The University of the State of New York

The State Education Department
State Review Officer
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No. 14-116

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

Appearances:
Andrea Spratt, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request for public funding for costs incurred in connection with home-based related services for their daughter for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).[1]

III. Facts and Procedural History

This matter involves a student who has attended a State-approved nonpublic school since 2005, and was instructed in a 6:1+2 special class for both the 2012-13 and 2013-14 school years (Tr. pp. 120, 175-78; see Parent Ex. B).[2] On June 13, 2013, a Committee on Special Education (CSE) convened to conduct the student's annual review and develop the student's individualized education program (IEP) for the 2013-14 school year (Dist. Ex. 4). Finding the student eligible for special education and related services as a student with autism, the June 2013 CSE recommended a 12-month program in a 6:1+2 special class in a New York State-approved, nonpublic day school with the support of a 1:1 paraprofessional (Dist. Ex. 4 at pp. 1, 10-11, 13).[3] The CSE also recommended that the student receive related-services consisting of three 30-minute sessions each of individual occupational therapy (OT), individual physical therapy (PT), and individual speech-language therapy per week (Dist. Ex. 4 at p. 10). The CSE further provided for the student to receive special transportation services (id. at p. 13).

By due process complaint notice dated June 24, 2013, the parents challenged the student's IEP for the 2013-14 school year (June 2013 IEP). Notably, the parents did not take issue with the CSE's recommendation for a 6:1+2 special class or the student's placement at a State-approved nonpublic school for the 2013-14 school year (Tr. p. 134; see Parent Ex. A at pp. 1-2).[4] Rather, the parents' sole disagreement with the 2013-14 IEP was that it did not provide the student with home-based related services consisting of three 30-minute individual sessions each of OT, PT, and speech-language therapy per week during the 2013-14 school year (Parent Ex. A at pp. 1-2). In this regard the parents contended that, in the past, the student had both received related services at her State-approved nonpublic school, and that she had received related services authorizations (RSAs) for home-based related services which, according to the parents, the student required "in order to generalize information learned during the school day and to make meaningful educational progress at school" (Parent Ex. A at pp. 1-2). The parents, therefore, contended that the CSE "impermissibly followed policy" by refusing to provide home-based related services, and that the district's "failure and/or refusal to consider [their] request for outside services" prevented them from being able to participate meaningfully during the development of the June 2013 IEP (Parent

[1] The administrative procedures applicable to the review of disputes between parents and school districts regarding any matter relating to the identification, evaluation, or educational placement of a student with or suspected of having a disability, or the provision of a free appropriate public education to such student, are well established and described in broader detail in previous decisions issued by the Office of State Review (see, e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087).

[2] The parties' familiarity with the student and the procedural history of the case prior to the development of the IEP at issue is presumed and need not be recited here. Any facts related to such that are necessary to the disposition of the issues raised in this matter will be set forth below to the extent necessary.

[3] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[4] Nor do the parents challenge the specific State-approved nonpublic school to which the student was assigned in the 2013-14 school year.

Ex. A at p. 2).[5] As relief, the parents sought an order from the IHO directing the district to fund three weekly sessions each of individual home-based OT, PT, and speech-language therapy through RSAs (id.).[6]

On October 7, 2013, the parties met for a prehearing conference and proceeded to an impartial hearing on December 6, 2013 which concluded on May 5, 2014 after three days of proceedings (Tr. pp. 1-198). On August 18, 2014, an IHO rendered a decision in which she denied the parents' request for home-based related services (IHO Decision at pp. 7-9). In particular, the IHO found that the parents sought home-based related services for purposes of allowing the student to "reach her potential" and to be able to generalize skills learned in school to the home, which was not required under the IDEA (id. at p. 7). In addition, the IHO found that the program offered to the student in the June 2013 IEP was "aimed" at giving her the opportunity to make measurable and adequate progress and was sufficient to provide a FAPE (id. at pp. 7-9). Additionally, the IHO found that the parents were able to participate during the June 2013 CSE meeting, and that their request for home-based related services was considered and discussed (id. at pp. 8-9). Lastly, the IHO found that two arguments asserted by the parents (i.e., that the June 2013 CSE had "predetermined the outcome of the IEP," and that the district failed to provide the parents with "prior written notice" of its decision not to include the home-based related services in the June 2013 IEP) were not raised in the parents' due process complaint notice and, therefore, could not be considered, though she did go on to suggest that prior written notice was not required (id. at p. 9).

The parents now appeal the IHO's decision, contending essentially that she incorrectly determined that they were allowed to meaningfully participate in the formation of the June 2013 IEP, and that the student did not need home-based related services to make meaningful educational progress. In addition, the parents argue that the IHO incorrectly found that they were precluded

[5] The parents also contended that they had not received the June 2013 IEP at the time they filed the due process complaint notice (Parent Ex. A at p. 2), however, this is not an issue raised (and, thus, that needs to be decided) on appeal.

[6] The parents also invoked the student's right to a pendency (stay-put) placement at the State-approved nonpublic school, together with home-based related services (Parent Ex. A at pp. 2-3). To this extent I note that a pendency hearing was held on July 8, 2013, and that an IHO issued an interim decision dated July 18, 2013, which determined, among other things, that the student's pendency was based on an unappealed decision in a prior proceeding which, as relevant here, ordered a placement in a State-approved nonpublic school and the issuance of RSAs for home-based related services consisting of three 30-minute individual sessions per week each of OT, PT, and speech-language therapy (July 8, 2013 Tr. pp. 1-7; Interim IHO Decision at p. 2; Parent Ex. B). The district does not dispute that this constitutes the student's pendency placement (Answer ¶ 2 n.2). However, the parents, in their petition, continue to raise the issue of pendency and assert that the IHO's interim order "omitted the agreement for the afterschool RSAs despite the fact that the [district] agreed the RSAs were a part of pendency" (Pet. p. 2). In this regard, and while the parents are correct in that the IHO's interim order does not explicitly reference the home-based RSAs (Interim IHO Decision at p. 3), since the IHO's interim decision was intended to implement the provisions of a prior unappealed decision that included the issuance of such RSAs (id. at p. 2; Parent Ex. B), and further since the district does not dispute that the student's pendency placement includes the issuance of these RSAs (Answer ¶ 2 n.2), I find that the IHO's interim decision establishes a pendency placement that includes the issuance of the RSAs sought by the parents.

from raising issues relating to predetermination and the lack of prior written notice.[7] In response, the district essentially denies the parents' allegations.

IV. 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. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The 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

[7] As noted by the district, the parents' petition does not comply with State regulations as it does not set forth their allegations "in numbered paragraphs" (8 NYCRR 279.8[a][3]). Counsel for the parents is cautioned to comply with the pleading requirements prescribed by State regulations in the future (8 NYCRR 279.8).

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, 486 Fed. App'x 954, 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]).

V. Discussion

A. Scope of Review

As noted above, the parents appeal from the IHO's determination that they did not raise claims in their due process complaint notice that (1) the CSE predetermined the June 2013 IEP, and (2) the district failed to provide them with written notice prior to changing the services recommended for the student and refusing the parents' request for home-based related services. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (20 U.S.C. § 1415[b][6], [7]; 34 CFR 300.507; 300.508; 8 NYCRR 200.5[i], [j]). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its 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 original 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][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]).

Upon review, I agree with the IHO that the parents' due process complaint notice cannot reasonably be read to include a claim that the district failed to provide them with prior written notice regarding its decision to recommend a modification to the student's related services (Parent Ex. A). Nor am I persuaded by the contention that the district agreed to allow the parent to raise this issue simply because, as the parents allege, it did not object to this issue being discussed at the hearing. This is especially true since it appears that the issue of prior written notice was first mentioned by the parents in their written "closing argument," which was submitted after the hearing. Consequently, this allegation is outside the scope of my review and will not be considered (see N.K., 961 F. Supp. 2d at 584-86).

However, I disagree with the IHO with respect to whether the parents' due process complaint notices raises the issue of "predetermination" by the June 2013 CSE. Specifically, the parents alleged in their due process complaint notice that "by refusing to consider and continue to fund [the home-based related] services, the [district] impermissibly followed policy rather than focus[ing] on the unique educational needs of the student, thereby denying the student a FAPE" (Parent Ex. A at p. 2). While the word "predetermination" does not appear in this allegation, it is an allegation that the CSE did not give any independent thought to the needs of the child when deciding whether or not to recommend home-based related services, which is the essence of what a "predetermination" claim is. Accordingly, I find that this allegation was sufficient to put the

district on notice of the parents' claim that the district impermissibly predetermined not to provide the student with home-based related services, and I will consider the issue herein.

B. Parent Participation

As noted above, one of the parents' contentions in this matter is that the IHO incorrectly determined that the district allowed them to meaningfully participate in the formation of the June 2013 IEP, and that the June 2013 CSE predetermined not to offer the student home-based related services. However, upon review, I find that, the evidence in the hearing record supports the IHO's determination that the district afforded the parents an opportunity to participate in the June 2013 CSE meeting and, further, that the June 2013 CSE did not engage in impermissible predetermination with respect to home-based related services.

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 & Commc'n 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, 210 Fed. App'x 1, 2006 WL 3697318, *1 [D.C. Cir. Dec. 6, 2006]).

When the CSE convened on June 13, 2013 CSE, the following members were in attendance: a district school psychologist who also served as the district representative, a district special education teacher, the parents, the parents' attorney, an additional parent member, and, via telephone, the student's classroom teacher at, as well as the program coordinator of, the State-approved nonpublic school that the student attended (Tr. pp. 22-23; Dist. Ex. 4 at p. 16). According to the district school psychologist, all of the CSE members participated for the entire CSE meeting and were given the opportunity to share their opinion regarding the student's functioning at her present program (Tr. pp. 22-23). The district school psychologist also testified that in developing the student's IEP for the 2013-14 school year, the June 2013 CSE relied upon an April 2012 psychological evaluation, a May 2013 progress report from the State-approved nonpublic school that the student attended, and input from the student's teacher, the program director at the student's school, and the students' parents (Tr. pp. 23-32; Dist. Exs. 2-3). Accordingly, the record reflects that the parents attended the June 2013 CSE meeting and participated thereat.

However, the parents suggest that the June 2013 CSE refused to consider the provision of home-based related services to the student. Specifically, the parents argue that the June 2013 CSE did not look at reports from various outside providers which they maintain indicated a need for home-based related services, and suggest that the CSE would not even discuss the issue (Pet. pp. 5-6). In this regard, the student's father testified that when he brought the issue up at the June 2013 CSE meeting, he was told that "[n]o, we're not going to talk about it" (Tr. pp. 126). However, the district school psychologist testified that while she did not remember the "exact discussion," she

remembered that the issue of home-based related services was discussed (Tr. pp. 34-35). On the record before me, therefore, I unable to find that the parents were precluded from discussing the provision of home-based related services at the June 2013 CSE.

Further, and with respect to the parents' claims that the June 2013 CSE did not "look at" various reports from outside providers (Pet. p. 5),[8] I note that while a CSE must consider the most recent evaluations of a student, consideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the 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 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Furthermore, the IDEA "does not require a [CSE] to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S., 2013 WL 3975942, at *11; see T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H., 2013 WL 1285387, at *15; 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, 142 Fed. App'x 9, 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).

Here, and even if the June 2013 CSE did not actively discuss the evaluations provided by the parent, the hearing record indicates that information from these evaluations was reflected in the IEP and was consistent with the other evaluative information available to and relied upon by the June 2013 CSE in the development of the June 2013 IEP (compare Parent Exs. C-E, with Dist. Exs. 3-4). For example, a March 2013 home-based speech-language progress report indicated that the student needed to improve her ability to communicate and understand the spoken word, improve her overall oral motor strength, auditory focus, and attention to task (Parent Ex. C at pp. 1-2). Similarly, the June 2013 IEP reflected that the student needed to improve her level of attention, work on verbal behavior training to learn functional communication skills, follow one to two step directions, and use pictures and her communication device to communicate (compare Parent Ex. C at pp. 1-2, with Dist. Ex. 4 at pp. 1, 4-5). A March 2013 home-based OT progress report indicated that the student was making progress in regulating sensory information and in exhibiting increased attention (Parent Ex. E at p. 1). Likewise, the June 2013 IEP reflected that the student had shown increased attention and significant improvement in her ability to regulate sensory information (Dist. Ex. 4 at p. 2). Both the OT report and June 2013 IEP noted areas of need including visual perceptual and fine motor skills; and both included goals and/or short-term objectives to address self-help/personal hygiene needs, and grasping of a writing utensil (compare Parent Ex. E at pp. 2-3, with Dist. Ex. 4 at pp. 2, 6, 8). In a June 2013 home-based PT report, the student was described as having a significant delay in gross motor skills, and that she presented with low muscle tone, poor motor planning, poor safety awareness, muscle weakness, gait

[8] In this regard, I note that the student's father testified that the district members of the CSE "cursorily looked at one or two reports, but not the reports from the outside providers" at the meeting (Tr. pp. 139-40).

deviation; and required contact guard-closed supervision (Parent Ex. D at p. 1). Similarly, the June 2013 IEP described the student as presenting with poor gross motor development and muscle strength, decreased motor planning and limited bilateral coordination which directly impeded her ability to navigate safely through her environment, on the stairs or when walking; and required an adult close to her at all times to prevent injury (Dist. Ex. 4 at p. 2). Based on the foregoing, therefore, I concur with the IHO's determination that the parents were not significantly impeded in their opportunity to participate in the creation of the student's June 2013 IEP.

Finally, and as noted above, the parents contend that the June 2013 CSE's decision to not offer home-based related services to the student was predetermined. As several courts have held, the IDEA prohibits a district from "mak[ing] educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team" (R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1188 [11th Cir. 2014]). However, advance 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, 506 Fed. App'x 80, 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]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; 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 R.L., 2014 WL 3031231, at *12; D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294).

Here, the hearing record contains evidence that, contrary to the parents' contentions, the June 2013 CSE gave consideration to other placement options for the student (Tr. pp. 35-36). For example, and as noted above, the district school psychologist testified that home-based related services were considered by the June 2013 CSE, but that in terms of the need for such services, it was not "evident" that such services were warranted (id.). The hearing record also indicates that the CSE considered a 12:1+1 special class placement in a specialized school but rejected it because the student "required a more restrictive environment" (Dist. Ex. 4 at p. 15). Accordingly, I am unable to find that the hearing record demonstrates that the district engaged in impermissible predetermination.

C. Home-Based Related Services

The gravamen of the parties' dispute on appeal is whether the student requires home-based related services in order to receive a FAPE. Upon careful review, I find the hearing record reflects that the IHO properly denied the parents' request for home-based related services for their daughter for the 2013-14 school year (see IHO Decision at pp. 6-9).

As an initial matter, the IHO's found that the reason that home-based related services are being sought by the parents in this matter is for purposes of maximization and/or generalization

across settings, which is a finding that is supported by the record.[9] However, and while it is understandable that the parents, whose daughter has substantial needs, desire greater educational benefits through the auspices of special education, a district is not obligated to pay for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Further, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Accordingly, to the extent that the home-based related services sought in this case are for the purposes of generalization of skills learned at school and/or the maximization of potential, I am unable to find that this alone is a basis for the provision of such services.

Further, and perhaps more importantly, the hearing record indicates that the program recommended in the June 2013 IEP (and which the student received during the 2012-13 school year) was sufficient to enable the student to receive educational benefits. Initially I note that student's State-approved nonpublic school addressed the student's unique educational needs by working on areas including vocational training, mobility, socialization, gross motor, and communication, while providing for the student's need to develop prerequisite skills toward achieving her goals (Dist. Ex. 3 at pp. 2-3). Further, and according to a May 2013 progress report which was available to the CSE at the time of the June 2013 CSE meeting, the student had made progress in several areas of need during the 2012-13 school year (Dist. Ex. 3). For example, the progress report indicated that for the 2012-13 school year, the student had "met several short term objectives given an array of prompts and faded prompts" (id. at p. 2). The progress report also indicated that the student was making some progress, commensurate with her abilities, toward a number of her goals (id. at pp. 2-3). Furthermore, when asked by the IHO whether the student's assigned State-approved nonpublic school provided the student with an educational benefit by itself, the parent testified that the student "definitely does get some educational benefit from the school" with regard to both academics and other skills (Tr. pp. 157-59). Moreover, the program coordinator at the student's State-approved nonpublic school testified that the student's IEP for the 2013-14 school year would confer educational benefits for the student (Tr. pp. 187-88). Accordingly, the hearing record reflects that the district offered the student an appropriate educational program that could address the student's needs during the school day without home-based related services.

[9] For example, the student's father testified that the student required home-based related services in order to "generalize" the skills learned at school to other environments (Tr. pp. 134-35), and that the reason why he was advocating for these services was for purposes of generalization and maximizing the student's potential (Tr. pp. 150-51). The parent further testified that the home-based related services were important for the student to "reinforce" the basic, functional activities learned at school and at home (Tr. p. 155). Similarly, the home-based speech-language provider testified that the student's home-based speech-language therapy provided the student with skills that "reinforce[d] everything she learn[ed] in school and transfer[red] it to her home environment" (Tr. pp. 84-85).

The parent, however, argues that reports from the home-based related service providers show that the student continues to need "outside services" (Pet. p. 5), but none of these reports establish that the student required home-based related services to receive educational benefits during the school day. The home-based speech pathologist testified that she familiarized herself with the student's performance in school by reviewing the June 2013 IEP, the student's communication book from school, and a progress report from the student's school-based speech therapist, speaking with the parents, and speaking with the student's school-based speech therapist once during the 2013-14 school year (Tr. pp. 70-72). However, although she had been providing home-based speech services to the student for six years, she had never visited the student's school or observed the student receiving services from her speech provider at school (Tr. pp. 72-73). Moreover, while the home-based speech report stated that "[the student's] services at home reinforce everything she is learning in school" (Parent Ex. C at p. 1), the home-based speech pathologist testified that she did not "know exactly what they do" and that she was "not a hundred percent sure what approach they use" (Tr. pp. 90-91).

Similarly, the home-based physical therapist's June 2013 report recommended that home-based PT continue in order to allow the student access to regularly, daily strengthening exercises; to provide constant repetition of gross motor activities through aggressive therapy; and because the student was more motivated and compliant at home (Parent Ex. D at p. 2). There is no indication in the report that the physical therapist had contacted the student's school or its providers to be able to compare the student's performance in the home versus the school; and, further, although the physical therapy report provided reasons for home-based therapy to continue, there is no basis provided to support a finding that the activities indicated could not be carried out in the school environment (id. at pp. 1-3).[10] That the student may have been more focused and compliant at home does not indicate that the student required home-based related services, as the hearing record indicates that the student received benefit from the related services provided at his school.

Likewise, with respect to the home-based OT progress report, while this report recommends that the student continue to receive OT to address her deficit areas, it suggests that the basis for this recommendation is that in the past the student had demonstrated "increased progress" due to consistency, repetition, and "carryover of school recommendations between therapists" (Parent Ex. E at p. 2). However, and as noted above, the district is not required to maximize the student's progress by providing her with services over and above those necessary for her to receive educational benefits.

Finally, the parents argue that the student will regress if she does not receive "outside services" and cite to the home-based OT report and the testimony of the student's home-based speech-language therapist to support this contention (Pet. p. 14).[11] However, while the home-based OT report does indicate that the student required home-based services because the student "regressed significantly due to two months of no carryover" (Parent Ex. E at p. 2), the report does not indicate how the student regressed other than stating that "regression has occurred as noted last

[10] The physical therapist who prepared the June 2013 progress report did not testify at the impartial hearing; rather, the physical therapist who provided the student's home-based services during the 2013-14 school year testified that he provided the student with PT services in a sensory gym instead of at home (Tr. pp. 100-03).

[11] It is undisputed that the student required a 12-month school year program, and consistent with this need, the June 2013 CSE recommended a 12-month school year program for the student (Dist. Ex. 4 at p. 11).

summer and fall" (id.). Further, and while the student's home-based speech-language therapist testified that there had been a "gap in services" for two weeks in the summer prior to the impartial hearing, and that it took the student "a couple of weeks" to get back on board (Tr. pp. 66-68), a two week gap does not comport with State regulations which defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).[12] Accordingly, as there is no evidence in the hearing record to indicate that the student experienced substantial regression with regard to her related services needs, the CSE did not have a basis on which to conclude that the student required home-based related services on a 12-month basis to prevent substantial regression.[13]

VII. Conclusion

Based on the above, I find that the hearing record supports the IHO's determination to deny the parents' request for public funding for the costs of the student's home-based related services for the 2013-14 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 6, 2014

HOWARD BEYER
STATE REVIEW OFFICER

[12] State guidance indicates that a period of review is inordinate "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], at p. 1, available at http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

[13] As noted by the Second Circuit Court of Appeals, IEPs must be evaluated prospectively as of the time they were created (see, e.g., R.E., 694 F.3d at 188). To that extent, I note that the parents also cite to another report from the student's home-based OT provider from November 2013 (Parent Ex. G) to support their contention that the student would regress without the benefit of "outside services." However, and aside from the fact that this report indicates only that that the student "revealed minimal gains" due to a break in services and does not explain how, if at all, the student regressed, as this report post-dates the June 2013 CSE, that CSE could not have relied on this report in formulating its 2013-14 recommendations for the student.