



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 12-108

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Alexander M. Fong, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Michelle Siegel, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent in part for her daughter's tuition costs at York Preparatory School (York) for the 2010-11 school year. The appeal must be sustained.

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 school 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 attended a nonpublic school (NPS) from kindergarten through seventh grade and, beginning in the latter half of first grade, received twice weekly pull-out support from a "learning specialist" (Tr. p. 222; Dist. Ex. 11 at p. 2). According to the parent, the student received vision therapy to address an eye tracking problem while in second grade and again in fourth grade and has received assistance from various tutors to address her needs in reading, math, organizational strategies, and homework completion (Tr. pp. 226-28; see Parent Ex. I at p. 1). The parent reported that the student was first evaluated at the end of her sixth grade year, revealing difficulties in the areas of processing, sequencing, and working memory (Tr. pp. 223-25, 230).¹

¹ This evaluation report was not included in the hearing record.

For the 2010-11 (eighth grade) school year, due to her increasing difficulties managing academic and organizational demands, the student transferred to York where she received additional support through York's Jump Start program (Tr. pp. 231-35; Dist. Ex. 11 at p. 2).² The student was evaluated privately by a neuropsychologist in January 2011, at which time she received diagnoses of attention deficit hyperactivity disorder (ADHD), predominantly inattentive subtype, and a learning disorder, not otherwise specified (Tr. p. 233; Dist. Ex. 11 at pp. 1, 6).³

After the parent referred the student to the CSE by letter dated November 26, 2010 (Parent Ex. A), the CSE convened on March 17, 2011 to determine the student's eligibility for special education and related services and develop a program for the student (Dist. Ex. 3 at p. 1-2). Participants at the CSE meeting included the parent, a district school psychologist who also served as the district representative, a district special education teacher, an additional parent member, a representative from the office of the parent's educational advocate, and the student's Jump Start teacher (via telephone) (Dist. Exs. 3 at p. 2; 4 at p.1). The CSE found the student to be eligible for special education and related services as a student with an other health-impairment (OHI) and recommended that she attend a 10-month classroom providing integrated co-teaching (ICT) services, with provision of services to commence March 31, 2011 (id. at pp. 1-2, 10; see Tr. p. 55).⁴

On March 28, 2011 the district notified the parent of the public school site to which the student had been assigned (Dist. Ex. 14). In a letter to the district dated April 29, 2011, the parent informed the district that she had visited the assigned school on April 28, 2011 and concluded that it was not appropriate for the student (Parent Ex. E). The parent asserted that the public school site was inappropriate because, among other things, the student would be overwhelmed by the number of students in the eighth grade ICT classrooms; there was no small group or individualized instruction provided; the assigned school's large physical plant and population would amplify the student's difficulties with attending, following through on tasks, keeping organized, and resisting distractions; the student would be faced with stressful standardized testing upon enrollment; and that because the assigned school did not include ninth grade classrooms, and the deadline for applying to district high schools had passed, the student "would be forced to accept whatever placement was left over" (id. at pp. 1-2). The parent indicated that an appropriate learning environment for the student would consist of small, quiet classrooms and ample opportunity for daily 1:1 instruction (id. at p. 2). The parent indicated that, until the CSE offered a placement for the student that met these criteria, she would continue the student's unilateral placement at York and seek tuition reimbursement for the 2010-11 school year at public expense (id.).

² Jump Start is described in the hearing record as a program that provides additional support to students with learning disabilities in a general education setting, by providing them with access to a "learning specialist," a certified special education teacher who assists the students with their organizational deficits and acts as a tutor, mentor, and advocate (Tr. pp. 351-52, 360-62). The Commissioner of Education has not approved York as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

³ The hearing record indicates that the student began taking medication to address her ADHD during the seventh grade (Tr. p. 232).

⁴ The March 2011 IEP incorrectly reflects an initial implementation date of March 31, 2010 (Dist. Ex. 3 at p. 2); the hearing record indicates that this was a typographical error (Tr. p. 55).

In a letter to the district dated June 7, 2011, the parent indicated that she had not yet received a school location recommendation for the student for the 2011-12 school year and that she desired the opportunity to visit a recommended site while school was still in session (Parent Ex. F at p. 1). She stated that unless the district offered an appropriate placement, she would continue the student's unilateral placement at York for the 2011-12 school year and seek tuition reimbursement (*id.*). The parent reiterated that she had previously rejected the school to which the district assigned the student for the remainder of the 2010-11 school year and that she was seeking reimbursement for the student's York tuition for the 2010-11 school year at public expense (*id.*).

A. Due Process Complaint Notice

By due process complaint notice dated May 5, 2011, the parent asserted that the March 2011 IEP failed to offer the student a FAPE for the 2010-11 school year (Dist. Ex. 1 at p. 2). Initially, the parent contended that the CSE failed to consider the private evaluations available to it, did not provide her with evaluations conducted by the district until the end of the CSE meeting, and failed to discuss the evaluations at the meeting (*id.* at pp. 2-3). Additionally, the parent asserted that the CSE was not properly composed because no social worker was present; the general education teacher did not meet necessary criteria; and the special education teacher was not someone who could have been responsible for implementing the IEP, did not have personal knowledge of the student, and had only general knowledge regarding ICT programs (*id.* at p. 3). With respect to the recommended program, the parent asserted generally that the recommendation failed to comport with the recommendations of those service providers who were most familiar with the student's needs (*id.* at pp. 2-3). The parent also expressed her disagreement with the CSE's classification of the student as a student with an OHI (*id.* at p. 2). The parent contended that the goals contained in the March 2011 IEP were inappropriate because they did not reflect all of the student's needs, were not developed at the March 2011 CSE meeting, and contained no evaluative criteria to measure the student's progress (*id.* at pp. 2-3). Furthermore, the parent stated that a required transition plan was not included on the IEP and that no transition goals or planning were discussed at the meeting (*id.* at p. 3). The parent asserted that the assigned school was also inappropriate because the student-to-teacher ratio was too large; there was no 1:1 instruction provided; the assigned school's large physical plant and population would "terrify and overwhelm" the student; the gym classes were overly large; it was not appropriate for the student to begin school at the end of the school year because of her difficulty in adapting to change; the student would be faced with stressful standardized testing upon enrollment; and that because the assigned school did not include ninth grade classrooms and the deadline for applying to district high schools had passed, the student "would be denied the choices" available to other students (*id.* at pp. 3-4). The parent requested reimbursement for the student's York and Jump Start tuition from December 1, 2010 through June 30, 2011, as well as reimbursement for unspecified evaluations (*id.* at p. 5).

In a response to the due process complaint notice dated June 10, 2011, the district asserted that the March 2011 IEP contained appropriate academic goals; the student's needs were discussed at the CSE meeting; York staff attended the CSE meeting; all members of the CSE, including the parent, had the opportunity to participate; and that a transition plan was not required because the student was not yet 15 years of age (Dist. Ex. 2 at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on November 10, 2011 and concluded on February 15, 2012, after four hearing dates (Tr. pp. 17-529).⁵ In a decision dated April 17, 2012, the IHO found that the March 2011 IEP failed to offer the student a FAPE (IHO Decision at pp. 29-32), York with Jump Start constituted an appropriate placement for the student (*id.* at pp. 32-33), and that equitable considerations supported the parent's claim for tuition reimbursement for the student's placement at York for two months of the 2010-11 school year (*id.* at pp. 34-37).⁶

Initially, the IHO found that the district failed to follow IDEA requirements regarding CSE composition by not including a social worker or a special education teacher who could have implemented the student's IEP or had personal knowledge regarding the assigned school (*id.* at p. 30). Furthermore, because the IEP did not follow the recommendations of the parent and the student's treating professionals, the IHO found that the parent was deprived of the opportunity to meaningfully participate in the development of the student's IEP (*id.*). With respect to the goals included on the IEP, the IHO found that they did not address all of the student's areas of need, were insufficiently detailed, and contained no evaluative criteria to measure the student's progress (*id.* at pp. 29-30). Additionally, the IHO found that the district failed to acknowledge the extent of the student's executive functioning deficits, such that the recommendation that the student attend an ICT classroom did not offer sufficient support for the student to make educational progress (*id.* at pp. 30-32).

Turning to the parent's unilateral placement of the student, the IHO found that York with Jump Start was an appropriate placement because the student had made significant progress during her time there and the smaller class sizes available at York contributed greatly to her success, as did the amount of small group and one-to-one instruction available (IHO Decision at pp. 32-33). Finally, the IHO found that the parent was equitably entitled to a portion of the student's 2010-11 school year tuition at York because the hearing record indicated that the student would have

⁵ A hearing was held September 27, 2011 to discuss the district's objections to a subpoena issued by the parent (Tr. pp. 1-16; IHO Exs. 1-2). The hearing record contains no documentation regarding why the proceeding convened almost five months after the parent submitted the due process complaint notice.

⁶ A review of the hearing record indicates that the applicable timelines were not followed in this case. While extensions to the timeline to render a decision were granted, the hearing record does not reflect that the IHO documented his reasons for granting the extensions, fully considered the cumulative impact of the factors relevant to granting extensions, or responded in writing to the extension requests (8 NYCRR 200.5[j][5][i], [ii], [iv]). Furthermore, although the hearing record indicates that the parties submitted posthearing memoranda (Tr. pp. 491, 527), the parties' posthearing memoranda were not included with the hearing record forwarded to the Office of State Review by the district. I remind the IHO that, while oral statements and written briefs by attorneys or parties are not treated as evidence, State regulations nevertheless require the IHO to identify (i.e. mark) and enter "all other items" he considers into the hearing record (8 NYCRR 200.5[j][5][v]; *see* 8 NYCRR 200.5[j][3][xii]). Finally, on the last hearing date, the IHO indicated that the parties' posthearing memoranda would be due on March 15, 2012 (Tr. p. 527); however, the IHO's decision indicates that the record was not closed until April 20, 2012 (IHO Decision)—but the IHO's decision is dated April 17, 2012 (*id.* at p. 37). I remind the IHO of those portions of State regulations which require that in cases where extensions of time to render a decision have been granted, the decision must be rendered no later than 14 days from the date the record is closed, which is "when all post-hearing submissions are received by the IHO [and o]nce a record is closed, there may be no further extensions to the hearing timelines" ("Changes in the Impartial Hearing Reporting System," Office of Special Education [Aug. 2011], available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>; *see* 8 NYCRR 200.5[j][5]).

remained at York, with the parent obligated to pay her tuition, until at least the date the parent visited the assigned school, such that reimbursement was not warranted prior to the time the parent rejected the recommended placement (id. at pp. 35-37).

IV. Appeal for State-Level Review

The district appeals, contending that the IHO erred in finding that it did not offer the student a FAPE, that York was an appropriate placement to meet the student's needs, and that equitable considerations supported in part the parent's request for tuition reimbursement. With regard to the composition of the March 2011 CSE, the district asserts that a social worker is not a required member of a CSE and the district's school psychologist was capable of interpreting the social history, and that it was irrelevant that the special education teacher present at the CSE meeting was not a teacher at the assigned school who could be responsible for implementing the IEP, as the hearing record indicates that she had sufficient knowledge of the special education program options available to the student to meet the requirements of the IDEA. Addressing IHO's finding that the parent was impeded from participating in the development of the student's IEP, the district contends that the parent was afforded an opportunity to express her concerns regarding the student's educational history, the district considered all available evaluative information, and the CSE's determination not to adopt the recommendations made in the private evaluation did not impede the parent's opportunity to participate. The district next argues that the IHO erred in finding that the goals were not measurable and failed to reflect each of the student's needs, as the March 2011 IEP contained goals aimed at addressing the student's attentional and organizational deficits, the student did not require academic or social/emotional goals to make progress, and the CSE's decision to leave the method of measurement to the teacher's discretion did not constitute the denial of a FAPE. Turning to the IHO's determination that an ICT classroom would not provide adequate support to the student, the district asserts that the special education teacher in the classroom would have been able to sufficiently address the student's executive functioning deficits.

The district also argues that the parent's unilateral placement was not appropriate for the student because she did not receive assistance from her Jump Start teacher during classes, but only before and after school; none of the student's teachers were certified special education teachers; and the student was not in the least restrictive environment (LRE) at York, where she was grouped primarily with students who required special education, with insufficient access to regular education students. Finally, the district contends that, even were the district placement inappropriate and the unilateral placement appropriate, equitable considerations weigh against the parent's claim for reimbursement of the student's York tuition. Specifically, the district asserts that the parent never intended to enroll the student in a public school program recommended by the CSE, the parent paid the entirety of the student's York tuition for the 2010-11 school year prior to the March 2011 CSE meeting, the parent would not have enrolled the student in the assigned school for the last two months of the 2010-11 school year regardless of other considerations, and the

parent failed to provide the district with the required 10-day notice prior to placed the student at York.⁷

The parent answers, denying the district's material assertions and requesting that the IHO's decision be upheld in its entirety.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir.

⁷ The district also asserts that it "promptly" responded to the parent's request for an initial evaluation and that the parent "delayed returning the consent for initial evaluation" (Pet. ¶ 44). However, while the district's response to the referral indicates that a notice of parental rights and a request for physical examination were attached, it does not indicate that a consent form was enclosed; rather, it specifies that a district social worker would request the parent's consent to evaluate the student prior to conducting a social history (Dist. Ex. 13). Additionally, the consent form was signed by the parent on the same day as the social history was conducted (Dist. Exs. 5; 12 at p. 1) and the social history indicates that the student's mother "signed all consents . . . with thorough explanations" (Dist. Ex. 12 at pp. 4-5), belying the district's claim of delay on the part of the parent. Furthermore, the IHO's decision clearly took this delay into account in granting the parent only two months of tuition reimbursement (IHO Decision at p. 36).

Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

Although the parent raised claims in the due process complaint notice relating to the failure of the CSE to provide the parent with certain assessments prior to the March 2011 CSE meeting or discuss them at the meeting, the development of goals prior to the CSE meeting, the lack of a transition plan on the March 2011 IEP, and various allegations relating to the assigned school (Dist. Ex. 1 at pp. 2-4), as the IHO did not address them in his decision and the parent has not pursued the IHO's failure to rule on these claims, they are not before me on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.4[b]). In this case, my review is limited to the IHO's findings of deficiency with respect to the composition of the CSE, whether the parent's participation in the development of the student's IEP was significantly impeded, the recommendation that the student attend an ICT classroom, and the sufficiency of the goals included on the March 2011 IEP.

B. CSE Process

1. CSE Composition

I note that although the due process complaint notice clearly indicated the parent's belief that the March 2011 CSE was not properly composed (Dist. Ex. 1 at p. 3), on the first hearing date counsel for the parent clearly indicated, in response to the IHO's request for clarification, that CSE composition was not at issue in the impartial hearing (Tr. pp. 24-25).⁸ It is not clear from the IHO's decision whether he considered the district's failure to ensure the attendance at the March 2011 CSE meeting of a social worker or an appropriate special education teacher to constitute a denial of a FAPE, as he noted the absence of such staff without making any explicit findings regarding the denial of a FAPE (see IHO Decision at p. 30). However, as the district has appealed from this aspect of the IHO's decision I will address it briefly.

⁸ It was thus improper for the IHO to address this issue in his decision, as the parent's withdrawal of her assertions with regard to CSE composition put them beyond the scope of the impartial hearing (see Application of the Dep't of Educ., Appeal No. 11-015).

With regard to the social worker, neither the IDEA nor federal or State regulations require the presence of a social worker at a CSE meeting (20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]; see Application of a Child with a Disability, Appeal No. 06-102). Because "there is no requirement that a school social worker . . . be present at the [CSE] meeting, therefore, their absence does not constitute a procedural violation" (M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]; cf. Savoy v. District of Columbia, 844 F. Supp. 2d 23, 37-38 [D.D.C. 2012]).

To the contrary, the presence of a "special education teacher" or "special education provider" of the student is required by the IDEA (20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]). The Official Analysis of Comments to the federal regulations states that the special education teacher member of the CSE "should be the person who is, or will be, responsible for implementing the IEP" (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). Assuming for purposes of this decision that an appropriate special education teacher from the district was not present at the March 2011 CSE meeting and that this constituted a procedural violation of the IDEA,⁹ the hearing record is devoid of any evidence that this violation impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47).¹⁰ This is particularly so in light of the fact that the student's Jump Start special education teacher for the 2010-11 and 2011-12 school years was present at the CSE meeting (Tr. pp. 377-78, 381; Dist. Ex. 3 at p. 2) and the parent testified that the Jump Start teacher was able to participate and provide information to the CSE regarding the student's academic difficulties and the strategies used at York to address these difficulties (Tr. pp. 246, 271).¹¹ Additionally, the resultant IEP reflects information that was provided by the Jump Start teacher (Dist. Exs. 3 at pp. 3-5; 4 at pp. 1-3; see Tr. pp. 41, 44-45). As the Jump Start teacher—who was directly acquainted with this student's particular needs—was able to fully participate in the March 2011 CSE meeting, I find that the lack of a district special education teacher member of the CSE did not rise to the level of a denial of a FAPE (A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student]'s educational and therapeutic

⁹ This would be a dubious conclusion, as the language of the IDEA and federal and State regulations do not require that the special education teacher "of the student" at the CSE meeting be an employee of the district (8 NYCRR 200.3[a][1][iii]; see 20 U.S.C. § 1414[d][1][B][iii]; 34 CFR 300.321[a][3]). Furthermore, the language in the Official Analysis of Comments indicating that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]) does not constitute a binding requirement but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school setting (see Application of the Dep't of Educ., Appeal No. 11-040).

¹⁰ Unsurprisingly, because of the parent's withdrawal of her challenge to the composition of the CSE, the district introduced no evidence at the impartial hearing regarding the district special education teacher member of the CSE's qualifications, potential ability to implement the March 2011 IEP, or familiarity with ICT programs.

¹¹ Although the Jump Start teacher testified at the impartial hearing, she was not asked any questions about her participation in the CSE meeting (Tr. pp. 374-416).

needs"]; Application of a Student with a Disability, Appeal No. 12-071; Application of the Dep't of Educ., Appeal No. 12-010; Application of the Dep't of Educ., Appeal No. 08-105).

2. Consideration of Private Evaluations/Parental Participation

Turning to the IHO's finding that the parent was prevented from participating at the March 2011 CSE meeting, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language and Communication Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]). One aspect of the parent's right to participate is the requirement that the CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). I find that under the circumstances of this case, the CSE adequately considered the private neuropsychological and educational evaluation provided to it by the parents.

The parent's due process complaint notice asserts that her participation in the development of the student's program was impeded by the CSE's failure to consider the private neuropsychological and educational evaluation obtained by the parent (see Dist. Ex. 1 at p. 2). However, the hearing record reflects that the parent participated in the development of the March 2011 IEP, including providing the CSE with the January 2011 private evaluation, information from which was incorporated into the IEP (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 11). Both the parent and the student's Jump Start teacher provided information regarding the student's skill levels and social/emotional functioning that is reflected in the student's IEP (Tr. pp. 320-23, 397, 399; compare Dist. Ex. 1 at pp. 3-4, with Dist. Ex. 2 at pp. 1-2). Furthermore, the hearing record indicates that the accommodations and goals on the March 2011 IEP were developed at the meeting based upon the private evaluation and with the assistance of the parent and the student's Jump Start teacher (Tr. pp. 70, 76, 244-45, 271; Dist. Ex. 4 at pp. 1-2), which tends to show that the district maintained an open mind during the IEP development process (see D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; Kiryas Joel, 777 F. Supp. 2d at 648-50). Although I can understand that the parent would have preferred that the CSE recommend a smaller class size, the IDEA does not mandate that the district follow the private evaluation's recommendation over the opinions of its staff (G.W. v. Rye City Sch. Dist., 2013 WL

1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a private recommendation alone does not invalidate the substantive adequacy of a program recommended by the CSE], aff'd 2005 WL 1791553 [2d Cir. July 25, 2005]; see M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]). In any event, "[n]othing in the IDEA requires the parents' consent to finalize an IEP. Instead, the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D.-S., 2011 WL 3919040, at *11, quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Based upon my review of the hearing record, I find that the district did not impede the parent's opportunity to participate in the development of the student's IEP (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

C. March 2011 IEP

1. 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]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).¹²

The IHO found, as alleged by the parent in her due process complaint notice, that the goals on the March 2011 IEP did not reflect all of the student's educational, social, or emotional needs and contained no evaluative criteria or objective methods of measurement (IHO Decision at p. 29; Dist. Ex. 1 at p. 2). A thorough review of the goals contained in the student's March 17, 2011 IEP reveals that although they are poorly written and unclear in some respects, they met the student's identified needs and would enable her to make educational progress.

Turning first to the finding that the goals did not meet all of the student's needs, neither the due process complaint notice nor the IHO's decision specify which needs of the student were not

¹² Although the due process complaint notice alleges the failure to develop transition goals as one of the deficiencies in the March 2011 IEP, I note that the IEP would not have been in effect when the student became age 15 (Dist. Ex. 3 at pp. 1-2), so that the failure to include transition goals was not a procedural violation (8 NYCRR 200.4[d][2][ix]; see 34 CFR 300.320[b]). Similarly, although the due process complaint notice alleges that the goals were not developed at the CSE meeting, the parent and district representative each testified that they were (Tr. pp. 70, 245).

met by the goals developed for the student on the March 2011 IEP (IHO Decision at p. 29; Dist. Ex. 1 at p. 2). In any event, upon a review of the hearing record, I find that the annual goals and short-term objectives were consistent with the student's identified needs in all areas.

In particular, the district representative testified that the CSE determined that the student had no academic needs other than those arising from her organizational and attentional deficits (Tr. pp. 49; 63-67). The district representative also noted that the student scored in the average range in standardized testing for both reading and math (Tr. pp. 68-69; Dist. Ex. 11 at pp. 5, 9) and the present levels of academic performance on the March 2011 IEP reflect that based on current academic testing, there was no indication that the student was behind in any of the areas tested (Dist. Ex. 3 at p. 3). However, the present levels of academic performance did reflect that the student exhibited slow processing speed; required reminders of instructions, lesson steps, and homework; had difficulty with the organization of papers, assignments, and step by step plans; required breakdown of instructions; and needed guidance with planning and organizing, especially for more complex and lengthy assignments (*id.*). Testimony by the student's Jump Start teacher for both the 2010-11 and the 2011-12 school year was consistent with the needs identified in the IEP and reflected that during the 2010-11 school year the student's primary academic deficits included difficulty keeping track of when assignments were due and submitting them on time, with impulsivity related to ADHD such as not reading directions carefully enough, and not following through with directions (Tr. p. 383),¹³ deficits all pertaining to the student's needs related to attention and organizational skills.

Furthermore, the student was determined to have no specific social/emotional management needs based on reports from CSE participants and the private evaluation report, which indicated that any academic anxiety the student experienced was secondary to her executive functioning deficits (Tr. pp. 78-79; Dist. Exs. 4 at p. 1; 11 at pp. 2, 5-6). Consistent with the January 2011 private evaluation, the present levels of performance on the March 2011 IEP indicated that while the student showed some anxiety related to completing complex academic tasks, she also presented with a healthy self esteem and ability to relate to others, and was a well behaved and motivated student (Dist. Exs. 3 at p. 5; 11 at p. 2). The CSE meeting minutes reflected that no social/emotional goals were included in the student's IEP because her social/emotional development did not present any particular concerns (Dist. Ex. 4 at p. 2). I find that it was reasonable for the CSE to conclude that the student's anxiety related to completing complex

¹³ The student's Jump Start teacher testified that the student also demonstrated difficulties with figurative language, reading comprehension, and math (Tr. pp. 382-83); however, the January 2011 private evaluation reflected that the student's score on the figurative language subtest of the Test of Language Competence-Second Edition (TLC-2) was in the 25th percentile (average range) (Dist. Ex. 11 at pp. 4, 10); her score on the reading comprehension subtest of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) was in the 58th percentile (average range) (*id.* at pp. 5, 9); and the student's scores on five separate math subtests on the WIAT-III ranged from the 34th to the 58th percentile (all within the average range) (*id.*). Additionally, the private neuropsychologist testified that the student had "a strong capacity to learn" and that her difficulties were primarily "in the execution of things, not in her understanding or conceptualization" (Tr. pp. 432-33). He further testified that the student's expressive language difficulties related to her processing speed and working memory deficits (Tr. p. 433). The private neuropsychologist also noted that although the student had previously received a diagnosis of a reading disorder, the student was now in the average range of achievement in reading, and the private evaluation report indicated that her reading disorder was "in partial remission" and that her reading comprehension difficulties stemmed from her slow processing speed (Tr. pp. 433-34; Dist. Ex. 11 at pp. 5-6, 9). As such, goals addressing these areas were not required on the IEP.

academic tasks could be addressed by the same goals that were designed to address the student's organizational and attentional needs, as the evidence reflects that her executive functioning deficits were the source of her anxiety (Dist. Ex. 11 at p. 2).

With regard to the student's health and physical development, the present level of health and physical development section of the IEP reflected that the student was in good health but was taking medication at home to address her ADHD (Dist. Ex. 3 at p. 6). Here again, the goals addressing the student's attentional and organizational needs would also address the student's deficits related to her ADHD.

Once the district put forth its case, the parent thereafter put forward no evidence that rebutted the district's prima facie showing that the goals developed were adequate to meet the student's needs. Rather, the testimony from those service providers who had worked with the student indicated that the CSE appropriately focused the IEP goals on the student's attentional and executive functioning deficits (Tr. pp. 284-85, 308, 382-83, 426-29). Based on the above, and consistent with State regulations, the CSE appropriately developed goals that addressed the student's areas of need, specifically, attention and organization, as reflected in the present levels of performance on the IEP (8 NYCRR 200.4[d][2][iii]). I note that the goals also complied with State regulations in that they were related to meeting the student's needs that resulted from her disability in order to enable the student to be involved in and progress in the general education curriculum (8 NYCRR 200.4[d][2][iii][1]).

With respect to the IHO's finding that the goals did not contain sufficient evaluative criteria by which to measure the student's progress; initially, the hearing record reflects that the March 2011 IEP contained two annual goals and one short-term objective pertaining to the student's needs related to attention and organizational skills (Dist. Ex. 3 at pp. 7, 9). However, as the student's IEP indicates that she is not an alternate assessment student for whom the IEP must include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present levels of performance and the measurable annual goal but rather reflects that she will participate in State and local assessments (*id.* at p. 12), and because the short-term objective does not consist of intermediate steps toward the annual goal (8 NYCRR 200.4[d][2][iv]), I will, for purposes of this discussion, address the short-term objective as a third annual goal.¹⁴

A review of the three goals on the March 2011 IEP reflects that they each address the student's needs in the areas of attention and organization by including elements and strategies that were designed to meet the student's needs (Dist. Ex. 3 at pp. 7, 9). However, a comparison of the three goals reveals that there is overlap among the three goals with regard to both the student's expected outcomes and the strategies which the student is to utilize in order to achieve each goal (*see id.*). For example, the expected outcome for the first listed goal (goal 1), namely to come to class with prepared materials, is included within the final goal (goal 3), which states, among other things, that the student will gather all the materials needed (*id.*). Goal 1 indicates the student will use strategies included in the academic management needs section of the IEP which are, in part,

¹⁴ The March 2011 IEP repeats the first goal on a separate page containing boxes in which the student's progress toward the goal could be recorded (Dist. Ex. 3 at p. 8). While the IHO remarked upon this practice as unusual (IHO Decision at pp. 29-30); I find no discrepancy with the district representative's testimony on this account (Tr. pp. 74-75).

also reflected in the second listed goal (goal 2) and goal 3 (id. at pp. 4, 7, 9). While the goals are ultimately appropriate because they accurately and comprehensively address the student's attentional and organizational needs, I caution the district that more care should be taken to ensure that the goals are written clearly and in conformity with State regulations.

With regard to the measurability of the student's goals, State regulation requires that each annual goal include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal (8 NYCRR 200.4[d][2][iii][b]). The State Education Department's Office of Special Education issued a guidance document in December 2010 which specifies that evaluative criteria refers to "how well and over what period of time a student must perform a behavior in order to consider it met" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPgguideDec2010.pdf>). A student's performance can be measured in terms of frequency, duration, distance, or accuracy; and period of time can be measured in days, weeks, or occasions (id.). Evaluation procedures refers to the method that will be used to measure progress, such as structured observations, student self-monitoring, written tests, recordings, work samples, and behavior charting (id.). Evaluation schedules refers to the date or intervals of time by which evaluation procedures will be used to measure the student's progress (id.).

In this case, goal 3 (Dist. Ex. 3 at p. 9) reflects the requisite information mandated by State regulations (8 NYCRR 200.4[d][2][iii][b]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation"). For evaluative criteria, goal 3 indicates that the student must perform the skill with 80% accuracy during 10 activities to meet the goal (Dist. Ex. 3 at p. 9). With regard to evaluation procedures, the IEP indicates that the student's progress would be measured by teacher observation, classroom participation, and examination (id.). The evaluation schedule indicates that the student's progress would be measured every 4 weeks (id.). The goal also reflects that the data collected would be revisited every marking period for indicators of progress toward the annual goal (id.).

While goal 3 includes the requisite evaluative criteria, procedure, and schedule as discussed above, goals 1 and 2 do not include these three components but rather indicate that they will be measured by the student's teacher at his or her discretion (Dist. Ex. 3 at pp. 7, 9). However, the district addressed this deficiency through the use of retrospective testimony by the district psychologist and the assistant principal of the assigned school indicating the evaluation procedures that would be used to measure the student's progress on goals 1 and 2. Testimony by the district psychologist indicated that goal 1 would be measured by "monitoring" whether the student comes to class with materials prepared; essentially a form of observation (Tr. p. 73). The assistant principal testified that to measure whether a student is coming to class with prepared materials, as in goal 1, teachers observe whether they have the mandated materials with them; and to track whether students are completing their assignments, the teachers would walk around the classroom, reviewing work samples (Tr. pp. 176-77). The assistant principal added that the teachers would keep data and anecdotal records on that information, which would involve behavior charting (id.). The district psychologist testified that goal 2 would be measured by the teacher monitoring and the student self-monitoring the student's improvement in organizational skills while working on completing assigned projects, which would involve observation and review of class work samples (Tr. pp. 73-74). With regard to goal 2, the assistant principal indicated that teachers would look for completion of class work, conduct notebook checks, and make sure a student was completing

assignments in class to measure a student's progress with regard to staying on task; constituting a review of work samples and observation (Tr. p. 177). These methods of measurement are not specified on the IEP itself, and as such this testimony cannot be relied upon to "rehabilitate a deficient IEP after the fact" (R.E., 694F.3d at 186).

However, upon reading the goals as a whole, the failure to follow the procedure for providing methods of measurement is an insufficient basis for finding a denial of a FAPE, where, as here, the methods are to some extent fairly deducible from the structures of the goals themselves. For example, the substantive content of goals 1 and 2, as noted above, is essentially repeated in goal 3, which does contain an appropriate statement of the methods of measurement. Therefore, despite the district's failure to identify for each annual goal the methods of measurement by which to monitor the student's progress as required by State regulation (8 NYCRR 200.4[d][2][iii][b]), I find that the goals, taken as a whole, appropriately addressed all of the student's needs relating to her disability and that the failure to specify the evaluation criteria, evaluation procedures, and evaluation schedules for each goal did not deprive the student of educational benefits or impede the parent's opportunity to participate in the development of the IEP so as to deny the student a FAPE (see K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *11 [S.D.N.Y. Aug. 23, 2012]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7-8 [S.D.N.Y. Mar. 28, 2012]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 108-09 [E.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289 [S.D.N.Y. 2010]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294-95 [S.D.N.Y. 2009], aff'd 2010 WL 565659 [2d Cir. Feb. 18, 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; Tarlowe, 2008 WL 2736027, at *9).¹⁵ However, this finding should not be taken as an endorsement of the manner in which the district wrote the student's goals. The district must take care to ensure that its IEPs meet State standards, rather than just filling out the IEP form. The failure to include the required measurement information on the March 2011 IEP constitutes a defect in the IEP, albeit in this instance not one which requires invalidation of the entire IEP (Karl v. Bd. of Educ. of Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir 1984]).

2. Integrated Co-Teaching Services

The hearing record demonstrates that the ICT program recommended by the March 17, 2011 CSE was an appropriate educational setting for the student and reasonably calculated to provide her with educational benefits. At the time of the March 17, 2011 CSE meeting, the student exhibited deficits in various facets of executive functioning including working memory, attention control, task planning and organization, and processing speed (Dist. Exs. 3 at pp. 3, 5-6; 4 at pp. 1-2; 11 at pp. 1-4, 8-10). The student demonstrated difficulty paying attention to details, following through on tasks, staying organized and resisting distractions; however, these symptoms were reportedly alleviated in part by medication the student took for her ADHD (Dist. Exs. 3 at p. 6; 11 at p. 1). The student was in the average to superior range of academic achievement, received passing grades in all her school subjects, and worked best in small group settings (Tr. pp. 254, 313; Dist. Exs. 7 at p. 1; 11 at pp. 5-6, 8-9; 12 at p. 2). With regard to her language abilities, all areas of the student's speech-language functioning were in the average to superior range (Dist. Ex. 11 at pp. 4, 10). With regard to social/emotional skills, the student exhibited some anxiety related to

¹⁵ I note that at no point did the parent or IHO specify any harm which did or would result to the student from the implementation of an IEP with goals lacking methods of measurement.

completing complex academic tasks; however, she demonstrated a positive attitude about school and was confident in her academic potential, her interpersonal skills, and in her general self esteem (Dist. Exs. 3 at p. 5; 11 at pp. 2, 5; 12 at p. 4). The hearing record does not indicate that the student was in need of related services nor does it reflect that the student required or received related services at York during the 2010-11 school year (Tr. pp. 55-56; Dist. Exs. 11 at p. 2; 12 at p. 3). The March 2011 CSE recommended strategies in the student's IEP designed to address the student's academic management needs including: use of checklists, graphic organizers, color coded notes, outlines, and planners; repetition of instructions; break-down of directions and assignment instructions; individual self repetition; and self checking of instructions (Dist. Ex. 3 at p. 4). The March 2011 IEP also indicated the student's need for redirection and reminders to remain on task, break-down of instructions, and guidance for planning and organization (id. at p. 3). The CSE also developed goals to address the student's deficits in organization and attention, as discussed in more detail above (id. at pp. 7-9).

In the January 2011 private evaluation report, the private neuropsychologist indicated that the student's deficits interfered with her ability to function in a typical educational environment and curriculum (Dist. Ex. 11 at p. 6). Although the IHO found that the CSE failed to acknowledge the severity of the student's deficits as reflected in the January 2011 private evaluation (IHO Decision at pp. 30-32),¹⁶ I disagree. Based on the interpretive ranges for the percentile scores included in the neuropsychological and educational evaluation, the district psychologist correctly interpreted the student's performance on the academic portion of the evaluation as falling between the average and superior ranges of functioning on various subtests (Dist. Ex. 11 at pp. 8-9). Testimony by the district school psychologist indicates that she clearly recognized and acknowledged the student's deficits in executive functioning that were reported in the private evaluation; however, the psychologist concluded that because the severity of the student's executive functioning deficits was not such that they impeded the student's ability to perform at an average to superior level academically, the deficits did not "rise to the level to require a more restrictive program than the one [the CSE] recommended" (Tr. pp. 104-06, 113). Similarly, while the private evaluator indicated in his report that the testing he conducted revealed executive functioning factors that interfered with the student's ability to "function up to her measured potential," the report reflected that despite these factors, the student's academic performance was in the average to superior range (Dist. Ex. 11 at pp. 3-6, 9). I find that the IHO's holding that the district psychologist's interpretation of the January 2011 private evaluation was unreasonable is not supported by the totality of the hearing record. The private neuropsychologist's testimony

¹⁶ To the extent that this portion of the IHO's decision could be read as finding that the district improperly failed to determine the student to be eligible for special education and related services both as a student with an OHI and as a student with a learning disability, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [emphasis in original]; see 20 U.S.C. § 1412[a][3][B] ["Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability listed in [20 U.S.C. § 1401] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability"]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]). Accordingly, as there is no dispute regarding the student's eligibility for special education, what is relevant for purposes of analysis is whether the March 2011 IEP identified and addressed the student's needs, regardless of how it categorized her disability. Furthermore, medical diagnoses do not necessarily correlate to educationally related disabilities, such that a medical diagnosis may be "useful, but not conclusive as to an educational handicapping condition" (Application of a Child with a Handicapping Condition, Appeal No. 91-11).

indicated that he agreed with the district psychologist's assessment of the student's impulsivity as "mild" (Tr. pp. 446-47; see Tr. pp. 67-68), but that he considered the class sizes at York to be "a much more appropriate fit for her needs" than an ICT classroom in a public middle school (Tr. pp. 440-42). The private psychologist also testified that the student did not necessarily require 1:1 support but rather needed to "have more of an opportunity [for teacher support] than a child typically has in a regular classroom" in order to manage the demands of the classroom (Tr. p. 440).

State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities who receive integrated co-teaching services in a class may not exceed 12 students, and the classroom is required to be staffed by, at a minimum, one special education and one regular education teacher (8 NYCRR 200.6[g][1]-[2]).¹⁷ The district also put forth evidence describing an ICT as called for in the IEP. The district's psychologist testified that, more significant than the number of students in the class, the structure of an ICT program would be very beneficial to the student, as the addition of a special education teacher to the classroom was in accordance with her need for a teacher to redirect and remind her in order to follow directions and complete tasks correctly (Tr. p. 139; Dist. Ex. 3 at p. 3). The assistant principal of the assigned school testified that the role of the special education teacher in an ICT classroom is to determine what components of the regular education teacher's lesson plan would need to be differentiated or modified, and what accommodations would need to be provided, to meet the needs of the special education students in the classroom (Tr. p. 152). The assistant principal indicated that the special education teacher would be responsible for implementing the necessary accommodations, conducting IEP meetings, writing annual goals, and monitoring the performance of students with disabilities in the classroom (id.). Testimony by the district psychologist indicated that the strategies to assist the student that were recommended in the January 2011 private evaluation, such as repeating instructions, having the student repeat back or paraphrase instructions to check for understanding, preferential seating, and various strategies that help with concentration, were strategies that they could be implemented by either of the teachers

¹⁷ Although counsel for the parent indicated that an ICT classroom may contain no more than 35 students (Tr. pp. 118-19), State regulation contains no absolute limitation on the number of students permitted in such a classroom (8 NYCRR 200.6[g][1]). Although when ICT services were first added to the continuum of special education services the original proposed regulatory language included both a fixed limit on the number of students with disabilities and a cap of students with disabilities as a proportion of total class enrollment (<http://www.regents.nysed.gov/meetings/2007Meetings/March2007/0307emscvesidd2.htm>), the limitation with regard to ratio of students with disabilities was deleted from the proposed regulation in a notice of revised rulemaking and was never implemented (N.Y. Reg., July 3, 2007 at 13, 18; see N.Y. Reg., Oct. 3, 2007 at 19-20). More recently, the Office of Special Education issued guidance indicating that the "number of nondisabled students should be more than or equal to the number of students with disabilities in the class in order to ensure the level of integration intended by this program option" ("Variance Procedures to Temporarily Exceed the Maximum Number of Students with Disabilities in an Integrated Co-teaching Services Class," Office of Special Educ. Mem. [Jan. 2011], available at <http://www.p12.nysed.gov/specialed/publications/varianceprocedures-jan2011.pdf>; see also "Continuum of Special Education Services for School-Age Students with Disabilities: Questions and Answers," Question 40, VESID Mem. [Apr. 2008], available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf> [noting that "There is no regulatory maximum number of non-disabled students in an integrated co-teaching class," but stating that the "CSE's recommendation for integrated co-teaching services should consider the overall size of the class enrollment (which includes students with disabilities and non-disabled students) and the ratio of students with disabilities to non-disabled students in relation to the individual student's learning needs"]]).

in an ICT class (Tr. p. 53; Dist. Ex. 11 at p. 13-14) and, as noted above, were contained on the March 2011 IEP (Dist. Ex. 3 at pp. 3-4).

Furthermore, although the parent's witnesses testified that in general the student would not be able to function in an ICT classroom, the hearing record does not support this conclusion (Tr. p. 313; 441, 479, 499). The hearing record reflects that the student's classes at the NPS were generally small, with between 15 and 18 students, and that most of the classes contained one general education teacher (Tr. pp. 304, 321-22). However despite the small class size, the student's report card from the NPS indicates that while in this setting, the student's grades reflected "marginally satisfactory" performance with regard to academic subjects (Parent Ex. J at pp. 1-3). In contrast to this, the hearing record reflects that in a similarly-sized classroom at York, the student was able to make greater progress when given special education support to address her organizational and attentional needs, even when the support was not provided directly in the classroom (Tr. pp. 348, 469, 494; Dist. Exs. 7; 12 at pp. 1-2). As such, the student's increased performance appears to be related to the special education support she received rather than classroom size. As indicated above, the recommended ICT classroom would have provided the student with a more intensive level of support than she had previously received by including a special education teacher throughout the day in each of her core academic subjects (Tr. pp. 150-53). Testimony from the district psychologist indicated that she understood the student to need a teacher "very nearby" at all times to remind her to follow directions, to repeat instructions, and to implement academic management strategies in her IEP, all of which could be provided in an ICT classroom (Tr. pp. 51-52). Moreover, nothing in the hearing record indicates that the student's anxiety would have prevented her from making progress in an ICT classroom. I note that the hearing record does not indicate that the student had ever been observed in an ICT classroom or while being provided with the level of support available in an ICT classroom (see Tr. pp. 222, 231-33, 235; Dist. Ex. 11 at p. 2).

Because the CSE addressed the student's need for more organizational and attentional support by providing ICT services, I find that the hearing record does not support the IHO's conclusion that the student could not make progress in an ICT classroom. As noted above, although a CSE must consider parents' suggestions or input offered from privately retained experts, the CSE is not required to adopt their recommendations for different programming (see, e.g., E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010], aff'd 2012 WL 2615366 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]). Additionally, even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator (see Watson, 325 F. Supp. 2d at 145). Although the student may arguably make more progress in a smaller, private school classroom setting, the IDEA requires that the district provide a "basic floor of opportunity" which confers "some educational benefit" upon the student (Rowley, 458 U.S. at 200-01), "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; see R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at *15 [S.D.N.Y. Nov. 16, 2012] ["While it is natural to assume that a student would benefit from being in a smaller classroom environment with more support, the IDEA does not require that the District provide an ideal learning environment, but instead only one where the student can progress"]), and in many instances, the number of students in a classroom will be less relevant to the determination of whether a placement is appropriate for a student than other aspects of the placement designed to meet the student's needs (T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4714796, at *9-*10

[S.D.N.Y. Sept. 26, 2012]). The IDEA does not require the district to offer the student the "best educational opportunities available" for the student (Watson, 325 F. Supp. 2d at 144). While the parents may have preferred that the student receive additional classroom support by way of a smaller student-to-teacher ratio, I find that the CSE's recommendation for the student to receive ICT services was sufficiently tailored to address the student's individual needs and was an appropriate placement in order to offer the student a FAPE.

VII. Conclusion

Having found that the district offered the student a FAPE for the 2010-11 school year, the necessary inquiry is at an end and I need not determine the appropriateness of the student's unilateral placement or whether equitable considerations support the parents' request for reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).¹⁸ I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 17, 2012 is modified, by reversing those portions which found that the March 2011 IEP did not offer the student a FAPE and ordered the district to reimburse the parent for a portion of the student's York tuition costs for the 2010-11 school year.

Dated: **Albany, New York**
 August 5, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁸ However, I note again my disagreement with the district's position that parents may not receive tuition reimbursement if the student had been placed in a private school prior to time the parents notified the district of their concerns with the program recommended for their child (see Application of the Dep't of Educ., Appeal No. 12-135). In particular, this position appears to be at odds with the Supreme Court's holding in Forest Grove that a student need not have previously received services under the auspices of the district for an IHO to award tuition reimbursement (557 U.S. at 239-45). I also remind the school district that the IDEA does not require, but merely permits, an IHO or SRO to reduce or deny tuition reimbursement when the district is not provided with timely notice that parents intend to seek tuition reimbursement for a unilateral placement (20 U.S.C. § 1412[a][10][C][iii]; see 34 CFR 300.148[d]).