The University of the State of New York

The State Education Department
State Review Officer
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No. 13-155

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

Law Offices of Neal H. Rosenberg, attorneys for respondents, Meredith B. Garfunkel, 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 (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Stephen Gaynor School (Stephen Gaynor) for the 2012-13 school year. The parents cross-appeal the IHO's failure to address additional issues in the due process complaint notice upon which to conclude that the district failed to offer an appropriate educational program to the student. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

On April 30, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (see Dist. Ex. 3 at pp. 1, 11).[1, 2] Finding that the student remained eligible for special education and related services as a student with a learning disability, the April 2012 CSE recommended integrated co-teaching (ICT) services in a general education classroom at a community school (id. at pp. 7, 11-12).[3] The April 2012 CSE also recommended two 30-minute sessions per week of occupational therapy (OT) in a small group developed annual goals, and recommended management needs to further address the student's needs (id. at pp. 3-8, 12).[4]

By final notice of recommendation (FNR) dated April 30, 2012, the district summarized the special education programs and related services recommended by the April 2012 CSE for the 2012-13 school year, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 5).

By letter dated May 11, 2012, the parents indicated that they visited an ICT classroom at the assigned public school site, and expressed continued concerns about whether the recommended program would be appropriate for the student, noting specifically the class size, the level of support the student would receive, how the student would receive individualized instruction or small group support, and how instruction would be provided to the students in the ICT setting (see Parent Ex. D at pp. 2-3). The parents also questioned how the ICT setting differed from the student's "current class," and indicated that the student continued to require the small group support that he received through SETSS (id. at p. 3). In addition, the parents expressed concerns about the variety of students' needs in the observed classroom (id.). Based upon their observations, the parents indicated that the ICT services would not be appropriate for the student and notified the district that the student would be seeing a neuropsychologist to "get an updated picture of his functioning" and they would share the results when available (id.).

By letter dated July 11, 2012, the parents provided the district with a copy of the updated evaluation report (May 2012 evaluation) so they could "meet to discuss the results" (Parent Ex. E at p. 1; see Dist. Ex. 11 at pp. 1-6). The parents noted that based upon the new results, the student had not made progress over the past school year in decoding, spelling, written expression and reading comprehension (Parent Ex. E at p. 1). According to the parents, the evaluator

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[1] At the time of the April 2012 CSE meeting, the student was attending a third grade, general education setting at a district public school, and he received special education teacher support services (SETSS) five times per week, as well as two 30-minute sessions per week of occupational therapy in a small group (see Parent Ex. A at pp. 1, 6-7; see also Dist. Exs. 4 at pp. 1-2; 9 at pp. 1-6; Parent Ex. C at pp. 1-2).

[2] On February18 and 20, 2012, the parents executed an enrollment contract with Stephen Gaynor for the student's attendance from September 2012 through June 2013 (Parent Ex. P at pp. 1-4). The Commissioner of Education has not approved Stephen Gaynor School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

[4] The April 2012 IEP noted a projected implementation date of May 7, 2012 (Dist. Ex. 3 at p. 1).

recommended that the student attend a "small specialized class" to address the student's "attentional and learning needs . . . with similar peers" (id.). Based upon these results, the parents indicated that the ICT services would not be appropriate for the student, and notified the district that they had reserved a "spot" for the student at Stephen Gaynor for the 2012-13 school year (id.).

By e-mail dated July 25, 2012, the district principal (principal) thanked the parents for meeting with her to discuss their concerns about the recommended ICT services, as well as how to address those concerns (see Dist. Ex. 12). The principal reflected that at the meeting, she asked the parents to consider whether the district should reconvene a CSE to "possibly add SETSS" to the student's IEP to "offer the level of support" they believed the student required and that the SETSS would be "in addition to his current services of [ICT] and OT" (id.). The principal provided the parents with contact information for the "Special Education support liaison[]" and "network leaders" in case the parents needed to follow up with them with questions (id.).

In a letter dated August 3, 2012, the parents thanked the principal for meeting with them to discuss the results of the student's updated evaluation report, but questioned whether the addition of SETSS to the recommended ICT services was a "formal offer" or whether a CSE needed to be convened (Parent Ex. F). The parents also expressed concerns regarding the need to pull the student out of his classroom to receive SETSS, which would further disrupt the student's day (see id.). Ultimately, the parents indicated that the ICT services with the addition of SETSS would not offer the student the level of support he required, because the student required "small group instruction for the entire day" (id.). The parents further indicated that they looked forward to hearing from the principal (id.).

In a letter dated August 10, 2012, the parents acknowledged receipt of the student's State test scores, indicating, however, that the scores did not reflect the student's "performance of skill level on the standardized testing" recently completed (Parent Ex. G). Having raised issues with the principal regarding the assistance provided to the student during the State examinations, the parents requested information about the district's inquiry into this situation (see id.).

In an undated letter transmitted to the district via facsimile on August 16, 2012, the parents requested potential dates to visit a fourth grade ICT classroom at the beginning of the upcoming school year (see Parent Ex. H). The parents reiterated concerns about the ICT services expressed in previous letters to the district, and notified the district of their intention for the student to begin the school year at Stephen Gaynor because they could not "accept the proposed IEP and placement" (id.). If, after visiting a fourth grade ICT classroom the parents found it was not appropriate, then the student would remain at Stephen Gaynor and they would seek reimbursement for the costs of the student's tuition (id.).

In a letter dated September 19, 2012, the parents informed the district that based upon their observations of ICT classrooms in both May and September 2012, they could not accept the proposed IEP and assigned public school site because the ICT services would not provide the student with sufficient small group support or instruction (see Parent Ex. I at p. 1). As a result, the parents notified the district of their intentions to continue the student's placement at Stephen Gaynor and to seek reimbursement of the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated November 8, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1 at p. 1). In particular, the parents asserted that the April 2012 CSE was not properly composed, and did not follow proper procedures in convening the April 2012 CSE meeting (id.). In addition, the parents asserted that the April 2012 CSE did not rely on appropriate documentation, and refused to consider "comprehensive testing" provided by the parents (id. at pp. 1-2). The parents alleged that the April 2012 IEP failed to include sufficient and appropriate annual goals, short-term objectives, and management needs; the April 2012 IEP failed to accurately and completely reflect the information presented to the April 2012 CSE; and the recommended ICT services were not appropriate to meet the student's needs (id.). The parents further asserted that the April 2012 CSE based the recommendation for ICT services upon "comments to the parents" at an earlier meeting with the principal, and therefore, impermissibly engaged in predetermination of the ICT services, depriving the parents of the opportunity to participate in the development of the student's IEP (id. at p. 2). In addition, the parents noted that the district failed to take "appropriate measures" to address concerns about assistance given to the student during State examinations (id.). With respect to the assigned school, the parents alleged that the ICT classrooms observed were too large and would not provide the individualized and small group support that the student required (id.).

With respect to the student's unilateral placement, the parents asserted that Stephen Gaynor provided the student with the "small, structured class" needed for him to receive "small group and individualized support with similarly functioning peers" and to make progress (Dist. Ex. 1 at p. 2). As relief, the parents requested tuition reimbursement, transportation, and related services (id.).

B. Impartial Hearing Officer Decision

On December 18, 2012, the parties met for a prehearing conference, and on January 29, 2013, proceeded to an impartial hearing, which concluded on May 31, 2013 after six days of proceedings (Tr. pp. 1-514; see IHO Decision at p. 3). By decision dated July 16, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, the student's unilateral placement at Stephen Gaynor was appropriate, and equitable considerations weighed in favor of the parents' request for tuition reimbursement (see IHO Decision at pp. 12-18).

Initially, the IHO found that the absence of an additional parent member at the April 2012 CSE constituted a procedural violation, which alone, did not result in a failure to offer the student a FAPE (see IHO Decision at p. 15). The IHO also found that contrary to the parents' allegations, the April 2012 CSE relied upon and used the parents' privately obtained "November 2011 [neuropsychological] evaluation test results" (November 2011 evaluation) in the development of the April 2012 IEP, and moreover, that the academic performance and learning characteristics and academic management needs included in the April 2012 IEP were accurate to the extent that those sections had been based upon the November 2011 evaluation results (id.).

Next, however, the IHO refused to "credit those portions of the IEP which refer[red] to or [were] based upon 'Teacher Report,'" because an investigation concluded that the student's SETSS

provider during the 2011-12 school year had "inappropriately assisted" the student on State examinations; therefore, the IHO determined that the SETSS provider's conduct served to "discredit" her estimate of the student" "abilities and performance" and her "contribution" to the development of the student's April 2012 IEP was "tainted" (IHO Decision at pp. 15-16). In addition, the IHO found that the information provided to the parents prior to the April 2012 CSE meeting that ICT services would be recommended constituted predetermination of the student's program (id. at p. 16). The IHO also concluded that the ICT program was not sufficient to meet the student's needs because he required a small class environment throughout the day to address his "significant deficits in decoding, reading fluency, spelling, writing, and math," as well as his difficulties with attention and processing speed (id.). The IHO found that an "ICT class" was too large and distracting, and the student would not receive sufficient individual attention and small group instruction (id.). The IHO also found that the assigned public school site was not appropriate because the classroom was too large and did not offer sufficient special education instruction and support (id. at pp. 16-17).

