The University of the State of New York

The State Education Department
State Review Officer
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No. 18-112

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his son's tuition costs at Carmel Academy for the 2014-15 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 began receiving special education services in second grade while attending a private school, and began attending Carmel Academy for 2012-13 school year (see Dist. Ex. 7 at pp. 1-2).[1]

The parent provided consent for the district to evaluate the student on October 14, 2013 (Dist. Ex. 4 at p. 1). The district conducted a psychoeducational evaluation on March 3, 2014 and a social history on March 18, 2014 (Dist. Exs. 6 at p. 1; 7 at p. 1). The psychoeducational evaluation report indicated that the student exhibited difficulty with inferential reading,

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

vocabulary, writing fluency, multi-step word problems, expressive language, and language organization (Tr. pp. 33-34; Dist. Ex. 6 at pp. 2-3). The social history reflected that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and exhibited difficulty with focusing and attention (Tr. pp. 33-34, 141, 147-48; Dist. Ex. 7 at p. 2).

In an email dated May 12, 2014, the parent indicated that he was "awaiting receipt and/or considering the appropriateness of the district's IEP program and/or recommendation for" the student and that he understood that he must request special education services in writing to the "school district of location by June 1st" (Parent Ex. A at p. 1). Additionally, the parent indicated that if he did not receive an offer of a free appropriate public education (FAPE) for the 2014-15 school year, he would enroll the student at Carmel Academy (id.).

The Committee on Special Education (CSE) convened on May 19, 2014 to develop the student's IEP for the 2014-15 school year (Dist. Ex. 3 at p. 16). The CSE recommended that the student receive five periods per week of integrated co-teaching (ICT) services in math, English language arts (ELA), and social studies; six periods per week of ICT services in science; three periods per week of special education teacher support services (SETSS) in social studies in a separate location; one 40-minute session per week of individual counseling services; one 40-minute session per week of group counseling services; two 40-minute sessions per week of group occupational therapy (OT); one 40-minute session per week of speech-language services; and two 40-minute sessions of group speech language therapy (id. at pp. 11-12). In addition, the CSE recommended testing accommodations for the student (id. at p. 13).

In a prior written notice dated May 22, 2014, the district informed the parent that the CSE had recommended that the student receive a 10-month program of ICT services, SETSS, counseling services, OT, and speech-language therapy in a community school (Dist. Ex. 8 at p. 1). The prior written notice also indicated that the CSE recommended "that the provision of these services be deferred," because it was "not educationally appropriate" for the student to change his educational program at that time (id. at p. 2). Finally, the prior written notice indicated that the recommended services would begin effective September 3, 2014 (id. at p. 3).

In a letter dated August 8, 2014, the parent indicated that he had received a school placement letter, which he assumed was incorrectly dated September 4, 2014 (Parent Ex. B at p. 1).[2] The parent requested to visit the school location to "see if it meets [the student's] needs" before the school year started (id.).

The school location letter dated September 4, 2014 provided the parent with the assigned public school location, and a contact number and address for the parent to use to inform the district if the student would be attending that school (Dist. Ex. 9). The letter further requested that if the parent wanted to visit the recommended assigned public school, that he contact district personnel using the information provided (id.).

[2] The parent indicated that he assumed the correct date of letter was August 4, 2014 (Tr. p. 205; Parent Ex. B at p. 1). A district document of events indicated that the school placement letter was sent on July 30, 2014 (Dist. Ex. 10 at p. 1).

The parent sent a letter to the district dated February 17, 2015 indicating that he had not heard back from the district since the August 2014 school location letter (Parent Ex. C at pp. 1-2). The parent indicated that he therefore enrolled the student at Carmel Academy for the 2014-15 school year and that he intended to enroll the student at Carmel Academy for the 2015-16 school year in the absence of any follow-up from the district (id.). The letter further explained that the parent "reserve[d] the right to obtain reimbursement from the [district] for the tuition paid," and that he continued to be open to consider any district placement for the student that was appropriate to meet his special education needs (id.).

A. Due Process Complaint Notice

By amended due process complaint notice dated November 16, 2015, the parent, through his attorney, asserted that the student was denied a FAPE for the 2013-14 and 2014-15 school years (Dist. Ex. 1 at p. 3).[3, 4]

The parent asserted that the district did not timely evaluate the student following his request made during the 2013-14 school year (Dist. Ex. 1 at p. 2). The parent argued that the CSE convened in May 2014 and there had been no change in the student's "learning deficits and ADHD which would justify any changes to his IEP" (id.). Further, the parent asserted that he made repeated attempts to visit the proposed school location following the May 2014 CSE meeting and due to his inability to visit the assigned public school site, he was forced to re-enroll the student at Carmel Academy for the 2014-15 school year (id. at pp. 2-3).

The parent argued that the district had been "prolonging the entire process with constant and unnecessary delays" (Dist. Ex. 1 at p. 3). The parent alleged that these delays denied him a meaningful opportunity to evaluate other schools in the area "that could possibly address [the student's] specific educational needs" (id.). The parent requested tuition reimbursement for the 2013-14 and 2014-15 school years at Carmel Academy (id.).

B. Impartial Hearing Officer Decision

The impartial hearing convened on October 16, 2015 and concluded on February 6, 2018 after eight days of proceedings (see Tr. pp. 1-679).[5] In a decision dated September 26, 2018, the

[3] The parent's due process complaint notice was amended from the initial due process complaint notice dated September 1, 2015 (see Dist. Ex. 2).

[4] The hearing record demonstrates that the parent's claims related to the 2013-14 school year were settled by the parties (Tr. pp. 246-48, 334-35, 436-37, 439-40; IHO Decision at p. 3). Therefore, this decision will not recite the parent's claims regarding the 2013-14 school year unless they are pertinent or related to the claims for the 2014-15 school year.

[5] These dates include two prehearing conferences conducted on October 16, 2015 and February 26, 2016 (Tr. pp. 1-3; 10-12). Further, a hearing was held on June 20, 2016; however, the transcript for that hearing date was lost and the IHO allowed for the district witness who testified at that hearing to testify again (Tr. pp. 173-75, 329-31). While this administrative appeal was pending, the transcript for the missing hearing date suddenly surfaced and was to the undersigned following a letter from the parent and my inquiry to the parties.

IHO found that no denial of a FAPE had been demonstrated and that the due process complaint notice was denied (IHO Decision at p. 10).[6] The IHO found that the IEP developed by the May 2014 CSE contained all the elements required under the IDEA as the academic needs of the student were incorporated into the present levels of performance, the IEP included goals and the measurement of those goals, and provided testing accommodations (id. at p. 8). The IHO determined that the IEP was tailored to "meet the student's educational deficits" (id.).

Further, the IHO held that the parent did not present evidence that the IEP was deficient and could not meet the student's needs (IHO Decision at p. 8). The IHO noted that the parent's main argument was that the proposed class size was too large (id.). The IHO found that the testimony of the district assistant principal indicated that the assigned public school could have implemented the services outlined in the IEP (id.). Additionally, the IHO determined that the unilateral placement at Carmel Academy was not the least restrictive environment for the student and held that there was no evidence showing that the school would have afforded the student with an opportunity to interact with non-disabled peers (id. at p. 9).

The IHO held that the record did not show that the student would have been unable to perform satisfactorily with the services mandated in the May 2014 IEP (IHO Decision at p. 9). Moreover, the IHO determined that the record indicated that the unilateral placement implemented the services in the IEP and the student was progressing with those services (id.). Also, the IHO found that the goals listed in the May 2014 IEP were sufficiently ambitious to enable the student to make progress and that the goals were sufficiently specific and measurable to guide instruction and evaluate the student's progress over the course of the school year (id.).

[6] I understand the parent's frustrations regarding delays at the district and CSE levels described in his complaint, and I address that below. However, I am deeply disturbed that, largely without an explanation, this impartial hearing process consisting of two prehearing conferences and six hearing dates—one of which was a do-over—took over three years. The parent began the impartial hearing process by filing the initial due process complaint notice in September 2015 (see Dist. Ex. 2). The first pre-hearing conference occurred in October 2015 (see Tr. pp. 1-3). Based on the hearing record, the parent did not object to any extension requests during the proceedings (Tr. pp. 17-18, 24, 164-67, 540-41). However, the record does not contain any extension requests prior to January 12, 2018. Additionally, the record indicated that the impartial hearing was delayed because the transcript for the June 20, 2016 hearing went missing, which required a district witness to testify again (Tr. pp. 173-75, 329-31). The hearing record is unclear regarding the extensions of the hearing timeline prior to January 2018 and what the record close date should have been. Moreover, Case Follow-Up Sheets may be a useful tool for a district to use for adhering to the State's electronic impartial hearing reporting system requirements, but the ones in the record are not a substitute for the IHO's obligations in granting extensions in the hearing record following the procedures outlined in 8 NYCRR 200.5. Extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]).

Since the IHO found that there was no denial of FAPE, the IHO determined that there was no need to determine whether the unilateral placement at Carmel Academy was appropriate or whether equitable considerations favor reimbursement (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parent, appearing pro se, appeals from the IHO's September 26, 2018 decision. The parent factually alleges that following the May 2014 CSE meeting, he received a prior written notice which indicated that no changes would be made to the student's educational plan. However, the parent further asserts that he then received a letter regarding the school location. After receiving the school location letter, the parent alleges that he was unable to visit the proposed school and that the district failed to comply with its own Standard Operating Procedures Manual.

As for his challenges to the IHO's decision, the parent argues that the IHO failed to take into account the evidence regarding the timeliness of the school location letter and the parent's inability to investigate the school. Further, the parent asserts that the IHO's finding that the IEP and school location constitute a FAPE "violates the guidelines, is illogical, unfair and is woefully misinformed."

The parent contends that the IHO failed to render any opinion whatsoever as to whether the school location letter was provided in a timely manner. The parent asserts that the Standard Operating Procedure Manual required the district to send him a "Nickerson Letter." The parent argues that the failure to comply with the Standard Operating Procedure Manual "effectively denied [him] an opportunity to evaluate the school and potentially raise objections and request a reevaluation." Moreover, the parent contends that it was acknowledged by the IHO that the parent did not have an opportunity to visit the assigned public school site; however, the IHO did not factor that into her decision. The parent further argues that the hearing record demonstrates that the district denied the parent an opportunity to investigate the school. For the first time on appeal, the parent also contends that the proposed public school site was inappropriate because it was a poor performing school according to data published on the internet.

The parent alleges that the district ignored the opinions and recommendations of the student's then-current teachers and it was "unfairly arbitrary for the IHO to accept as evidence what the CSE says, but not what the professionals at Carmel [Academy] say, and the CSE is obligated to consider the parents' views when formulating the IEP and making a decision for [the student's educational] placement." To that end, the parent points to the testimony of the student's teacher indicating that the student was prone to distractions and required constant re-focusing. The parent contends that the larger class size would have been disastrous and caused the student to regress. The parent asserts that the IHO improperly relied on testimony from witnesses who had never met the student rather than the parent and his teacher. As relief, the parent requests that the SRO grant $35,000 in tuition reimbursement for Carmel Academy for the 2014-15 school year as well as $15,000 for attorney fees.[7]

[7] Although unclear from the hearing record or his request for review, it appears from the context of this case that the parent is attempting to recover fees that he paid to his attorney to represent him at the impartial hearing. The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to the prevailing party;

In an answer, the district contends that it provided the student with a FAPE for the 2014-15 school year. The district asserts that the IEP was reasonably calculated to enable the student to make progress in light of his circumstances. Further, the district argues that the parent was not denied his right to meaningfully participate in the process as the IDEA does not confer upon a parent the right to participate in the selection of the school location. The district asserts that it provided the parent with timely notice of the school location and that the assigned public school could have fully implemented the student's IEP. The district alleges that the parent raised claims in his request for review that were not raised before the IHO and are beyond the permissible scope of review. Lastly, the district contends that an SRO does not have authority to grant attorney fees to the parent and there has been no demonstration that the requested amount is reasonable.[8]

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

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and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; see also B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009]; Application of a Student with a Disability, Appeal No. 11-027; Application of the Bd. of Educ., Appeal No. 09-081).

[8] The parent submitted two letters to the SRO dated October 22, 2018 and October 30, 2018, following the district's submission of its answer. These letters were not submitted to the district and do not comply with the form requirements of Part 279.6 of State regulations, which govern the requirements for a party to submit a reply. Further, it is noted that following the submission of these letters, the SRO forwarded the letters to the district on October 24, 2018 and November 2, 2018, respectively. In the letters from the SRO, the parent was reminded that any communications to the SRO must be copied to the district as well. Ex parte communications about the merits of a proceeding are not permissible.

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]).[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).

VI. Discussion

A. Preliminary Matters

1. Settlement of the 2013-14 School Year

The parent in his request for review alleges that he was not provided with a Nickerson letter, which is required when the district has not offered the student a special class placement on or before the 60th school day from the date the district received parental consent for an evaluation.[10] Further, the parent argues that the district was required to offer a school placement within 60 days of the consent for evaluation.

[9] 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).

[10] Although not fully described in the hearing record or in the IHO's decision, a "Nickerson letter" is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The Nickerson letter remedy authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]). The remedy provided by the Jose P. decision was intended to address those situations in which a student was not evaluated within 30 days or placed within 60 days of referral to the CSE (id.; see R.E., at 192, n.5; M.S. v. New York City Dep't Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]).

The parent provided the district with consent to evaluate the student on October 14, 2013 (Dist. Ex. 4 at p. 1).[11] The hearing record demonstrates that the student was evaluated by the district in March 2014 (see Dist. Exs. 6; 7). The March 2014 psychoeducational evaluation and March 2014 social history were the evaluations conducted by the district in order for the CSE to develop the May 2014 IEP for the 2014-15 school year (see Dist. Exs. 3; 6; 7). Therefore, the claims raised by the parent regarding the district's failure to evaluate the student following his October 14, 2013 provision of consent to evaluate relate to the 2013-14 school year—which the parties admit during the impartial hearing were settled—not the 2014-15 school year (Tr. pp. 246-48, 433-34, 439). Because the parent's claims related to the 2013-14 school year were settled, including the claim that the district failed to evaluate the student, further review of this issue is foreclosed. I understand that the parent may be attempting to express his continued dissatisfaction with the district, and one cannot help but be sympathetic to such frustrations involving a child; however, this continued displeasure with those events does not render these facts relevant as to whether the district offered the student a FAPE for the 2014-15 school year. As the evidence discussed below clearly shows, the factual circumstances changed insofar as the district evaluated the student before the CSE convened to plan for the 2014-15 school year.

Moreover, even if the matter had not been settled, I would not have jurisdiction over the parent's claim that the district failed to provide him with a Nickerson letter after failing to evaluate the student. Disputes over relief provided pursuant to Nickerson letters cannot be resolved through the IDEA due process mechanism because neither an IHO, nor an SRO, has jurisdiction over matters related to the stipulation reached in the Jose P. class action suit. The remedy provided by the Jose P. decision was intended to address those situations in which a student had not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P., 553 IDELR 298; see R.E., 694 F.3d at 192, n.5; M.S., 734 F. Supp. 2d at 279; see also Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 02-075; Application of a Child with a Disability, Appeal No. 00-092). Jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69, 75 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925, 933 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011]; Application of a Student with a Disability, Appeal No. 12-039 [indicating that "[n]o provision of the IDEA or the Education Law confers jurisdiction upon a state educational agency or a local educational agency to sit in review of or resolve disputes over injunctions or consent orders issued by a judicial tribunal"]), and "it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order" (see P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011]).

Consequently, neither an IHO nor SRO has the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy

[11] The parent in the request for review asserted that consent was provided on October 13, 2013 (Req. for Rev. at p. 3).

for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *17 n.29 [E.D.N.Y. Jan. 21, 2011], adopted at 2011 WL 1131522, at *4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d at 167; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. 2010]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11-*12 [S.D.N.Y. Oct. 16, 2012]; M.S., 734 F. Supp. 2d at 279 [addressing the applicability of and parents' rights to enforce the Jose P. consent order]).

2. Scope of the Impartial Hearing

Initially, I note that the parent did not clearly challenge the appropriateness of the May 2014 IEP in the due process complaint notice. It is well settled that a party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]).

However, despite the parent's failure to allege deficiencies in the May 2014 IEP, the district nevertheless proceeded to open the door to claims regarding the appropriateness of the IEP during the hearing through the questioning of its own witnesses (see P.G. v. New York City Dep't of Educ., 959 F.Supp.2d 499, 509–10 (S.D.N.Y.2013) [concluding that the district "opened the door" to an issue which the parents would have otherwise waived, "when it raised the issue in its opening argument and elicited testimony about it from one of its witnesses on direct examination."] Although the district opened the door for the parent to challenge the appropriateness of the May 2014 IEP, the parent did not raise the allegations that the particular school site was a low-performing school during the impartial hearing nor can it be said that the district opened the door to this particular type of claim by raising contrary evidence as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, the parent's allegations that the public school site was poor performing based upon information published on the internet is beyond the scope of the impartial hearing and, understandably, was not ruled upon by the IHO. Accordingly, as this issue is raised for the first time on appeal, it is outside the scope of the impartial hearing and will not be considered (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]).

3. Scope of Review

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulation provides that a request for review or a cross-appeal "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate" the relief sought by the appealing party (8 NYCRR 279.4[a], [f]). Further, it has long been held that a memorandum of law is not a substitute for a pleading, which is expected to set forth the appealing party's allegations of the IHO's error with appropriate

citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] ["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"]).

In this case, the IHO determined that the student's academic needs were incorporated into the present levels of performance and that the goals included in the May 2014 IEP were sufficiently ambitious to enable the student to make progress (IHO Decision at pp. 8-9). The parent has not challenged these findings in his request for review. Accordingly, as neither party has appealed these determinations, they are final and binding on the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[12]

B. 2014-15 School Year

1. May 2014 IEP

Although the parent has procedural concerns, I have elected to address the procedural below after the section examining the substance of the IEP, although most of the time I prefer to address the procedural matters first. I have taken this course in this particular decision because at least some of the procedural concerns relate more to the selection of a particular school site than to the IEP. With respect to the IEP matters, the IHO found that the May 2014 IEP "contained all the elements required under the IDEA," that the student's academic needs were incorporated into the present levels of performance, the IEP included goals and testing accommodations, and that the "IEP was tail[or]ed to meet the student's educational deficits" (IHO Decision at p. 8). The parent appeals and asserts that the IHO erred in finding the IEP was appropriate, because professionals from Carmel Academy who attended the May 2014 CSE meeting and testified at the impartial hearing stated that a "large class size"—such as a general education classroom with ICT services—would be "disastrous" for the student.

The hearing record shows that the following members participated in the May 2014 CSE meeting: a district representative, a district special education teacher, and the parent; and by telephone from Carmel Academy the director of the educational resource program, a psychologist, a speech therapist, an occupational therapist, and a classroom teacher (Tr. pp. 29-30; Dist. Ex. 3 at p. 19). Although the accuracy and adequacy of the present levels of performance set forth in the May 2014 IEP are not one of the issues in dispute, a brief discussion thereof provides context for

[12] Additionally, the parent asserted that the IHO should not have addressed the issue of least restrictive environment (LRE) in her decision. Specifically, the IHO noted that the IDEA requires a student be educated in the LRE and noted that there is a strong preference in the IDEA for mainstreaming students with their non-disabled peers (IHO Decision at pp. 8-9). The IHO also found that the unilateral placement would not have been the LRE for the student (id. at p. 9). While an assessment that a placement is in a student's LRE cannot be the sole rationale for why an IEP is appropriate (see L.R. v. New York City Dep't of Educ., 193 F. Supp. 3d 209, 215 [E.D.N.Y. 2016]), the CSE is tasked with balancing the presumption in favor of mainstreaming against the importance of providing an appropriate education (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 162 [2d Cir. 2014]). Accordingly, the IHO's consideration of LRE concepts as a part of his overall determination as to whether the student was offered a FAPE was not a misapplication of the law as alleged by the parent.

the discussion of the disputed issue to be resolved—namely, the appropriateness of the ICT placement recommended in the IEP by the May 2014 CSE. A review of the hearing record indicated that in addition to the information provided by the student's then-current teachers and related service providers, the May 2014 CSE considered a March 2014 psychoeducational evaluation report and a March 2014 social history (Tr. pp. 32-34, 49-50; Dist. Exs. 3 at pp. 1-4, 19; 6; 7).

According to the March 2014 psychoeducational evaluation report, the student's full scale IQ of 89 was in the low average range, and consisted of composite standard scores ranging from low average to average; identifying relative strengths in verbal comprehension, working memory, and processing speed and relative weaknesses in perceptual reasoning, word knowledge and social comprehension (Dist. Ex. 6 at pp. 1-2, 5). Additionally, the report indicated that the student's academic functioning ranged from low average to average; specifically indicating that he demonstrated adequate decoding, reading fluency, comprehension, basic math, problem solving and spelling skills (id. at pp. 2-5). The report further indicated that the student demonstrated delayed writing skills and exhibited difficulties in math with multi-step problems involving multiplication, division and fractions (id.). Additionally, while the student achieved a score within the average range on spelling measures, further analysis showed that he exhibited error patterns that included the addition of unnecessary letters, omissions of needed letters, and mispronunciations (id.). In writing, the student's score was in the low average range, which according to the evaluator indicated that his writing skills were delayed, noting that he had difficulty writing complete sentences (id.). Regarding the student's social/emotional skills, the March 2014 psychoeducational evaluation report indicated that the student was an active and respectful child, who had good relationships with his family and got along with his peers (id.).

The March 2014 social history update reported that the student continued to exhibit difficulty with his graphomotor and speech-language skills; however, he was making consistent progress in both areas (Dist. 7 at p. 1). The social history update further indicated that the student continued to experience distractibility and required consistent refocusing and redirection in order to complete tasks and assignments; however, the update noted that the staff in his current setting were very pleased with his academic progress (id.). Additionally, the update indicated that the student's behavior had improved, he was cooperative and appeared comfortable "in his current school environment," and he was able to develop and maintain relationships with peers and adults (id.).

The March 2014 social history update provided the parent's report of the student's current school performance, which indicated that the student continued to exhibit difficulties and delays despite making a "great deal of progress in his current academic setting," and included the parent's opinion that the student would continue to make progress as long as he received instruction in a small class setting with individualized instruction (Dist. Ex. 7 at p. 1). The social history update reported that the student was happy to go to class and engage with his teachers; however, the parent was concerned that if the student received less support he would "not [be] able to focus and/or to understand academic material" (id. at p.2). Finally, according to the social history update, the parent reported that the student did not have any current significant behavioral difficulties, and that he received a "great deal of assistance in the social-emotional areas" (id.).

Review of the present levels of performance in the May 2014 IEP reflected some of the information provided in the March 2014 psychoeducational evaluation report (compare Dist. Ex. 6 at pp. 1-2, with Dist. Ex. 3 at p. 1). Additionally, the IEP's present levels of academic performance detailed information presented by the student's then-current teachers and related service providers during the May 2014 CSE meeting (Tr. pp. 32-39; Dist. Ex. 3 at pp. 1-4, 19). Specifically, the present levels of academic performance indicated that the student was a fluent reader and that his decoding skills were stronger than his comprehension skills (Dist. Ex. 3 at p. 2). According to the IEP, the student needed to work on identifying the main idea and his main area of weakness was his inferential reading skills (Dist. Ex. 3 at p. 2). Furthermore, the IEP present level of academic performance indicated that the student needed to continue to develop his vocabulary skills and use context clues to comprehend new words (id.). At the time the IEP was developed, the student's difficulty with "focusing and withdrawing" affected his reading potential (Dist. Ex. 3 at p. 2). In writing, the IEP reflected that the student required "a lot" of teacher support in order to write a thesis statement based on research, motivate and sustain his writing, and edit his work (id.). The May 2014 IEP also indicated that organizing, synthesizing and summarizing information was difficult for the student; he required the use of a graphic organizer; needed to work in small sessions; struggled with attention to details; and needed to improve his grammar, syntax, and ability to expand sentences (id.). Finally, the IEP estimated the student's writing skills to be at the late third grade to beginning fourth grade level (id.). In math, the IEP present level of performance indicated that the student was able to solve multi-digit multiplication and short division problems without remainders, and could determine which operations to use when solving addition and subtraction word problems (id.). The IEP indicated that the student struggled with conceptually understanding the relationship between multiplication, division and fractions, and that he needed to improve his ability to solve multi-step word problems (id.). According to the IEP, the student's math skills were estimated to be at a late fourth grade level for multi-step word problems and at an early fifth grade level for computation problems, but also noted that the student's performance was variable from day to day (id.). The "effect of student needs on involvement and progress in the general education curriculum" section of the May 2014 IEP indicated that the student's academic skills were below grade level (id. at p. 4). Finally, regarding executive functioning skills, the IEP present levels of academic performance indicated that the student struggled with sustaining attention and effort, that he would become resistant to engaging in tasks he anticipated to be difficult or long, and that he needed to improve his study skills (id. at p. 2).

The May 2014 IEP's present level of performance reflected reports from the student's then-current speech therapist that he struggled with expressive language, both orally and in writing, with formulating his thoughts, and that he "tend[ed] to repeat what other students have said" (Dist. Ex. 3 at p. 2). Additionally, the speech therapist reported that the student was working on organizing his expressive language both in writing and verbally; expanding his vocabulary; creating complex sentences by combining two short sentences into a long one; using abstract language; inferential thinking; and problem solving (id. at pp. 2-3).

The CSE's description of the present level of social development in the May 2014 IEP indicated that the student continued to experience distractibility, required frequent refocusing, and that he struggled with sustaining effort and "engaging in academic progress" (Dist. Ex. 3 at p. 3). Additionally, the IEP described that the student had a tendency to "respond to academic challenges by shutting down or using avoidance strategies;" however, he would work with the teacher when

he realized he had fallen behind (id.). The May 2014 IEP present level of social performance described that, while he had made some progress in this area, he could "fall apart and cry when feeling overwhelmed" and had difficulty articulating his needs and emotions (id.). Additionally, the IEP reflected past school reports that the student "used to freeze when faced with tasks he found difficult" (id.). The IEP included a parent report that although the student needed to develop his coping skills, he was able to develop and maintain relationships with adults and peers, he could be very charming with a great sense of humor, and that he had become more open to support and feedback (id.).

The present level of physical development in the May 2014 IEP indicated that the student had received diagnoses of "attention and focusing difficulties for which he used to take medication," and reflected reports from the student's OT provider that he was working on writing in cursive because it was easier that writing in print, he was using a computer for written assignments, and he was described as a good typist (Dist. Ex. 3 at pp. 3-4). Additionally, the OT provider reported that the student was working on impulse control using games; however, he would get easily frustrated and would often stop when he perceived failure (id.). Finally, the OT provider indicated that the student needed to improve his ability to self-regulate and his fine motor skills (id.).

As support for the student's management needs, the May 2014 CSE determined that the student would benefit from sitting next to a "peer helper who can provide assistance when he experiences confusion;" modeling; practicing; reviewing learned materials; breaking complex tasks or procedures into component parts; and using graphic organizers (Dist. Ex. 3 at p. 4). Additional support to address the student's management needs that were noted within the present levels of academic performance included providing an editing checklist and enlarged graph paper (id. at p. 2).

According to the district representative, during the May 2014 CSE meeting the Carmel teachers and related service providers gave input and the CSE members "devise[d the] goals together" (Tr. pp. 36-39). The annual goals contained in the May 2014 IEP addressed the student's areas of need related to academic, speech-language development, self-regulation, fine motor, and coping skills (Dist. Ex. 3 at pp. 5-10). In addition, consistent with the State and federal regulations, the annual goals included evaluative criteria (i.e., 4 out of 5 trials, 80 percent), evaluation procedures (i.e., teacher/provider observations, performance assessment tasks, teacher made test), and a schedule to measure progress (i.e., once per quarter) toward meeting the annual goals (id.). For example, one annual goal targeted the student's ability to produce clear and coherent writing in which the development and organization is appropriate to task, purpose and audience in four out of five trials, using teacher observations, which would be measured one time per quarter (id. at p. 5). Similarly, another annual goal targeted improving the student's coping skills when faced with challenging academic tasks in four out of five trials, using provider observations, which would be measured one time per quarter (id. at p. 9).

To further support the student's identified needs, the May 2014 CSE recommended the following testing accommodations for the student: extended time (1.5), separate location or room, revised test directions, directions read and reread, on-task focusing prompts, use of a calculator, and use of masks and markers in test booklets (Dist. Ex. 3 at p. 13).

As noted above these aspects of the IEP are not disputed issues by the parties. Turning next to the first issue in contention, for the 2014-15 school year, the May 2014 CSE recommended that the student attend a general education classroom and receive five periods of ICT services per week each for math, ELA, and social studies; six periods of ICT services per week for science; three periods per week of SETSS for social studies; and 40-minute related service sessions including counseling once per week individually and once per week in a group of three; two sessions per week of group OT; and speech-language therapy once per week individually and twice per week in a group of three (Dist. Ex. 3 at pp. 11-12). Following review of the evaluative information and input from the Carmel Academy personnel, the district representative explained during her testimony the district's viewpoint that the student functioned "largely within the average range," despite his language and attention difficulties (Tr. pp. 32-34, 40-41, 49-50). She further testified that in the "ICT" general education class, two teachers provide students with instruction using the general education curriculum and either co-teach, or work in small groups with students (Tr. p. 91). The teachers plan lessons together, and the special education teacher modifies and supports the provision of the curriculum to students via previewing, reviewing, and providing individual assistance (id.). Therefore, she concluded that due to the supports provided within the classroom (e.g. modified assignments, assistance to complete assignments, repetition, and small group work) and that the student would be "working on these areas of weakness with individual providers," the May 2014 IEP and placement recommendations were appropriate (Tr. pp. 40-41). The district representative further testified that given the student's "mostly" average skills, "he should be in [a] gen[eral] ed[ucation] class with gen[eral] ed[ducation] peers," who would provide modeling, and that she concluded a self-contained placement to be too restrictive of a setting (Tr. pp. 41, 72, 91-92, 97-98).

Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]). ICT services are defined 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]).[13] I have previously pointed out the shortcoming with impartial hearing records regarding the lack of a uniform definition for SETSS during impartial hearings to the district and IHOs repeatedly and at some length (see Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056; Application of a Student with a Disability, Appeal No. 16-054). There is no evidence describing the SETSS services that the May 2014 CSE contemplated the student was to receive as recommended in the May 2014 IEP. In a prior decision, the undersigned SRO explained that "an administrative hearing officer cannot take judicial notice of facts attendant to a highly specialized term like SETSS" that is not used

[13] According to the hearing record ICT services are provided in a general education classroom taught by both a regular education teacher and a special education teacher, which consists of approximately 25 to 30 students, 40 percent of whom have an IEP (Tr. pp. 91, 382-83).

outside this district and that "the district . . . should be prepared to develop the evidentiary hearing record regarding the definition of SETSS in all cases in which it bears on disputed issues in the case" (Application of a Student with a Disability, Appeal No. 16-056), and this is precisely such a case.[14] Such evidence would be especially useful because the term "SETSS" is not specifically identified on New York State's continuum of special education services (see generally 8 NYCRR 200.6; see also 8 NYCRR 200.6[d], [f]). Similar to the circumstances in Application of a Student with a Disability, Appeal No. 16-056, the district in this case did not create a hearing record before the IHO that offers any explanation as to what "SETSS" entails, and I will not take judicial notice of the meaning of the term. Therefore, I am unable to render findings regarding what additional support SETSS might provide to the student in this case as there is no clear record of this service, and SETSS is not defined in State or federal laws or regulations, is not referenced in any currently published federal or State policy documentation, and is not identified on the State continuum of special education services (see Application of a Student with a Disability, Appeal No. 16-056). I have warned parties and IHOs in the past that this is not a term used in the State's continuum of educational services and judicial notice cannot be taken of the term as the district has suggested I do in this case (see Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056; Application of a Student with a Disability, Appeal No. 16-054).[15] Since the hearing record does not contain an adequate definition, I will not consider the recommendation of SETSS in my analysis of whether the May 2014 IEP offered the student a FAPE.

Despite the district's shortcomings related to the production of evidence describing the purpose and definition of SETSS in this instance, upon careful review of the hearing record as a whole, I find that the remaining programing recommended in the May 2014 IEP was sufficient to enable the student to receive educational benefits and make appropriate progress in light of his circumstances. Specifically, to meet the student's academic needs identified in the March 2014 psychoeducational evaluation report and the May 2014 IEP present levels of academic performance, the May 2014 CSE developed annual goals to improve the student's reading, written language, and math skills, and recommended that the student receive ICT services—provided by a special education teacher—daily in all four core academic subjects (compare Dist. Ex. 3 at pp.

[14] The district in the answer attempts to define SETSS by citing to Application of a Student with a Disability, Appeal No. 16-056 (Answer at p. 2). However, the holding of that decision demonstrates that the district has the responsibility in each impartial hearing to clearly define what constitutes SETSS, and the SRO will not attempt to interpret SETSS without a clear record.

[15] The district perversely suggests that I should take judicial notice of the term SETSS as described in Application of a Student with a Disability, Appeal No. 16-056, when the main point in the discussion of SETSS in that case is that judicial notice cannot be taken of the term from one case to another. The district uses SETSS differently from case to case (see, e.g., Application of a Student with a Disability, Appeal No. 17-103 [noting that there was no explanation regarding SETSS, and finding in that case that it must be defined as 1:1 direct instruction of the student by a certified special education teacher in the student's home]). Even the district's policy manual in effect at the time of the events in this proceeding, (which the district was required to submit in full to conform with the IHO's ruling admitting the entire document), mentions SETSS many times, but it is of little use in determining what this student would receive when being provided this service, thus the SETSS aspects of the IEP cannot be relied upon by the district in proving its case, despite mentioning it as part of the programing in their arguments on appeal.

1-3 and Dist. Ex. 6 at pp. 2-4, with Dist. Ex. 3 at pp. 5-7, 10-11). The May 2014 CSE developed annual goals and recommended testing accommodations as well as both individual and group counseling services to address the student's difficulty with executive functioning, attention, and poor coping/self-regulation skills (Dist. Ex. 3 at pp. 2-4, 7-13). Annual goals and direct speech-language therapy were recommended to address the student's communication needs (id. at pp. 2-3, 6, 8-9, 12). Finally, the CSE recommended that the student receive OT services to address his fine-motor difficulties related to writing, and his self-regulation deficits (id. at pp. 4, 10, 12). Therefore, the hearing record reflects that the district offered the student an appropriate educational program that could address the student's needs, without consideration of the recommendation of SETSS.[16]

Turning to the parent's specific IEP placement dispute on appeal—the size of the recommended class—the May 2014 IEP indicated that at the meeting, the parent and Carmel Academy personnel expressed concern about class size, and the parent opined that the student would be "lost in a large classroom" because he needed "a lot of refocusing" and had "difficulty producing his work" (Dist. Ex. 3 at p. 17). On appeal, the parent alleges that the IHO failed to consider evidence regarding his opinion and the input from the Carmel Academy personnel who participated in the May 2014 CSE meeting. However, review of the IEP shows the CSE's consideration of those differing viewpoints as well but, on balance, the information in the hearing record shows that the district staff at the CSE were not in agreement with the parent and the Carmel participants as to the appropriate setting and addressed the underlying concerns by recommending support from the special education teacher who would provide the student with ICT services within the general education classroom; the use of graphic organizers, editing checklists and a calculator; management strategies such as being seated next to a peer helper who could provide assistance when the student experienced confusion, modeling, practice, review of materials learned, and breaking complex tasks into component parts; the related services of speech-language therapy, OT, and counseling; and annual goals designed to improve his academic, self-regulation, coping, and language skills (id. at pp. 1-13).

The parent further argues on appeal that the IHO failed to consider the testimony from the student's sixth grade teacher from Carmel Academy about the student's level of anxiety and distractibility exhibited during the 2014-15 school year (see e.g. Tr. pp. 561, 585-91, 594-96, 618-22). However, this information post-dates the May 2014 CSE meeting and is therefore impermissibly retrospective evidence that cannot be relied upon for the purpose of assessing the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a

[16] Although SETSS was not included in the analysis of FAPE, the hearing record indicated that the May 2014 CSE identified social studies as the student's most difficult subject due to the amount of reading and writing required; therefore, the CSE recommended that the student receive SETSS specifically to support the student's academic work in social studies (Tr. pp. 40-41; Dist. Exs. 3 at p. 11; 6 at pp. 3-4).

subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).[17] As noted previously, the parent has not argued on appeal that the evaluative information available to and considered by the May 2014 CSE was inappropriate or insufficient, and the hearing record indicates that approximately five staff members from Carmel Academy attended the May 2014 CSE meeting, provided information about the student's present levels of performance, and assisted in developing the annual goals (Tr. pp. 29-39, Dist. Ex. 3 at p. 19). As discussed above in detail, review of the information available to the May 2014 CSE did not provide any indication that the student was exhibiting the level of anxiety and distractibility prior to or at the time of the May 2014 CSE that the student's Carmel Academy sixth grade teacher testified to at the time of the hearing that that were observed during a time period after the CSE was conducted and the IEP was developed (compare Tr. pp. 561, 585-91, 594-96, 618-22, with Dist. Exs. 3 at pp. 1-4; 6; 7). Additionally, to the extent that prior to May 2014 the student did exhibit some anxiety and attention difficulties, the May 2014 IEP acknowledged that the student experienced distractibility, struggled with sustaining attention and effort, was resistant to engaging in tasks he anticipated would be long or difficult, required frequent refocusing, could "fall apart and cry when feeling overwhelmed" and, as discussed above, provided supports and services to address those needs (Dist. Ex. 3 at pp. 2-3).[18]

Based on this information, the hearing record supports the IHO's finding that the May 2014 IEP was reasonably calculated for the student to make progress in light of his circumstances and was a lesser restrictive option that, offers a more advantageous student-to-teacher ratio than a general education class that lacks ICT services, but does not go so far as to remove the student from his nondisabled peers by placing him in a special class setting, which, in light of the relevant evidence, was unnecessary and, to the IHO's point, impermissible for the district under the IDEA's LRE mandate.

2. CSE Process and School Location

a. Parent Participation

Next, I will address the remaining procedural concerns, some of which precede the completion of an IEP, and some of which relate to matters that occur after the completion of an IEP. First, the parent argues that he was denied the right to meaningfully participate in the CSE process because the district failed to consider his concerns and the concerns of the student's then-current teachers.

[17] I am not unconcerned by the information relayed by the student's sixth-grade teacher in the private school during the impartial hearing, and note that it is the type of information that any parent should make known to a CSE and, if necessary, seek a new CSE meeting to review such new observations regarding significant increases in a student's anxiety; however, as the sixth grade teacher's observations in this case post-date the matter in question, it is not a dispute to be decided within the confines of this case. However, I note that testimony from the teacher about the student's sixth-grade needs and experiences may be relied upon to meet the parents' burden to show that Carmel Academy was appropriate unilateral placement.

[18] I note that the March 2014 social/emotional update report provided by the parent indicated that the student did not have any "current significant behavioral difficulties" (Dist. Ex. 7 at p. 2).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; 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 & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Here, the record does not support a finding that the district did not take into consideration the opinions of the student's then-current teachers or the parent at the May 2014 IEP. The May 2014 IEP reflects that the concerns regarding the student were noted (Tr. P. 32-39; Dist. Ex. 3 at pp. 1-4). The district was not required to adopt the recommendations of the parent and then-current teachers wholesale (see T.F., 2015 WL 5610769, at *5 [disagreement with the opinions of the parents and outside professionals does not support finding that parents were denied the opportunity to participate in the development of the IEP or that the recommendations were predetermined]; E.F., 2013 WL 4495676, at *17 [parents had opportunity for meaningful participation, even though district did not agree to the parents' preferred placement]). The record demonstrates that the parent was fully able to participate with the May 2014 CSE.

b. Assigned Public School

The parent asserts that he was unable to visit the assigned public school prior to the start of the 2014-15 school year as the district did not respond to his attempts to set up a visit. The parent argues that he was forced to unilaterally place the student because of his inability to visit the assigned public school.

The United States Department of Education has opined that the IDEA does not provide a general entitlement to parents of students with disabilities to observe proposed school placement

options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]); see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority]; E.A.M., 2012 WL 4571794, at *11 [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F., 2011 WL 5419847, at *12 [same]).[19] On the other hand, there is some district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding "implicit" in the reasoning of the Second Circuit's decision in M.O. the proposition that parents have the right to obtain information on which to form a judgment about an assigned school]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered, rather than, the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Here, the parent was not denied the right to meaningful participate in the IEP decision-making process. The assigned public school does not reflect how the IEP was developed and whether the parent was able to fully participate in that process. As discussed above, the record demonstrates that the parent was able to fully participate with the CSE and in the development of the IEP. Further, there is no evidence in the hearing record that the school site was incapable of implementing the student's IEP (Tr. p. 109).

c. Prior Written Notice

The parent asserts that the prior written notice sent to him following the May 2014 IEP was misleading and effectively denied him an opportunity to dispute the CSE's recommendation until a month before school started.

The May 22, 2014 prior written notice stated that the student's services were deferred because it was "not educationally appropriate for [the] child to change his/her educational program at this time." (Dist. Ex. 8 at p. 2). Although, this language was poorly crafted, review of the entire May 22, 2014 prior written notice reveals that the student was recommended for services provided by the district to begin on September 3, 2014 (id. at p. 1-3). The first page of the prior written notice stated that the student was recommended for ICT services, SETSS, and related services in a 10-month school year at a district community school (id. at p 1). The third page of the prior written notice indicated that the proposed recommended services would begin effective September

[19] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

3, 2014 (id. at p. 3). While I find that the district should have been more clear regarding how the prior written notice is worded, the defect in this case does not amount to a denial of a FAPE as it did not significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). None of the evidence in the hearing record convinces me that the parent was misled into believing that the district was offering something other than an ICT setting, SETSS, and the listed related services, or that the district had opted to place the student in a nonpublic school. Again, I agree with the parent insofar as I would find that annoying and frustrating, but it is not a denial of a FAPE.

VII. Conclusion

Having determined that there is insufficient reason to overturn the IHO's determination that district offered the student a FAPE for the 2014-15 school year, it is not necessary to determine whether Carmel Academy was an appropriate unilateral placement or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (see T.P., 554 F.3d at 254; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 9, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER