classes, it did not include a specific type of instruction for executive functioning skills, and it did not require that the student attend foreign language instruction during the school day. Because they were not written elements required under the March 2021 IEP, these claims are not permissible challenges to the assigned school site's capacity to implement the IEP (see Y.F., 2016 WL 4470948, at \*2).

Nevertheless, the hearing record includes sufficient information to show that the assigned public school was capable of implementing the March 2021 IEP and also includes sufficient information to contradict the parent's testimony on much of the points raised by the parents.

The principal of the assigned school testified that she met with the student's parents "via Zoom" in June 2021 (Tr. pp. 113-14). At the time of the June 2021 virtual tour, she did not have the student's March 2021 IEP (Tr. pp. 112, 113, 117-118). She testified that when the parents inquired whether the assigned school offered ICT services in ELA, math, science, and social studies classes, she said "yes" and when asked if the school offered opportunities for advanced placement classes she also said "yes" (Tr. p. 115). Contrary to the parent's assertion, at the hearing, the principal testified that the assigned school offered an ICT class in geometry (Tr. p. 125). Similarly, the principal testified that the assigned school offered ICT services in "advanced classes" described as "college credit bearing courses" that were co-taught with college professors, one regular education teacher, and one special education teacher (Tr. p. 123).

Regarding the parents' request for foreign language instruction during the school day, the principal testified that the assigned school had a foreign language instruction option during the week (Tr. p. 125). She further testified that the assigned school offered Spanish, French and Russian (Tr. p. 126).

With respect to the parents' request for executive functioning instruction throughout the school year, rather than as part of a two-week virtual course offered in August 2021, the student's IEP does not indicate that the CSE recommended a separate class for executive functioning instruction (see Dist. Ex. 2). Additionally, there is nothing in the hearing record indicating that the assigned school would not have been able to implement the executive functioning supports identified in the March 2021 IEP, which were discussed in the section above.

Turning to the parents' assertion that the school could not implement ten periods per week of ICT services for ELA, the student's father testified that the principal of the assigned school told him the student "would get five classes a week in their core ELA, and she would get five in electives" (Tr. pp. 230-31). The student's father testified that he took this as the school only being able to provide half of the recommendation for ELA (Tr. p. 231). The school psychologist testified that the ELA for high school could be electives in reading and writing courses, such as reading, writing, or poetry or "any course that's very laden in the English Language arts" (Tr. p. 90). This testimony is consistent with the principal, who testified that the student would have had five periods of ELA and five courses she described as an "ELA type of elective," such as poetry (Tr. pp. 144-45). Assuming that a failure to provide ten periods per week of ICT services in a class

identified as ELA, rather than in electives that are directed at ELA skills, could be considered a deviation from the March 2021 IEP such a failure would have to amount to a material or substantial deviation from the student's IEP in order to constitute a denial of a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at \*11-\*12 [E.D.N.Y. Mar. 27, 2015]), and this is not the case here.

Overall, based on the above, the hearing record, particularly the principal's testimony, indicates that the assigned school would have been able to implement the March 2021 IEP.<sup>13</sup>

## **VII. Conclusion**

Having determined that there is insufficient reason to overturn the IHO's finding that the district offered the student a FAPE for the 2021-22 school year, I need not reach the issues of whether the parents' unilateral placement of the student at York Prep for the 2021-22 school year was an appropriate placement for the student or whether equitable considerations supported the parents' request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 13, 2022**

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**STEVEN KROLAK  
STATE REVIEW OFFICER**

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<sup>13</sup> The parents argue that the testimony by the principal is impermissibly retrospective and that the IHO erred in relying on it to rehabilitate the IEP; however, it is not being used here to rehabilitate the IEP but rather to show that the district was capable of implementing the March 2021 IEP at the assigned school (see B.P. v. New York City Dep't of Educ., 634 Fed. Appx. 845, 848 [2d Cir. 2015] [finding that testimony by district staff demonstrated that the placement school had the ability to implement the student's IEP despite any misinformation provided to the parents]).