With respect to the student's unilateral placement at Stephen Gaynor, the IHO found that the program addressed the student's reading, writing, mathematics, and processing deficits with a language-based curriculum, small class and small group environments, multisensory instruction, intense structure, and appropriate supports (see IHO Decision at p. 17). The IHO also found that Stephen Gaynor, appropriately grouped students according to academic and social levels, staff possessed the requisite credentials and experience, the parents communicated with staff, and Stephen Gaynor offered parent training (id.). In addition, the IHO found that the student made progress both academically and socially, and the program improved the student's self-esteem (id.).

Turning to equitable considerations, the IHO found that the parents fully cooperated and communicated with the April 2012 CSE (IHO Decision at p. 17). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Stephen Gaynor for the 2012-13 school year upon presentation of proper proof of payment (id. at pp. 17-18).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that Stephen Gaynor was appropriate, and that equitable considerations weighed in favor of the parents' requested relief. The district asserts that the IHO erred in finding that the absence of an additional parent member at the April 2012 CSE meeting resulted in a failure to offer the student a FAPE. The district also asserts that the IHO erred in discrediting portions of the April 2012 IEP, which may have relied upon input from the student's SETSS provider, as well as the IHO's reliance upon an investigation report submitted into evidence regarding the SETSS provider's alleged misconduct. Next, the district contends that the IHO erred in concluding that the April 2012 CSE impermissibly predetermined the ICT services recommendation in the April 2012 IEP. The district argues that the IHO erred in finding that the ICT services were not sufficient to meet the student's needs and that the student required a small class placement. The district also asserts that the IHO erred in determining that the assigned public school site was not appropriate due to the large classes and the failure to offer sufficient special education instruction and support. In addition, the district asserts that the IHO erred in finding Stephen Gaynor was appropriate and that equitable considerations weighed in favor of the parents' request for tuition reimbursement.

In an answer, the parents respond to the district's assertions and generally argue in support of upholding the IHO's decision in its entirety. In a cross-appeal, the parents argue that if the IHO's conclusion that the district failed to offer the student a FAPE is overturned, then additional grounds existed for the IHO to determine that the district failed to offer the student a FAPE, including that the district failed to adequately consider updated testing completed in May 2012 (May 2012 evaluation) in the development of the student's IEP. In an answer to the parents' cross-appeal, the district argues that the parents' allegation is without merit because the parents—at the time of the April 2012 CSE meeting—had not yet obtained the May 2012 evaluation of the student, which they sent to the district in July 2012.

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), 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. 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 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; 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. April 2012 IEP

1. CSE Composition

The district asserts that the IHO erred in finding that the absence of an additional parent member at the April 2012 CSE meeting contributed to a determination that the district failed to offer the student a FAPE. In response, the parents assert that the IHO correctly concluded that the absence of an additional parent member at the April 2012 CSE meeting, in addition to the other procedural and substantive errors, resulted in the district's failure to offer the student a FAPE. Contrary to the parents' assertions, a review of the hearing record indicates that the absence of an additional parent member at the April 2012 CSE meeting did not rise to the level of a denial of a FAPE because it did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits to the student (W.S. v. Nyack Union Free Sch. Dist., 2011 WL 1332188, at *8-*9 [S.D.N.Y. Mar. 30, 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; A.H., 2010 WL 3242234, at *2; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419).

At the time of the April 2012 CSE meeting, relevant State law and regulations in effect required the presence of an additional parent member at a CSE meeting convened to develop a student's IEP (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647 [S.D.N.Y. 2011] [noting that the absence of an additional parent member does not constitute a violation of the IDEA]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 293-94 [S.D.N.Y. 2009], aff'd, 2010 WL 565659 [2d Cir. Feb. 18, 2010]; Bd. of Educ. v. R.R., 2006 WL 1441375, at *5 [S.D.N.Y. May 24, 2006]; Bd. of Educ. v. Mills, 2005 WL 1618765, at *5 [S.D.N.Y. July 11, 2005]; Application of the Dep't of Educ., Appeal No. 11-136; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042).[5] Under applicable State law and

[5] Effective August 1, 2012, amendments to State law and regulations provide that an additional parent member is no longer a required member of a CSE unless specifically requested in writing by the parents, by the student, or by a member of the CSE at least 72 hours prior to the meeting (Educ. Law § 4402[1][b][1][a]; 8 NYCRR 200.3[a][1][viii]).

regulations, a CSE subcommittee has the authority to perform the same functions as a CSE, with the exception of instances in which a student is considered for initial placement in a special class, or a student is considered for initial placement in a special class outside of the student's school of attendance, or whenever a student is considered for placement in a school primarily serving students with disabilities or a school outside of the student's district (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][4]). State law further provides that when a district is permitted to convene a CSE subcommittee, the subcommittee need not include an additional parent member (Educ. Law § 4402[1][b][1][d]; 8 NYCRR 200.3[c][2]-[5]).

In this case, it is undisputed that an additional parent member did not participate in the April 2012 CSE meeting in violation of both State law and regulations in place at the time of the meeting (see Dist. Exs. 3 at pp. 13-14; 8 at p. 1). The parents contend that the "purpose of a parent member is to help advocate and explain the process," but they do not cite any authority for this proposition. Assistive guidance from the Office of Special Education indicates that "[t]he additional parent member can provide important support and information to the parents of the student during the meeting and, in addition to the student's parents, participates in the discussions and decision making from the perspective of a parent of a student with a disability" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 7, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). However, it is also undisputed that all of the student's then-current providers, including his regular education teacher, his SETSS provider, and his occupational therapist, attended the April 2012 CSE meeting, in addition to the principal, the district school psychologist (school psychologist) and the parents (id.; see Tr. pp. 53, 76-77, 350-51). Thus, while an additional parent member may have been able to provide support or information to the parents during the April 2012 CSE meeting, it is unclear from the hearing record how an additional parent member could have contributed any more knowledge, expertise, or support to the parents than they already had available to them, such that the absence of an additional parent member impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student and resulted in a failure to offer the student a FAPE for the 2012-13 school year. In addition, as explained more fully below, a review of the hearing record indicates that notwithstanding the absence of an additional parent member at the April 2012 CSE meeting, the parents actively and meaningfully participated in the April 2012 CSE meeting and in the development of the student's IEP (see Tr. pp. 90-91, 109-12, 140, 372).

2. Predetermination/ Parental Participation

The district asserts that the IHO erred in finding that the April 2012 CSE impermissibly predetermined the ICT services recommended in the student's April 2012 IEP. The parents seek to uphold the IHO's finding and argue that the April 2012 CSE essentially finalized the student's IEP prior to the meeting because the April 2012 CSE did not discuss other, more restrictive programs for the student, and completely excluded the parents from the process. The parents also argue that a draft IEP already listed ICT services as a recommendation, and they had been told prior to the April 2012 CSE meeting that ICT services would be recommended, which demonstrates predetermination. A review of the hearing record supports the district's assertion, and the IHO's finding must be reversed.

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 P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Communication Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).[6]

Moreover, the consideration of possible recommendations for a student, prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

[6] The IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D.-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at *17 [noting 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"]; see also 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]).

A review of the hearing record indicates that in April 2012 when the parents met with the principal to discuss concerns related to the administration of State examinations to the student, the principal "mentioned" that ICT services would be recommended for the student at the upcoming April 30, 2012 CSE meeting (Tr. pp. 348-53). In addition, the hearing record reveals that a draft IEP had been created prior to the April 2012 CSE (Tr. pp. 79-80, 135-36, 145, 158-60, 162). The school psychologist testified, however, that the April 2012 CSE came to the meeting with an "open mind as to what the recommendations would be" for the student (Tr. p. 158). She further testified that the April 2012 CSE considered other programs before arriving at the recommendation for ICT services, including SETSS, a special class in a community school—such as a 12:1 or a 12:1+1 self-contained special class placement—and a nonpublic school (Tr. pp. 100-01, 139-41; see Dist. Ex. 3 at pp. 12-13).

In addition, as noted above, the hearing record reflects meaningful and active parental participation at the April 2012 CSE meeting and in the recommendation for ICT services. In ultimately reaching the decision to recommend ICT services, the April 2012 CSE considered the parents' dissatisfaction with the student's current placement in a general education setting with SETSS during the 2011-12 school year, as well as the parents' concerns about the student's rate of progress in that program (see Tr. pp. 82-83). Furthermore, the school psychologist testified that in light of the recommendation in the November 2011 evaluation report, the April 2012 CSE decided to provide the student with more services (id.). The school psychologist also testified that at the April 2012 CSE meeting, the parents expressed that the "ICT class was too large and that [the student] would need a small class" (Tr. p. 91; see Tr. pp. 353-61, 371-72 [describing concerns raised by the parents at the April 2012 CSE meeting]). According to the school psychologist, the parents also expressed that the student's "needs were too significant to be able to learn in that class" (Tr. pp. 109-100). The April 2012 CSE responded to the parents' concerns by talking about how the student was doing, how the student compared to the other students in his grade, how the student made progress, and how the April 2012 CSE "absolutely disagreed" with the parents that the ICT services would not meet his needs (Tr. p. 110).

With respect to the 12:1 and 12:1+1 self-contained special class placements considered and rejected by the April 2012 CSE, the school psychologist testified that the parents believed the student needed a "small class in a specialized school" (Tr. pp. 140, 371-72). However, the April 2012 CSE explained to the parents that a special class in a specialized school would be "too restrictive" for the student and it would preclude the student from access to his typically developing peers (Tr. pp. 139-40). Additionally, the April 2012 CSE documented the parents' concerns in the April 2012 IEP, and noted that the parents believed that the student required a nonpublic school placement (see Dist. Ex. 3 at p. 12; see also Tr. p. 111). Thus, the evidence in the hearing record reflects that there was some permissible pre-formed opinion among district personnel based on the information they had seen, but that there was an open, active dialogue between the April 2012 CSE and the parents with respect to the recommendation for ICT services. Had the CSE acceded to the parent's wishes in this instance, as further described below, it would have likely violated its LRE mandate. To hold that the principal's statement sharing a viewpoint with the parent ahead of a CSE meeting constitutes predetermination under circumstances such those described here would essentially place a counterproductive muzzle upon parent-school district communications outside of a CSE meeting.

Based upon foregoing, the evidence in the hearing record does not support the IHO's conclusion that the April 2012 CSE predetermined the recommendation for ICT services in the April 2012 IEP, and the IHO's finding must be reversed.

3. Evaluative Information and Present Levels of Performance

Turning to the cross-appeal, the parents argue that the district violated State regulation by failing to consider the most recent May 2012 evaluation of the student in the development of the student's IEP, which resulted in a failure to offer the student a FAPE. The district asserts that the May 2012 evaluation did not exist at the time of the April 2012 CSE meeting, and therefore, the April 2012 CSE could not have considered it. In addition, the district contends that the hearing record establishes that the April 2012 CSE relied upon sufficient evaluative information to develop the student's IEP and that the April 2012 IEP accurately reflects the student's needs even if it did not exhaustively describe his needs. A review of the hearing record supports the district's contentions, and the parents' cross-appeal must be dismissed.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations ().[7] However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 2013 WL 592664, at *8 [S.D.N.Y. Feb. 14, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

In developing a student's IEP, a CSE must also consider independent educational evaluations obtained at public expense and 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, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d

[7] Although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come from (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

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]; K.E. v. Indep. Sch. Dist. No 15, 2010 WL 2132072, at *19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that 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], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

In this case, the hearing record demonstrates that the April 2012 CSE considered several sources of evaluative information in the development of the student's April 2012 IEP, including the district's 2011 psychoeducational evaluation, the November 2011 evaluation, the student's progress reports from the 2011-12 school year, a 2012 occupational therapy annual review plan, and input from the student's teachers prior to the April 2012 CSE meeting (see Dist. Exs. 3-4; 6-7; 9; see also Tr. pp. 76-79). The hearing record also demonstrates that at the time of the April 30, 2012 CSE meeting, the November 2011 evaluation represented the student's most recent evaluation available for consideration (compare Dist. Ex. 6 at p. 1, with Dist. Exs. 7 at p. 1 and 11 at p. 1).[8]

In relevant part, the April 2012 CSE developed the present levels of academic performance and individual needs section of the student's April 2012 IEP based upon information from the 2011 psychoeducational evaluation, the November 2011 evaluation report, and teacher reports (see Dist. Ex. 3 at pp. 1-2). For example, the April 2012 IEP indicated that based upon testing results, the student demonstrated stronger verbal skills stronger compared to non-verbal skills (compare Dist. Ex 3 at p. 2, with Dist. Ex. 6 at p. 2). Additionally, the April 2012 IEP indicated that the student demonstrated typical development in all social, emotional, and behavioral areas, as reported in the 2011 psychoeducational report (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 6 at p. 3). With respect to the November 2011 evaluation report, the April 2012 IEP reflected percentile ranks derived from the administration of the Woodcock Johnson-Third Edition Tests of Achievement (WJ-III ACH) to the student in the areas of reading, mathematics, and writing (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 7 at pp. 8-9; see also Tr. pp. 95-96). The April 2012 IEP also reflected the findings of the private evaluator in the November 2011 evaluation report regarding the student's social, emotional and behavioral functioning (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 7 at pp. 8-9).

In addition, the school psychologist testified that in February 2012, she met with the parents at a "pre-meeting before the IEP" to discuss the student because his parents had expressed concerns and wanted to talk to the principal (see Tr. pp. 51-52). At that meeting, the school psychologist

[8] The May 2012 evaluation of the student occurred on May 9 and May 18, 2012, and the parents shared a copy of the May 2012 evaluation report with the district in July 2012 (see Dist. Ex. 11 at p. 1; Parent Ex. E at p. 1).

discussed the student's difficulties, his "needs within the school system," and his academic needs (Tr. p. 52). In addition to discussing the student's needs, the school psychologist also reviewed the November 2011 evaluation report with the parents, and expressed her concerns with some of the information provided in the report (see Tr. pp. 53-54). She also testified that she considered the November 2011 in drafting the April 2012 IEP and reported the WJ-III ACH scores in the IEP (see Tr. pp. 95-96). In addition, although the hearing record does not indicate that every member of the April 2012 CSE had a copy of the November 2011 evaluation report, the hearing record does establish that the April 2012 CSE adequately considered the November 2011 evaluation report in the development of the student's April 2012 IEP (Tr. pp. 135, 154, 369-70). Thus, the evidence in the hearing record supports the IHO's finding that the April 2012 CSE properly considered the November 2011 evaluation.

A review of the hearing record also indicates that the April 2012 CSE relied upon the student's progress reports from the 2011-12 school year as a source of information regarding the student's functioning and progress in the areas of reading, writing, writing mechanics, speaking and listening, mathematics, social studies, specialty classes, social/emotional development, and approach to learning, and was accurately reported in the present levels of performance and individual needs section of the April 2012 IEP (compare Dist. Ex. 3 at pp. 1-3, with Dist. Ex. 9 at pp. 1-5). For instance, the April 2012 IEP indicated that the student's independent reading level based upon the 2011-12 progress report (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 9 at p. 2). The April 2012 IEP also indicated that the student exhibited mild delays in attention, as reported in the 2011-12 progress report (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 9 at pp. 2, 5). In addition, the April 2012 IEP included management strategies derived from the 2011-12 progress report, such as frequent check-ins and prompts to stay on task (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 9 at p. 5).

Similarly, a review of the hearing record demonstrates that the April 2012 CSE relied upon the student's 2012 occupational therapy annual review plan in the development of the April 2012 IEP. For instance, the April 2012 IEP reflected that the student had difficulty with capital letters and he needed checklists to check revisions in assignments (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 4 at p. 2). Additionally, the student's fine motor needs and accommodations, including index cards, a weighted pencil, and adaptive paper, reflected information obtained from 2012 occupational therapy annual review plan (compare Dist. Ex. 3 at pp. 2-3, with Dist. Ex. 4 at pp. 1-2). The April 2012 IEP also noted that the student benefitted from exploring keyboarding skills as an alternative to handwriting, which mirrored a recommendation in the 2012 occupational therapy annual review plan (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 4 at pp. 1-2). Finally, the April 2012 CSE adopted the occupational therapist's recommendation for the student to receive two 30-minute sessions per week of OT in a small group (compare Dist. Ex. 3 at p. 8, with Dist. Ex. 4 at p. 2).[9]

Based upon the foregoing, the hearing record establishes that the April 2012 CSE relied upon the most recent evaluation of the student available at that time—notably, the November 2011 evaluation report—in addition to other sources of information about the student in the development

[9] The April 2012 IEP also included input from the student's teacher at the April 2012 CSE meeting, including information related to his academic achievement in reading, writing, and mathematics (see Dist. Ex. 3 at pp. 1-2).

of the student's April 2012 IEP. To the extent that the parents later submitted a May 2012 evaluation report regarding the student's updated testing results, the hearing record does not support the parents' assertion that the failure to consider this subsequent document resulted in a failure to offer the student a FAPE for the 2012-13 school year, or alternatively, that the April 2012 CSE did not have sufficient or appropriate documentation upon which to develop the student's IEP (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at *12 [S.D.N.Y. Sept. 16, 2013] [holding in relevant part that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

Turning briefly to the district's contentions with respect to the IHO's decision to discredit portions of the April 2012 IEP that may have relied on input from the student's SETSS provider as a basis upon which to conclude that the district failed to offer the student a FAPE,[10] the district asserts, among other things, that the hearing record does not support the IHO's finding that any of the SETTS provider's contributions to the development of the April 2012 IEP were tainted because the evidence in the hearing record corroborates the information in the IEP about the student's academic performance.

An SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; M.W., 869 F. Supp. 2d at 330; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

Here, the IHO's decision to discredit portions of the April 2012 IEP was not based upon a credibility determination of a witness presented at the impartial hearing (see Tr. pp. 1-514). Instead, the IHO appeared to discredit portions of the April 2012 IEP—which the IHO did not specifically identify in the decision—based upon his presumption that the SETSS provider contributed to the creation of the student's 2011-12 progress reports (i.e., "Teacher Report" as indicated in the decision) and the SETSS provider's input at the April 2012 CSE meeting (see IHO Decision at pp. 15-16; Dist. Exs. 3 at p. 14; 9 at pp. 1-6). However, a review of the 2011-12 progress report does not reveal any evidence upon which to conclude that the SETSS provider assisted in the creation of those progress reports, as the student's regular education teacher is the only name on the document except for the parents' signatures (see Dist. Ex. 9 at pp. 1-6). As for the SETSS provider's input at the April 2012 CSE meeting, the school psychiatrist testified that the SETSS provider only reported on the annual goals that the student was working on (Tr. pp. 157, 160). The hearing record does indicate, however, that the SETSS provider assisted in the development of the student's draft IEP in conjunction with his occupational therapist and his regular education teacher (Tr. pp. 135-36). However, in reviewing the April 2012 IEP, one cannot discern with any degree of certainty which portions of the IEP the April 2012 CSE created directly

[10] At the conclusion of an investigation into the alleged incidents, a May 2013 report concluded that the SETSS provider in question inappropriately assisted students and provided them with answers during an administration of the April 2012 New York State Grade Three English language arts (ELA) examinations (see Parent Ex. T at pp. 1, 6). However, the same investigation also concluded that the SETSS provider did not change this particular student's "answers in order to justify the recommendation of a less restrictive educational setting" for the student (id.).

as a result of information provided by the SETSS provider, or that the information provided by the SETSS provider was tainted (see Dist. Ex. 3 at pp. 1-14). Here, the IHO provided no clarification as to which portions of the IEP he found to be based upon either the "Teacher Report" or the SETSS provider (see IHO Decision at pp. 15-16). Additionally, as noted above, the April 2012 CSE relied upon more than just the 2011-12 progress report or input from the SETSS provider at the meeting to devise the student's April 2012 IEP. Therefore, the IHO's decision to discredit portions of the April 2012 IEP based upon the SETSS provider's alleged misconduct must be reversed.

4. ICT Services

Next, the district asserts that the IHO erred in finding that the recommended ICT services in the April 2012 IEP were not sufficient to meet the student's needs and that the student required a small class placement. The parents respond by asserting that the IHO correctly determined that based on the hearing record, ICT services would not be sufficient to meet the student's needs. The parents assert that the student's deficits in processing speed, executive functioning, and attention would not be appropriately addressed, and the recommendation for ICT services was not the student's LRE because the student had difficulties in his prior general education setting. A review of the hearing record supports the district's assertions, and the IHO's finding must be reversed.

State regulations define ICT services as the "provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students," and require such classrooms to be "minimally" staffed with both a regular education teacher and a special education teacher (8 NYCRR 200.6[g], [g][2]).[11] Recently, the Second Circuit described ICT services as a placement "somewhere in between a regular classroom and a segregated, special education classroom," and declined to analyze an ICT classroom placement as a placement in a "special class," noting further that the appropriate question focused on whether the "ICT services were appropriate supports for [the student] within a general education

[11] While State regulation contains no absolute limitation on the number of students permitted in such a classroom, guidance issued by the Office of Special Education indicated 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"];8 NYCRR 200.6[g][1]).

environment" (M.W. v. New York City Dep't of Educ., 2013 WL 3868594, at *9-*12 [2d Cir. July 29, 2013]).[12]

According to the school psychologist's testimony, the April 2012 CSE recommended ICT services based, in part, upon the parents' input and their dissatisfaction with the student's current placement in a general education setting with SETSS during the 2011-12 school year, as well as the parents' concerns about the student's rate of progress in that program (see Tr. pp. 81-83). The school psychologist testified that generally, the ICT classrooms contained either the same number of students as in the general education classrooms, or were a "little smaller," and that the environment allowed students to receive special education modifications throughout the day whenever they needed it (see Tr. p. 82). The school psychologist also testified that the ICT services were appropriate for the student because he would receive instruction in the general education curriculum, he was "socially very typical" and could interact with his typically developing peers, and he would receive help when he needed it (Tr. p. 84). She also testified that the ICT services would benefit the student's self-esteem, and he would remain with students with whom he was familiar and had friends (id.). In addition, the school psychologist testified that with two teachers in the ICT classrooms, the student would receive the appropriate support to help him maintain his focus when distracted (see Tr. p. 87).

Notwithstanding the support offered through the ICT services, the school psychologist testified about the strategies and supports recommended in the April 2012 IEP to address the student's needs related to processing speed and attention, including: multi-modal delivery of instruction; check-ins; small group instruction; simplified language in directions; tasks broken down into manageable steps; graphic organizers; editing checklists; providing a "finished product" of the current writing assignment; refocusing when needed; and adaptive writing strategies, such as a weighted pencil, triple-lined paper, and a marker for copying work (Tr. pp. 86-87; Dist. Ex. 3 at p. 3).

Before reaching the decision to recommend ICT services, the April 2012 CSE considered continuing SETSS in a general education setting because the student had exhibited steady progress, but due to the pull-out nature of SETSS—which the student did not like because he missed classwork—the April 2012 CSE considered other options (Tr. p. 100; Dist. Ex. 3 at pp. 12-13). The April 2012 CSE also considered and rejected a special class placement for the student because his academic skills did not warrant such a restrictive placement option (Tr. pp. 83, 100; Dist. Ex. 3 at p. 13). In addition, the April 2012 CSE rejected the special class placement option as too restrictive based upon the student's test scores, the student's functioning with the classroom and the SETSS class, and the level of improvement that the student had made since receiving services (see Tr. pp. 100-01).

The parents, however, expressed concern at the April 2012 CSE meeting about the size of the ICT classrooms, and at the impartial hearing, testified that given the student's academic needs,

[12] In describing how LRE related to the continuum of service options, State guidance in 2008 indicated that ICT services were "directly designed to support the student in his/her general education class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3-4, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) [Apr. 2008], available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

an ICT class was too large (Tr. pp. 91, 354-55). Yet other than a recommendation in the November 2011 evaluation report to transfer the student to a "small, specialized school designed" for learning disabled students or students with an attention deficit hyperactivity disorder, the hearing record does not contain evidence to support the parents' preference for a small class placement. Indeed, the November 2011 evaluation report even described the student as "articulate and socially engaging," and reported test results demonstrating that the student exhibited superior range abilities in verbal reasoning, high average perceptual reasoning abilities, average working memory, borderline range processing speed, average sight-word vocabulary, average reading comprehension skills, average applied problems skills, and borderline range skills in the areas of math calculation and math fluency, which support the April 2012 CSE's ultimate decision to recommend ICT services (see Dist. Ex. 7 at pp. 5-6, 8-10).

Additionally, the hearing record reflects that the student worked well independently, worked well in a small group, showed evidence of self-motivation, persisted to complete assignments, and completed homework in a thorough and timely manner (see Dist. Ex. 9 at p. 3). According to the 2011-12 progress report, the student worked well with peers, used materials in a safe and resourceful manner, managed conflicts in an appropriate manner, demonstrated respect for peers and adults, followed class rules and routines, and exhibited self-control (id.). Overall, as indicated in the March 2011-12 progress report, the student met grade level standards in many areas related to reading, writing, speaking, listening, and mathematics, and overall exceeded grade level standards in the area of social/emotional functioning (id. at pp. 2-3).

With respect to whether the ICT services constituted the student's LRE, the IDEA requires that a student's recommended program must 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). However, the Second Circuit noted that the two-prong test adopted in Newington did not adequately address the LRE question involving a student's recommended placement in a "general education environment with [ICT] services," and noting further that the appropriate question focused on whether the "ICT services were appropriate supports for [the student] within a general education environment" (M.W., 2013 WL 3868594, at *11-*12).

The hearing record demonstrates that in this case the recommended ICT services within a general education class were not overly restrictive. As mentioned, the student demonstrated average social skills and an ability to interact well with peers (see Dist. Exs. 6 at p. 3; 9 at pp. 1-5). In addition, the student's nondisabled peers could serve as social role models for the student (Tr. p. 84).

Based upon the foregoing, the hearing record contains sufficient evidence to support a finding that the ICT services recommended in the April 2012 IEP were tailored to address the student's needs and offered the student a FAPE in the LRE for the 2012-13 school year.

B. Challenges to Assigned Public School Site

The district asserts that the IHO erred in finding that the assigned public school site was not appropriate because the classes were too large and did offer sufficient special education

instruction and support. The parents assert that there is no testimony regarding the actual class that the student would be placed in and whether the district could implement the April 2012 IEP.[13]

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C., 906 F. Supp. 2d at 273 [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L.,

[13] To the extent that IHO's analysis of the assigned public school site is an analysis of the appropriateness of the ICT recommendation in the April 2012 IEP, the discussion in the previous sections demonstrates that the ICT services are both appropriate to meet the student's needs and the LRE for the student.

2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because '"[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"']).

In view of the forgoing, the parents cannot prevail on the claims that the district would have failed to implement the April 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's April 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186 [2d Cir. 2012]; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parents did not accept the April 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. E; H-I). Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's IEP at the public school site and, therefore, there is no basis for concluding that it failed to do so. Accordingly, the IHO's findings relating to the classes at the public school site must be overturned and cannot be relied upon as a basis for finding that the district failed to offer the student a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Stephen Gaynor was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 16, 2013 is modified by reversing those portions that found the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to reimburse the parents for the cost of the student's tuition at Stephen Gaynor for the 2012-13 school year.

Dated: **Albany, New York**
November 15, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER