The University of the State of New York

The State Education Department
State Review Officer
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No. 14-143

Application of a STUDENT WITH A DISABILITY, by his 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:
Skyer & Associates, LLP, attorneys for petitioners, Jesse Cole Cutler, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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 the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Churchill School and Center (Churchill) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such

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

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

III. Facts and Procedural History

The hearing record indicates the student is socially engaging, even-tempered, kind-hearted, bright, and has a sunny disposition (Dist. Exs. 5 at p. 24; 6 at p. 10). Private neuropsychological testing conducted in January 2013 and updated testing conducted in May 2013 revealed that the student demonstrated superior visual analytic and conceptual reasoning abilities, in contrast to significant language-based difficulties, consistent with the criteria for diagnoses of a mixed receptive and expressive language processing disorder, a reading disorder, a math disorder, a disorder of written expression, and a memory disorder (Dist. Exs. 5 at pp. 11, 24; 6 at p. 10). The testing indicated the student struggled to cope with the academic and linguistic demands of the school day, and he was aware of and upset by his difficulties in school with attention, language, and learning (Dist. Ex. 5 at p. 23).[1] Additionally, while the student tended not to self-advocate in

[1] The hearing record indicates the need for caution in diagnosing the student as having an attention deficit hyperactivity disorder (ADHD) because the student's difficulties with language-based learning, executive function (planning and organization), sensory modulation, and reactive anxiety were "at the least exacerbating his difficulties maintaining concentration and undermining his resolve when approaching challenging tasks" (Dist. Exs. 5 at pp. 18, 24; 6 at pp. 7-9).

the classroom, he verbally expressed his anxiety and self-doubt about his classroom performance at home (id.).

The student's educational history indicates that the student attended a Montessori preschool program where he initially received speech-language therapy through the Early Intervention Program and later received speech-language therapy, occupational therapy (OT), physical therapy (PT), and special education itinerant teacher services through the Committee on Preschool Special Education (CPSE) (Tr. pp. 350-51).

In preparation for the student entering kindergarten, a district school psychologist evaluated the student, observed him in his preschool classroom, and met with the student individually (Tr. pp. 421-22). The CSE met in September 2012, determined the student was eligible for special education programs and related services as a student with an other health-impairment, and developed an IEP for the 2012-13 school year (Parent Ex. J). The September 2012 CSE recommended placement in a general education classroom with integrated co-teaching (ICT) services for English language arts (ELA) and mathematics (Parent Ex. J at pp. 5, 8).[2] The CSE also recommended related services of two 30-minute sessions of speech-language therapy per week in a group of three, one 30-minute session of PT per week in a group of two, two 30-minute sessions of OT per week in a group of two, and a full time 1:1 crisis management paraprofessional (id.).

The parents obtained a private neuropsychological evaluation in January 2013 (Dist. Ex. 5). In February 2013, the parents visited Churchill and applied for admission for the student (Tr. pp. 435-36). The parents signed an enrollment contract with Churchill in March 2013 and made three payments towards the student's tuition between March 7, 2013 and May 21, 2013 (Parent Exs. P; Q; see Tr. pp. 438-40). In a letter to the CSE chairperson dated April 24, 2013, the parents informed the district that they were concerned the student was not making progress in his current educational program and believed it was not addressing his special education needs (Parent Ex. B at p. 1).[3] The parents requested a "CSE [r]eview meeting . . . to determine an appropriate, full-time special education program for [the student]" (id.). They also submitted a copy of the January 2013 neuropsychological evaluation report for the CSE to consider (id. at p. 2). In May 2013, the neuropsychologist, who conducted the January 2013 neuropsychological evaluation, conducted a neuropsychological evaluation update for the student (Dist. Ex. 6).

On May 23, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Tr. p. 26; Dist. Ex. 1). Participants in the May 2013 CSE meeting included the student's special education teacher (who also acted as the district representative), the student's regular

[2] ICT services are defined in State regulations as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom providing ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a guidance document which further describes ICT services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

[3] Although the parents raised concerns about the student's "current educational program" and requested an "immediate CSE [r]eview meeting," the parents requested a review of the student's program for the upcoming 2013-14 school year and did not request a review of the student's program for the remainder of the 2012-13 school year (Parent Ex. B at p. 2).

education teacher, his occupational therapist, his physical therapist, his speech-language pathologist, a school psychologist, the principal of the student's school, a district "network liaison," the parents, and counsel for the parents (id. at p. 13). The May 2013 CSE found the student continued to be eligible for special education programs and services as a student with an other health-impairment and recommended placement in a general education class with ICT services for ELA and mathematics (id. at p. 7).[4] The CSE recommended related services of one 30-minute session of OT per week in a group of two, one 30-minute session of individual OT per week, one 30-minute session of speech-language therapy per week in a group of three, two 30-minute sessions of individual speech-language therapy per week, and the services of a full time 1:1 crisis management paraprofessional (id. at p. 8).[5, 6] In addition, the May 2013 CSE added five group sessions per week of Special Education Teacher Support Services (SETSS) in ELA to the student's IEP (id.). The May 2013 CSE agreed that the student's private neuropsychologist would conduct a classroom observation of the student (Tr. p. 244). However, the parents, counsel for the parents, and the district CSE members disagreed as to whether the May 2013 CSE finalized a recommendation or agreed to "table" the discussions and reconvene after completion of the neuropsychologist's observation (Tr. pp. 82-83, 323-24, 440-41).[7]

On June 20, 2013 the parents, the principal, the school psychologist, and the district network liaison met to discuss the private neuropsychologist's observation (Tr. pp. 82-84, 244-46, 271-72, 557-58). On the same day, the district issued a final notice of recommendation (FNR) that summarized the recommendations made by the May 2013 CSE and identified the particular public school to which the district assigned the student for the 2013-14 school year (Parent Ex. M). The FNR listed an address for the assigned school, as well as the name, address, and telephone number of an individual to contact from the CSE for information (Parent Ex. M).

In a letter to the CSE dated July 1, 2013, the parents rejected the program recommendations included in the June 2013 FNR and requested that the CSE reconvene (Parent Ex. G at p. 3). In response, the district sent an e-mail to counsel for the parents on August 2, 2013 notifying them that because the school staff was on vacation and unavailable to participate, the CSE would be reconvened in the last week of August 2013 or the first week of September 2013 (Parent Ex. L at

[4] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute in this appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[5] The May 2013 IEP indicates that the student "graduated" from PT at the end of the 2012-13 school year (Dist. 1 at p. 3).

[6] Although the September 2012 IEP and the May 2013 IEP both indicate that the CSE's recommendation for a crisis management paraprofessional was a group service, the district school psychologist explained that it was an error and the student received the services of a full time 1:1 paraprofessional while in the district (Tr. pp. 172-73). The school psychologist also testified that the parents understood that the student received the services of a 1:1 paraprofessional and would have continued to receive the services of a 1:1 paraprofessional during the 2013-14 school year (Tr. pp. 173-74).

[7] On June 11, 2013, the neuropsychologist conducted a classroom observation of the student (Dist. Ex. 7).

p. 1). For the 2013-14 school year the parents placed the student at Churchill (Tr. p. 447; Parent Exs. P; Q).[8]

A. Due Process Complaint Notice

In a due process complaint notice, dated September 11, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Dist. Ex. 8). The parents asserted that the May and June 2013 CSEs predetermined the program recommendation and denied the parents an opportunity to participate in the development of the IEP, that the June 2013 CSE was not duly constituted, that the annual goals included in the IEP were generic and lacked methods of measurement, that an ICT program was not appropriate to meet the student's needs, that continuation of a general education class with ICT services was not appropriate considering the student's lack of progress in a similar program during the 2012-13 school year, and that the IEP did not include meaningful management needs (id. at pp. 4-8). As relief the parents requested reimbursement for their unilateral placement of the student at Churchill for the 2013-14 school year (id. at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 8, 2014 and concluded on June 17, 2014 after three days of proceedings (Tr. pp. 1-569). In a decision dated August 12, 2014, the IHO determined that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at pp. 10-14). Initially, the IHO found that the May 2013 CSE was validly composed, that the May 2013 CSE finalized an IEP for the 2013-14 school year, and that the June 2013 meeting was not a CSE meeting but a meeting to determine if the parents had any new information that would require the CSE to reconvene (id. at pp. 6-7). The IHO found that ICT services were appropriate for the student (id. at pp. 10-13). The IHO determined that the May 2013 CSE appropriately relied on reports from the student's teachers and considered information provided by the private neuropsychologist (id. at pp. 11-12). The IHO found that the May 2013 IEP incorporated some of the recommendations made by the private neuropsychologist in her January and May 2013 reports, particularly the addition of SETSS and an increase in individual speech-language therapy services (id. at pp. 12-13). In addition, the IHO determined that the student had made progress in a general education class with ICT services during the 2012-13 school year, and that such progress was an indication that the continuing recommendation of placement in a general education class with ICT services for the 2013-14 school year was reasonable (id. at pp. 10-11). Finally, the IHO determined that in the event the district had committed any of the procedural violations alleged by the parents, none of those alleged violations would have risen to the level of a denial of FAPE (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parents appeal from the IHO's August 12, 2014 Decision. The crux of the parents' complaint regarding the substance of the May 2013 IEP is that the student did not make progress in a district ICT classroom during the 2012-13 school year and the district's continuing placement of the student in an ICT classroom, even with the addition of SETSS and an increase in speech-

[8] Churchill is a nonpublic school that has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (Tr. p. 296; see 8 NYCRR 200.1[d], 200.7).

language therapy, was not reasonably calculated to enable the student to receive an educational benefit. The parents also continue to raise a number of procedural issues related to the development of the IEP, most significant of which are the parents' allegations that the district predetermined the program recommendation and denied the parents an opportunity to participate in the development of the IEP.[9] The district answers, generally denying the allegations contained in the petition and asserting that the IHO was correct in finding that the May 2013 IEP was appropriate and the district offered the student a FAPE.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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.

[9] The parents do not raise any specific arguments on appeal regarding the annual goals included in the May 2013 IEP; however a brief review of the same indicates that the goals were aligned to the student's areas of academic (task completion/behavior, reading, writing), social/emotional (following directions, listening and communication), and physical development (handwriting, visual scanning and tracking, fine motor, following directions in the presence of auditory distractors/fading verbal cues) needs (Dist. Ex. 1 at pp. 1-7). In addition, the annual goals were sufficiently specific and measurable, and they included the frequency of and the manner in which progress would be measured (see id. at pp. 4-7).

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 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]).

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. May 2013 CSE Process

As an initial matter, the parents challenge the IHO's determination that the May 2013 CSE finalized an IEP for the student for the 2013-14 school year. The parents assert that the May 2013 CSE meeting was "tabled" for the private neuropsychologist to observe the student in his classroom and that the district did not consider the report from the private neuropsychologist's classroom observation because all of the required members of the CSE were not present for the June 2013 meeting. However, upon review, the IHO's determinations that the May 2013 CSE finalized an IEP for the 2013-14 school year and that the June 2013 meeting was not a CSE meeting are supported by the hearing record.

The IHO considered the relevant testimony, weighing the testimony by the parents' attorney (who attended the May and June 2013 meetings) that he suggested the May 2013 CSE reconvene to allow the private neuropsychologist to observe the student against the testimony by the district school psychologist and the school principal that the May 2013 CSE agreed it would be a good idea to have the neuropsychologist observe the student in his classroom, but nonetheless finalized an IEP for the student for the 2013-14 school year (IHO Decision at pp. 6-7; compare Tr. pp. 323-25, with Tr. pp. 82-85, 244-46). Although the student's special education teacher testified that the May 2013 CSE agreed to reconvene after the neuropsychologist observed the student, she also testified that the May 2013 CSE made an appropriate recommendation for the student and that the May 2013 CSE considered the neuropsychologist's reports in making its recommendation (Tr. pp. 167-69, 223-24, 233-34). In addition, the school principal testified that the CSE did not reconvene to review the observation report because it did not present any new information from the neuropsychologist's prior reports (Tr. pp. 245-46). Upon review of the observation report, the CSE's determination that it did not contain sufficient new information to warrant a reconvene of the CSE was reasonable, as the observation report contained the same recommendations as the report from the May 2013 neuropsychological evaluation update (compare Dist. Ex. 6 at pp. 11-13, with Dist. Ex. 7 at pp. 4-6).[10] Accordingly, the hearing record supports the IHO's determination

[10] The parents assert that the observation report contained new information indicating that a 1:1 paraprofessional hindered the student's ability to learn in "real time" (Tr. pp. 340-41). Although evaluative information obtained after a CSE meeting is not normally permissible as a basis for determining whether that IEP was substantively appropriate (see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 512-13 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at the time the IEP in question was developed]), in this instance, because the parents sent the observation report to the district and requested a CSE meeting, the observation report is considered in determining the substantive appropriateness of the May 2013 IEP and is discussed in more detail below.

that the May 2013 CSE finalized an IEP for the student and the IHO was correct to analyze the appropriateness of the recommended program based on the May 2013 IEP (Dist. Ex. 1).

Additionally, while the parents may be correct in alleging that the district committed a procedural violation by failing to provide them with prior written notice of its decision not to convene a CSE meeting in June 2013, under the circumstances presented here, the district's failure to comply with procedural requirements did not deprive the student of educational benefits or significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (see 20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). Counsel for the parents was in communication with the school principal prior to the June 2013 meeting and was advised that the participants in the meeting would be the school principal, the district school psychologist, and the network liason (Parent Ex. L at pp. 2-3). While counsel for the parents testified that during the June 2013 meeting he requested the presence of the student's teachers and service providers, there is no indication in the hearing record that the parents' attorney requested their presence prior to the meeting or responded to the district's e-mail listing the meeting participants (Tr. pp. 338-39; Parent Ex. L at pp. 2-3). After the June 2013 meeting, the parents requested a reconvene of the CSE by letter dated July 1, 2013 (Parent Ex. G at p. 3). In response the district advised the parents that a reconvene could not be held until late August or early September because the student's teachers were not available during the summer; however, the parents rejected the district's offered program and indicated their intention to enroll the student at Churchill at public expense by letter dated August 23, 2012 and a reconvene of the CSE never took place (Tr. pp. 249-50; Parent Exs. A; L). The student's mother testified that the purpose of the request for a reconvene in the parents' July 1, 2013 letter was to have the CSE reconsider the same concerns from the prior meetings and that they did not have any new information (Tr. pp. 477-79).

As a corollary to the parents' arguments addressed above regarding whether the June 2013 meeting was a CSE meeting and whether the CSE was able to consider the neuropsychologist's observation report, the parents also argue that the CSE did not "duly" consider the neuropsychologist's January 2013 and May 2013 evaluation reports and did not consider placing the student in a "full-time special education program" as recommended by the neuropsychologist. A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141,

145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *18 [S.D.N.Y. Sept. 16, 2013]; E.S. v. Katonah-Lewisboro Sch. Dist., 742 F.Supp.2d 417, 436 [S.D.N.Y. 2010]).

The neuropsychologist participated in the May 2013 CSE meeting via telephone (Tr. pp. 231, 320-21, 440, 514-15).[11] The CSE reviewed the neuropsychologist's January 2013 and May 2013 evaluation reports (Tr. p. 321). The parent testified that during the meeting, the neuropsychologist explained her reports, but was interrupted by the school principal, who believed the May 2013 report was inaccurate (Tr. pp. 440-41). The school principal also testified that at the time of the May 2013 CSE meeting she believed the May 2013 evaluation was performed within too short a time period from the January 2013 evaluation; however, during the hearing she acknowledged that the testing was conducted within an appropriate time period (Tr. pp. 264, 268-69). The district school psychologist testified that she believed the evaluation reports were "very thorough," that she agreed with some of the recommendations, and that she held the testing from the May 2013 evaluation "in a little less regard" because she believed the testing was performed too close to the January 2013 evaluation (Tr. pp. 30-31).

Based on the contentious nature of the May and June 2013 meetings and the district personnel's dismissal of the testing results from the May 2013 neuropsychological evaluation (Tr. pp. 30-31, 264, 321-22, 440-41), I can appreciate the parents' concerns that the CSE did not "duly" consider the recommendations of the private neuropsychologist. However, regardless of whether the May 2013 CSE accepted the testing results from the May 2013 neuropsychological report, the hearing record supports the IHO's determination that the CSE sufficiently considered the opinion of the neuropsychologist and the recommendations contained within her reports (IHO Decision at pp. 11-13). Specifically, while the May 2013 CSE did not adopt all of the recommendations contained in the neuropsychological evaluation reports, the CSE did adopt some of the private neuropsychologist's recommendations (Dist. Exs. 5 at pp. 26-27; 6 at pp. 11-13; compare Dist. Ex. 1 at pp. 7-8, with Parent Ex. J at p. 5).[12] In particular, the May 2013 CSE made changes intended to address the neuropsychologist's recommendations that the student receive intervention by a reading specialist and "an increase in one on one language therapy" (Dist. Exs. 5 at p. 26; 6 at p. 11). Additionally, while the parents allege that the May 2013 CSE did not consider placement options other than an ICT class, both the parents and counsel for the parents testified that the CSE discussed 12:1 and 12:1+1 programs (Tr. pp. 323, 345, 441, 475).

Under these circumstances, I agree with the IHO's determination that the May 2013 CSE considered the parents' private evaluation reports to the extent required, although perhaps not to the extent that the parents would have preferred (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *10 [S.D.N.Y. Dec. 23, 2013] [a CSE is not required to follow all of the

[11] The neuropsychologist's name does not appear on the sign in sheet for the May 2013 CSE meeting (Dist. Ex. 1 at p. 13). The neuropsychologist also participated in the June 2013 meeting via telephone (Tr. pp. 344, 517).

[12] The recommendations in the January and May 2013 reports are almost identical except the January 2013 report indicated the student would have required "full time placement in a specialized program" if he did "not make adequate academic progress" during the remainder of the 2012-13 school year, whereas the May 2013 report indicated the student required "full time placement in a small, specialized program" and included recommended testing accommodations (compare Dist. Ex. 5 at pp. 26-27, with Dist. Ex. 6 at pp. 11-13).

recommendations contained in a private evaluation]). 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 disagreement between the parents and the district does not mean that the parents were denied the opportunity to participate or that the outcome of the CSE meeting was predetermined]; 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]).[13]

B. May 2013 IEP

1. Progress in District

At the core of the parents' concerns regarding the May 2013 IEP is the parents' contention that the student did not make progress with ICT services in kindergarten during the 2012-13 school year, rendering it inappropriate for the May 2013 CSE to recommend ICT services for the student for the 2013-14 school year. However, consistent with the IHO's findings, the hearing record demonstrates that the student made educational progress during the 2012-13 school year and that the May 2013 CSE appropriately considered the student's progress in developing the student's IEP for the 2013-14 school year. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be

[13] The IDEA, rather than requiring parental consent to an IEP, "'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]).

appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

The student's special education teacher testified that the student needed less support towards the end of the 2012-13 school year and made meaningful and appropriate progress, particularly in light of his difficulties with decoding and receptive/expressive language (Tr. pp. 140-41, 149, 157-58). She further testified that from the beginning of the school year up to June 2013, the student progressed at a "steady rate of progress" that was in line with some of the other students in the class (Tr. p. 133). Significantly, the private neuropsychologist acknowledged that the student made "individual progress" during the 2012-13 school year (Tr. p. 552). However, she believed that the student's progress was not sufficient because the student did not make progress in relation to his peers (id.).

The parents' main concern regarding the student's progress in the district focused on the student's reading level at the end of the 2012-13 school year (Tr. pp. 424-25, 430-31, 440-41, 536-37). The student's reading level was assessed beginning in December 2012 or January 2013 at levels "A" and "B," indicating that he relied primarily on picture support rather than words (Tr. p. 134; Dist. Ex. C at pp. 2-3).[14] The student's special education teacher testified that by June 2013, the student tested at level "C" and began to focus more on words and word patterns rather than on picture support (Tr. pp. 134-35).[15] She also testified that in order to meet standards, students must be reading at level "D" by the end of kindergarten (Tr. p. 135; see Parent Ex. C).[16]

Although the student was not at grade level standards by the end of kindergarten, the student did advance at least one reading level and made notable progress in developing reading skills during the 2012-13 school year (Dist. Ex. 3 at pp. 2-3, 8-10).[17] The student's special education teacher testified that in September 2012, the student's phonemic awareness was at a minimum level, whereby he knew approximately 18 uppercase and lowercase letters (Tr. p. 134; Dist. Ex. 3 at p. 9). By the end of the school year, the student knew all 26 uppercase and lowercase letters (id.). In September 2012, the student knew approximately seven out of 26 sounds, and had four sight words (Tr. p. 134). By the end of the same school year, the student knew all 26 letter sounds and knew 25 out of 35 sight words (Tr. pp. 134, 138-39).[18] In "Words Their Way," a phonics program that incorporates scaffolding and was used in the student's kindergarten class, the student started off in "early alphabet" (letters and sounds in isolation) and progressed to "within

[14] As the letters of the reading levels move upward in the alphabet (from A to Z), the books become more complex and picture and word pattern support decreases (Tr. p. 135; see Parent Ex. K at p. 1).

[15] The student moved up to reading at a level "C" in March 2013 and remained at a level "C" through the end of the school year (Dist. Ex. 3 at pp. 2-3).

[16] A letter from the district indicates that during the first marking period in the first grade students need to be reading at a level "F/G" in order to meet standards (Parent Ex. K at p. 1). However, the student's special education teacher explained that it must have been an error as the benchmark standard for the end of kindergarten is a level "D/E" (Tr. p. 208; Dist. Ex. 3 at p. 1).

[17] The student's kindergarten progress reports indicate that he mastered one out of five reading skills and partially mastered the remaining four (Parent Exs. E at p. 1; H at p. 1; I at p. 1).

[18] The special education teacher testified that knowing 25 out of 35 sight words by the end of the school year was standard (Tr. p. 134).

word patterns" (blending sounds within a word) (Tr. pp. 134, 136). The student's progress in ELA is also indicated in a comparison of the January 2013 and May 2013 neuropsychological reports, as the student moved from not being able to attempt to decode or encode any words to being unable to decode or encode "unfamiliar words" and developed a few sight words and spelling words (compare Dist. Ex. 5 at p. 22, with Dist. Ex. 6 at p. 10).

Specific to the student's ability to read words or to answer questions, the special education teacher indicated that at the beginning of the 2012-13 school year the student had difficulty sustaining attention, but with constant redirection by the end of the school year the student required only minimal support (Tr. p. 137). At the beginning of the school year, the student "needed a lot of prompting and support with verbal skills" but by the end of the school year, prompts and supports were provided on an as-needed basis (id.). At the beginning of the school year the student was unable to answer simple direct and inferential questions related to text, whereas at the end of the year the student was able to do so (Tr. p. 138).

The student also made academic progress in mathematics and writing (Tr. pp. 139-41). At the time of the May 2013 CSE meeting, the hearing record indicates that the student was working around grade level in mathematics (Dist. Ex. 6 at p. 8; Parent Ex. H at p. 5). At the beginning of the school year, the student was unable to count past 20, whereas by the end of the school year he was able to count to 69 or 70 (Tr. p. 139). Initially, the student was unable to answer problem solving questions, but by the end of the 2012-13 school year, he was able to answer problem solving questions related to addition and subtraction (Tr. pp. 139-40). The student also ended the school year requiring less support in understanding operational signs for addition and subtraction (id.). In writing, the student's report cards indicated that he mastered one out of four writing skills and partially mastered the remaining three (Parent Exs. E at p. 1; H at p. 1; I at p. 1). The special education teacher testified that at the beginning of the 2012-13 school year the student's writing was difficult to read and was limited to pictures and letter strands (Tr. p. 141). However, by the end of the school year, the student displayed improvement, in that in addition to pictures, he was able to write simple sentences and his writing was more clear and legible (id.).

A comparison of standardized test results from the January 2013 neuropsychological evaluation with standardized testing conducted four months later in May 2013 reveal that the student performed worse in oral expression, made no progress in listening comprehension, and made approximately one month's progress in early reading skills (Tr. pp. 508-9; see Dist. Exs. 5 at p. 1; 6 at p. 1). However, I note that the hearing record did not account for the standardized procedures in which standardized testing must be administered, as opposed to the differentiated use of effective teaching strategies (i.e., repetition of instructions, shown an example, praise, positive reinforcement, and redirection) included in the student's IEP for the 2012-13 school year, that accommodated and supported his learning and progress in the kindergarten classroom (see Parent Ex. J at p. 1).

With regard to related services, the May 2013 IEP specified the student's progress in speech-language therapy, OT, and PT between September 2012 and the time of the May 2013 CSE meeting (Dist. Ex. 1 at pp. 2-3). The May 2013 IEP indicates the student made significant improvements in articulation and speech intelligibility, phonological processing skills, social-

emotional development, conversational skills, attention, controlling his emotions, self-organizing materials while completing a task, and in answering wh- questions (Dist. Ex. 1 at p. 2).[19]

While the hearing record demonstrates that the student's overall academic achievement in reading did not meet grade level standards for a student his age, it also documents progress, consistent with his identification as a student with a disability, albeit somewhat less than what might have been expected in light of his cognitive abilities (see Dist. Exs. 1 at pp. 1-4; 3 at pp. 2-3, 8-10; 5; 6; Parent Exs. E; H; I). Accordingly, the hearing record supports the IHO's finding that the student progressed in the district with the support of ICT services, even though the student was not catching up to his same age peers, and it was appropriate for the May 2013 CSE to consider the student's progress in a general education class with the support of ICT services in developing the student's IEP for the 2013-14 school year (see H.C., 528 Fed. App'x at 66-67 [noting that a student's progress should not be compared to the progress made by the student's nondisabled peers], quoting Mrs. B, 103 F.3d at 1121).

2. ICT and Related Services

In addition to supporting the IHO's finding that the student made progress while attending a public school placement during the 2012-13 school year, the hearing record also supports the IHO's determination that the recommendation for a general education class with ICT services, a 1:1 paraprofessional, SETSS, and related services was reasonably calculated to provide the student with educational benefits.

The school psychologist testified that she disagreed with the neuropsychologist's recommendation for a smaller self-contained class because the student was functioning well with the support of ICT services (Tr. p. 33). The student's special education teacher testified that part of the reason the May 2013 IEP was appropriate was because ICT services would have allowed the student to be educated in his least restrictive environment (Tr. p. 167-68). The district school psychologist described an ICT class as "a general education class with a special ed component" (Tr. p. 45).[20] She explained that the general education and special education teachers in a classroom providing ICT services work as a team, that the general education teacher teaches the lesson to the whole class, and that the special education teacher works with the special education students "to clarify or simplify [the] lesson" and to differentiate it for each student (id.).

The private neuropsychologist testified that she did not believe ICT services were appropriate because in his current ICT class the student "couldn't process the language in real time" (Tr. p. 519). She testified that during her observation of the student, the student needed a paraprofessional to break down and repeat the lesson and that the repetition kept the student at a

[19] In OT, the student achieved several goals and showed improvement in his handwriting skills (Dist. Ex. 1 at p. 3). As the student was fully negotiating and participating in the school environment, he "graduated" from PT at the end of the 2012-13 school year (id.).

[20] 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" (8 NYCRR 200.6[g]). An ICT class "shall minimally include a special education teacher and a general education teacher" and the maximum number of students with disabilities in such a class "shall not exceed 12 students" (8 NYCRR 200.6[g][1], [2]).

slower pace than the rest of the general education class (Tr. pp. 516-17).[21] However, upon review, the neuropsychologist's classroom observation actually supports the appropriateness of the recommended program (see Dist. Ex. 7). In the observation report, the private neuropsychologist described how the class flowed from one activity to the next, as well as how the teachers and paraprofessional guided the students through routines and tasks (Dist. Ex. 7 at pp. 2-3). The report detailed the supports provided to the student and the rest of the class (id.). In particular, the class utilized a multi-sensory approach (verbal instruction followed by visual presentations) and the student's paraprofessional provided simplified language, clarification of materials, and attentional support (id.). The report indicated that the student participated in the lesson and the neuropsychologist noted that with the provided supports the student was able to comply with task demands (id.). Although the neuropsychologist also stated that the "intensive level of support [in the classroom] . . . hampers [the student's] ability to learn in 'real time' as he is consistently being provided with a simplified explanation of material that has just been presented" (id. at p. 3), she did not modify her assessment of the student's needs as a result of her classroom observation, and the observation report merely reiterates the recommendations from her prior January 2013 and May 2013 assessments of the student (see Dist. Exs. 5 at pp. 26-27; 6 at pp. 11-13; 7 at pp. 4-6).

The May 2013 IEP also reflected a variety of management strategies, which were consistent with the description of the student's class contained in the observation report and with many of the strategies recommended by the private neuropsychologist (Tr. pp. 184-89; Dist. Exs. 1 at pp. 1-4; 5 at pp. 26-27; 6 at pp. 11-12; 7 at pp. 2-4). The May 2013 IEP indicated that the student needed various types and amounts of support in the classroom, and was able to make progress with provided supports (i.e., reinforcement, reminders, positive praise, rewards, verbal cues) (Dist. Ex. 1 at p. 1). The May 2013 IEP also indicated that, academically, the student required teacher and paraprofessional support through positive praise and rewards, reinforcement, encouragement, redirection, and reminders (id. at pp. 1-2).[22] In speech-language therapy, the May 2013 IEP reflected that the student benefitted from minimal verbal and visual prompting and visual and verbal cues/directives (id. at p. 2). In OT, the May 2013 IEP noted the student required supervision and visual and/or verbal cues depending on the task (id. at p. 3). Specific to the recommended full-time 1:1 paraprofessional, testimony by the student's special education teacher indicated the student's 1:1 paraprofessional did not interfere with instruction or distract the student during the 2012-13 school year (Tr. p. 174). The special education teacher testified that the May 2013 CSE discussed "at length" how the 1:1 paraprofessional would support the student while also pulling back "to see what [the student] was capable of doing independently" (Tr. p. 175).

Additionally, putting aside the student's progress in a general education class with the support of ICT services during the 2012-13 school year, the May 2013 CSE also made modifications to the student's program in an attempt to address the private neuropsychologist's concerns and the student's special education needs in the least restrictive environment (Tr. pp. 44-

[21] I note that breaking down and repeating lessons is in accord with the recommendations contained in the neuropsychologist's reports indicating that the student required "slowed, syntactically simplified presentation of language with repetition in order to comprehend classroom instructions" (Dist. Exs. 5 at p. 27; 6 at p. 11; 7 at p. 4).

[22] Although the private neuropsychologist expressed concern—based on reports from the parents—regarding the potential for the student to experience anxiety in a general education setting (Tr. pp. 511, 519-20; Dist. Ex. 6 at pp. 9-10), the hearing record reflects that an ICT class was socially appropriate for the student in that the student was socially engaging, well-liked, and had friends (Dist. Exs. 1 at pp. 2-3; 5 at pp. 9-10, 24; 6 at pp. 2, 6).

45, 167-69). The private neuropsychologist indicated that in her discussions with the parents she suggested initiating an Orton-Gillingham based reading program and increasing the student's language interventions (Tr. p. 505; see Dist. Exs. 5 at p. 26; 6 at p. 11). Taking into account the recommendations for Orton-Gillingham based reading instruction, the May 2013 CSE recommended SETSS five times per week in order to provide the student with daily reading instruction (Dist. Ex. 1 at pp. 4, 11). The May 2013 IEP also indicated that SETSS would have incorporated "Fundations," which the school psychologist described as an Orton-Gillingham based program (Tr. pp. 44, 53-54; Dist. Ex. 1 at p. 4). Additionally, consistent with the neuropsychologist's recommendation to increase the student's 1:1 speech-language therapy, the May 2013 CSE changed the student's speech-language therapy services from two group sessions per week to two individual sessions per week and one group session (Dist Exs. 1 at p. 2; 5 at p. 26; 6 at p. 11; compare Dist. Ex. 1 at p. 8, with Parent Ex. J at p. 5). The individual sessions were intended to address the student's specific language delay, while the group session was intended to address his expressive and social pragmatic needs and his ability to follow multi-step directions in the presence of auditory distractors (Dist. Ex. 1 at p. 2).

In consideration of the above, the hearing record supports finding that the recommendations made by May 2013 CSE were reasonably calculated to provide the student with a FAPE for the 2013-14 school year, and that in its totality, the May 2013 IEP would have conferred an educational benefit to the student in the least restrictive environment.

C. Assigned School Issues

The parents assert on appeal that the assigned public school site would not have been able to implement the May 2013 IEP because the school did not offer ICT services at the frequencies called for in the student's IEP (Pet. ¶¶ 36-37). However, the parents did not raise this as an issue in their due process complaint notice (see Dist. Ex. 8). 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]; B.M. v New York City Dep't of Educ., 2014 WL 2748756, at *2 [2d Cir. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]). Accordingly, the parents' claims related to the public school site which would have implemented the May 2013 IEP are outside of the scope of the impartial hearing.[23]

Nevertheless, even if the parents had properly raised this claim, the parents cannot prevail for reasons similar to those set forth in other decisions issued by the Office of State Review regarding implementation claims (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of a Student with a Disability, Appeal No. 13-237). The parents' claims regarding the frequency of the ICT services at the assigned public school site turn on how the May 2013 IEP would or would not have been implemented and, as it is undisputed that the student did not attend

[23] Upon review of the hearing record, although the district presented a witness from the assigned public school site, the only reference to the frequency of the ICT services was during cross-examination over an objection from the district's attorney (Tr. pp. 257-28), which is insufficient to indicate that the district opened the door to the parents' allegations regarding implementation of ICT services (see B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 249-50 [2d Cir. 2012]).

the district's assigned public school site during the 2013-14 school year (see Parent Ex. A), the parents' claim is speculative and they cannot prevail (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; C.L.K., 2013 WL 6818376, at *13; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

In summary, the district sustained its burden of establishing that the program recommended in the May 2013 IEP was reasonably calculated to address the student's needs. The necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Churchill was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
December 18, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER