The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-158

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:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 (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 student presents with scattered abilities and inconsistent functioning across multiple domains, including those related to cognitive, speech-language, visual-perceptual, and attending skills (Dist. Exs. 2 at pp. 2-3, 6-7; 3 at pp.1, 7-8; 10 at p. 1). He is described as social and cooperative; it was also noted that while the student exhibited a tendency to be easily distracted, he was responsive to "redirection, prompting, and cueing" (Dist. Exs. 2 at pp. 1-2, 8; 3 at p. 1; 10 at p. 2; 18 at p. 1; 20 at p. 1).

On February 22, 2013, the parents executed an enrollment agreement with Churchill for the student's attendance during the 2013-14 school year (see Parent Ex. I). On March 7, 2013, the CSE convened to develop the student's IEP for the 2013-14 school year (Dist. Ex. 6). Finding the

student eligible for special education and related services as a student with a speech or language impairment, the March 2013 CSE recommended placement in a general education classroom with 25 periods per week of integrated co-teaching (ICT) services, together with related services consisting of two 30-minute sessions per week of occupational therapy (OT) in a group of two, one 30-minute session per week of individual OT, two 30-minute sessions per week of speech-language therapy in a group of two, and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 1-2, 7-8).[1]

Based upon the parents' request, the CSE reconvened on May 9, 2013, to discuss the parents' concerns regarding the program recommended in the March 2013 IEP and the particular public school site to which the district had assigned the student to attend (Dist. Exs. 9; 10; 12; Parent Exs. A; B). The resulting IEP contained the same recommendations as the March 2013 IEP, with minor changes to the student's instructional levels and the addition of parental concerns based on their visit to the assigned public school site (Tr. pp. 182-83; compare Dist. Ex. 6 at pp. 7-8, 12-13, with Dist. Ex. 10 at pp. 7-8, 12-13; see Tr. pp. 249-52; Dist. Ex. 7 at p. 2).[2] By letter to the district dated June 13, 2013, the parents expressed their concern with the continued recommendation for ICT services, as well as the particular public school site they had visited, and requested "an alternate program" recommendation (Dist. Ex. 11).

By final notice of recommendation (FNR) dated June 14, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the same public school site as the school to which the district assigned the student to attend for the 2013-14 school year (Dist. Ex. 13; see Dist. Exs. 11; 12; Parent Exs. A; B). By letter dated July 24, 2013, the parents reiterated the concerns stated in their June 2013 letter and informed the district that the student was being evaluated by a neurologist, which would be forwarded to the district "for consideration at any review meeting" (Dist. Ex. 14). In a letter to the district dated August 6, 2013, the parents noted that, pursuant to a conversation on July 31, 2013, the district had indicated an unwillingness to reconvene the CSE; however, the parents requested that the CSE reconvene for a second time in order to discuss the results of a neurological evaluation conducted on July 31, 2013 (Parents Ex. C at p. 1; see Parent Ex. D). In a letter dated August 23, 2013, the parents advised the district that they were rejecting the May 2013 IEP as inappropriate for the student and that they planned to enroll the student in Churchill and seek public funding for the costs of the student's tuition for the 2013-14 school year (Dist. Ex. 15).[3]

[1] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute in this appeal (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] Because the March 2013 IEP was superseded as a result of the May 2013 CSE meeting prior to implementation, the resulting May 2013 IEP became the operative IEP for purposes of the impartial hearing and subsequent State-level review (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013]).

[3] Churchill 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. 625; see 8 NYCRR 200.1[d], 200.7).

A. Due Process Complaint Notice

In a due process complaint notice dated September 10, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Dist. Ex. 1). Initially, the parents alleged that the CSE failed to address their concerns, ignored the input of the student's teachers/providers, failed to discuss the student's annual goals during the May 2013 CSE meeting, and predetermined the student's educational program for the 2013-14 school year, which impeded the parents' opportunity to participate in the CSE meeting (id. at pp. 2-4). Additionally, the parents argued that the CSE's failure to reconvene a second time based on their request significantly impeded their opportunity to participate in the development of the student's IEP (id. at p. 5). Next, the parents contended that the annual goals were not appropriate and the May 2013 IEP failed to include appropriate management needs (id. at pp. 3-4).[4] The parents further contended that the recommended placement in a general education classroom with ICT services was inappropriate for the student (id. at p. 2). The parents also alleged that the assigned public school site was inappropriate for the student because the student would not be functionally grouped, and the school and proposed class were "overly large" for the student (id. at p. 4). Lastly, the parents alleged that Churchill was an appropriate unilateral placement for the student, and that there were no equitable considerations that would bar or diminish their request for relief because cooperated with the CSE (id. at p. 5). As relief, the parents requested reimbursement for the costs of the student's tuition at Churchill for the 2013-14 school year (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

After a prehearing conference on December 3, 2013, an impartial hearing was convened on the merits on December 10, 2013, and concluded on July 14, 2013, after nine days of proceedings (Tr. pp. 1-920). In a decision dated September 4, 2014, the IHO found that the district offered the student a FAPE for the 2013-14 school year (see IHO Decision at pp. 8-15). Specifically, the IHO found that the May 2013 IEP was developed with participation from the student's parents, teachers, providers, and evaluators (id. at p. 10). The IHO further found that the CSE considered a variety of evaluative information and that the May 2013 IEP was not predetermined but there was a "difference of opinion" (id. at p. 11). With respect to the parents' request to reconvene the CSE, the IHO found insufficient evidence in the hearing record that the district was aware of the parents' request (id. at pp. 14-15). The IHO further noted that even if the CSE had reconvened, it was not required to change the recommendation for ICT services based on the opinion of the private neurologist (id. at p. 15). Next, the IHO found that the recommendation for placement in a general education class with ICT services was "entirely reasonable" to attempt to provide the student with "a less restrictive approach . . . first, before subjecting the student to a far more restrictive setting" (id. at p. 13). With respect to the assigned public school site, the IHO

[4] The allegations in the due process complaint notice that the annual goals in the May 2013 IEP were not appropriate and the IEP failed to include appropriate management needs were neither addressed by the IHO nor advanced on appeal by the parents. Under the circumstances of this case, the parents have effectively abandoned this claim by failing to identify it in any fashion or make any legal or factual argument as to how it would rise to the level of a denial of a FAPE. Therefore, these claims will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

found that district was not obligated to "defend the details" of the assigned public school site because the parents never intended to enroll the student at the district school (id. at p. 10). Lastly, the IHO did not address whether Churchill was an appropriate unilateral placement for the student and, while noting "a concern" with respect to equitable considerations, declined to decide these issues in light of finding that the district offered the student a FAPE for the 2013-14 school year (id. at pp. 13-14). Thus, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition at Churchill for the 2013-14 school year (id. at p. 15).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 school year. More specifically, the parents argue that their participation was impeded in the development of the student's IEP because the CSE: (1) ignored their concerns during the March and May 2013 CSE meetings; (2) failed to consider the results of a December 2012 neuropsychological evaluation; (3) impermissibly predetermined the student's program recommendation; and (4) failed to discuss the annual goals during the May 2013 CSE meeting. The parents also argue that their participation was impeded because the CSE failed to reconvene the CSE based on their request to review the student's neurological evaluation. The parents further argue that the recommended placement in a general education class with ICT services was inappropriate for the student.

The district answers, denying the parents' material assertions and arguing that the IHO correctly concluded that the district offered the student a FAPE for the 2013-14 school year.

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. 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. Parental Participation

The parents allege on appeal that the district denied the parents the opportunity to meaningfully participate in the development of the student's IEP because the district ignored their concerns during the March and May 2013 CSE meetings, failed to consider the results of a December 2012 neuropsychological evaluation, impermissibly predetermined the program recommendation, and failed to discuss the annual goals during the May 2013 CSE meeting.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding 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"]; DiRocco v. Bd. of Educ., 2013 WL

25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

With respect to the parents' contentions that their concerns were ignored during the March and May 2013 CSE meetings, the district social worker who attended both CSE meetings testified that the parents disagreed with the CSE's recommended placement in a general education class with ICT services at both meetings (Tr. pp. 110, 180). The student's father testified that during the CSE meeting "we kept saying we were concerned about the size of the class and the ICT class" (Tr. p. 515). The student's father further testified that the CSE meeting "ended with a friendly agree to disagree" and that the CSE was "very supportive at the meeting, and it was a very supportive conversation" (id.). The student's special education itinerant teacher (SEIT) testified that at the time of the CSE meeting, she did not believe that a program offering ICT services would be appropriate for the student (Tr. p. 465). When asked by the parents' attorney whether she was able to voice her opinion during the CSE meeting, the student's SEIT answered "I did state my opinion. Again, I do hope that it was heard" (Tr. p. 466). The SEIT further testified that "I can't testify as to what they did not and did not hear, but I just found myself trying to repeat what I was saying, trying to interject without interrupting" (id.). In this regard, the hearing record shows that the parents and the student's providers participated, in part, by virtue of expressing their disagreement, and the fact that the CSE did not adopt those recommendations does not amount to a denial of meaningful participation (see DiRocco, 2013 WL 25959, at *20; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7).

With respect to the parents' assertion that the May 2013 CSE "ignored" the December 2012 privately-obtained neuropsychological evaluation report, it is well settled that 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 [2d Cir. 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]).

In this case, the hearing record indicates that the May 2013 CSE reviewed and considered the December 2012 neuropsychological report and incorporated details of the report into the May 2013 IEP (Tr. pp. 186-87). Specifically, the May 2013 IEP describes the student as sweet, social,

cooperative, and responsive to praise, language that is consistent with multiple evaluative reports, including the neuropsychological evaluation, the speech-language pathology assessment, a social worker's report, a SEIT report, and his OT annual review (Dist. Exs. 2 at p. 1; 3 at p. 8; 5 at p. 2; 10 at p. 1; 20 at p. 2). The IEP also highlights the student's processing difficulties noted in the December 2012 neuropsychological evaluation and the October 2012 speech-language assessment reports (Dist. Exs. 2 at pp. 2, 4, 7; 3 at p. 8; 10 at p. 1). Additionally, the May 2013 IEP acknowledges the student's difficulties with maintaining focused attention and his tendency to engage in impulsive behaviors at times, as indicated in the neuropsychological and speech–language pathology reports (Dist. Exs. 2 at pp. 2-3, 6; 3 at pp. 1-2, 7-8; 10 at p. 1).

With respect to the parents' assertion that the CSE predetermined the student's program recommendation, courts have determined that a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).

In the instant case, the district social worker who attended the March 2013 and May 2013 CSE meetings, testified that during the March 2013 CSE meeting, the CSE considered and rejected a general education setting because the student "presents as a student with some deficits" (Tr. pp. 104-05). The district social worker further testified that the CSE considered a general education setting with related services of speech-language and OT but it was rejected by the CSE because it was "not appropriate to meet [the student's] needs" (Tr. pp. 105-06). Additionally, the district social worker testified that the CSE considered and rejected special education teacher support services for the student because it was "not sufficient to meet [the student's] needs" (id.). The district social worker further testified that the CSE considered and rejected a 12:1 special class in a community school because it was "too restrictive" and the student would be able to "access the general ed curriculum" based on his "cognitive profile and relative strengths" (Tr. pp. 106-07). Thus, there is no basis in the hearing record for a finding that the district predetermined the student's placement recommendation (see also B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [rejecting claim of predetermination where the record reflected participation by the parents in the development of the student's program]).

With respect to the parents' contention that the CSE failed to discuss the annual goals during the May 2013 CSE meeting, the district social worker testified that the student's annual goals were discussed during the March 2013 but she did "not recall having discussed the goals at the second [CSE] meeting" (Tr. pp. 181-82). The student's father testified that he did not know if the student's annual goals were discussed during the May 2013 CSE meeting, but indicated that when he received the March 2013 IEP before the May 2013 CSE meeting, he was not concerned with the annual goals as they "were not the first thing on his plate" (Tr. pp. 528, 561-62). The student's father further testified that "he needed to push for Churchill" and the goals were just "stamped out goals" that felt like "arbitrary information" (Tr. p. 561). To the extent that the failure to discuss the annual goals at the May 2013 CSE meeting may have constituted a procedural violation, the hearing record does not contain sufficient evidence upon which to conclude that such a procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, especially as here the parents did not raise any concerns about or ask to discuss the annual goals at the May 2013 CSE meeting (20 U.S.C.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H., 394 Fed. App'x at 720; see Matrejek, 471 F. Supp. 2d at 419).[5]

While the parents would have preferred that the CSE recommend Churchill, the district representative testified that the CSE "felt that based on his cognitive profile . . . [ICT services] could meet [the student's] needs in spite of his language delays, which we could also address through speech therapy, and his fine motor delays which we could address through OT" (Tr. p. 119). Thus, the parents' dissatisfaction with the CSE's ultimate recommendation of an ICT program recommendation does not establish that their participation in the development of the student's IEP was significantly impeded or that the CSE's recommendation was predetermined.

B. Request to Reconvene

The parents assert that the district's failure to reconvene the CSE a second time in August 2013 in response to their request significantly impeded their right to participate in the development of the student's IEP. For the reasons set forth below, the hearing record reveals that the district's failure to reconvene the CSE did not impede the parents' right to participate in the development of the student's IEP.

In addition to a district's obligation to review the IEP of a student with a disability at least annually, federal and State regulations also require a CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, 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 Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In the instant case, the CSE convened on March 7, 2013, to develop the student's IEP for the 2013-14 school year (Dist. Ex. 6). The district social worker testified that during the March 2013 CSE meeting, the parents were not receptive to the March 2013 CSE's recommendation for placement in a general education class with ICT services for the student, and as a result, the CSE recommended that the parents visit the assigned public school site (Tr. p. 111). After visiting the assigned public school site, the parents notified the principal of the assigned school, via letter dated April 2, 2013, that the "ICT classroom is not appropriate given [the student's] documented needs"

[5] As noted above, the parents continue on appeal to challenge the process by which the annual goals were developed, but raise no deficiencies regarding the actual content of the goals.

and therefore, requested that the CSE reconvene in order to "discuss and determine an appropriate program" (Parent Ex. A). By letter dated to the district dated April 17, 2013, the parents reiterated their concerns regarding the recommended program and requested that the CSE reconvene to develop an appropriate IEP for the student (Parent Ex. B)

In response to the parents' request, the CSE reconvened on May 9, 2013, in order to discuss the parents' visit to the assigned public school site and to reconsider the March 2013 CSE's recommendation for placement in a general education class with ICT services for the student (Dist. Ex. 10). According to testimony from the district social worker regarding the May CSE meeting, she stated that after listening to the parents' concerns, the May 2013 CSE considered the student's strengths and weaknesses and ultimately decided that the student would "benefit" from placement in a general education class with ICT services (Tr. pp. 178-89). The district social worker further testified that the May 2013 CSE advised the parents that "we would agree to disagree" (Tr. p. 179). Subsequent to the May 2013 CSE meeting, the parents sent a letter to the district on July 24, 2013, expressing their disagreement with the recommendation for the student and requesting an "alternate program" (Dist. Ex. 14 at pp. 1-2). The parents also advised the district that the student was in the process of being evaluated by a neurologist (id. at p. 2). A district administrator testified that in response to the parents' July 24, 2013 letter, she called the student's father and stated that in order for the CSE to "entertain revisiting the IEP to make a new recommendation," the CSE would need "new documentation from a medical doctor" (Tr. p. 288). By letter to the district administrator dated August 6, 2013, the parents requested that the CSE reconvene a second time in order to discuss a neurological clinical summary, which recommended a "small class with a great deal of individual support" for the student (Parent Exs. C; D). The district administrator testified that she did not receive the parents' letter of August 6, 2013 (Tr. pp. 289-90).

With respect to the parents' contention that their right to participate in the development of the student's IEP was impeded due to the district's failure to respond to the parents' request to reconvene the CSE for a second time, the IHO found that the parents' participation was not impeded. First, the IHO found that the hearing record lacked proof that the parents' August 2013 letter reached the district administrator (IHO Decision at pp. 14-15). The IHO further found that even if the CSE reconvened for a second time, it would have been unlikely that there would be a change in the CSE's recommendation based on the neurological clinical summary (id. at p. 15). Setting aside the IHO's finding that the hearing record lacked proof that the August 2013 letter was received by the district administrator on the basis that the hearing record contains a "certified mail receipt" and "tracking information," which adequately support a finding that the parents mailed the letter, along with the neurological update, to the district administrator, and that they were received (Parent Ex. C at p. 2; N), I nonetheless adhere to his ultimate determination. To the extent that the district erred in failing to reconvene the CSE for a second time, especially after the district administrator advised the parents that the CSE would reconvene after new documentation became available, or to provide the parents with prior written notice stating the reasons why the district did not believe it was necessary to reconvene the CSE, the information in the neurological clinical summary did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by the May 2013 CSE became inappropriate as a result. Thus, based on

the unique circumstances of this case, the parents' participation was not impeded based on the CSE's failure to reconvene the CSE a second time.[6]

C. Integrated Co-Teaching Services

The parents contend on appeal that placement in a general education class with ICT services was not reasonably calculated to address the student's needs. More specifically, the parents argue that the information before the CSE demonstrated that the student required a small, specialized school environment. Upon review of the evidence in the hearing record, the IHO properly concluded that the May 2013 CSE's recommendation of a general education classroom with ICT services was reasonably calculated to provide educational benefit to the student.

According to State regulation, a school district may include ICT services in its continuum of services (8 NYCRR 200.6[g]). State regulation defines 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]). In addition, State regulation requires that personnel assigned to each class providing such services "shall minimally include a special education teacher and a general education teacher," and "the number of students with disabilities in such classes shall not exceed 12 students (8 NYCRR 200.6[g][1]-[2]).

In the instant case, the hearing record reveals that the March 2013 CSE reviewed sufficient and current evaluative information regarding the student's functioning (Tr. pp. 40, 46-50, 66-67, 73-78, 352-53). As noted above, nearly all of the information memorialized in the March 2013 IEP was carried over to the May 2013 IEP (Tr. pp. 173, 178; compare Dist. Ex. 6 at pp. 1-3, with Dist. Ex. 10 at pp. 1-3). Specifically, the May 2013 IEP incorporated aspects of information drawn from a October 2012 speech-language pathology assessment, a November 2012 Committee on Preschool Special Education (CPSE) speech-language progress report, a November 2012 OT annual report, a December 2012 neuropsychological evaluation report, a February 2013 evaluation report prepared by the district social worker, and an undated report authored by the student's SEIT (Dist. Ex. 7 at p. 2; compare Dist. Ex. 10 at pp. 1-2, with Dist. Ex. 2 at pp. 2, 7, 8, and Dist. Ex. 3 at pp. 2-8, and Dist. Ex. 5 at pp. 2-4, and Dist. Ex. 18 at pp. 1-2, and Dist. Ex. 19 at pp. 1-2, and Dist. Ex. 20 at pp. 1-2). The hearing record also indicates that the CSE considered verbal input provided by meeting participants, who included the student's parents, the neuropsychologist who authored the December 2012 evaluation report, the district social worker, a general education teacher, a special education teacher, and a school psychologist (Tr. pp. 66, 143-44, 176-180, 184, 187, 192, 352).[7]

According to the December 2012 neuropsychological evaluation report, the student's overall "cognitive potential is at least within the high average range," despite some scatter in the student's performance on the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) (Dist. Ex. 2 at p. 3). Further, the evaluator opined that in light of the scatter of the

[6] Nonetheless, the district is cautioned to comply with federal and State requirements that it provide the parents with prior written notice on the form prescribed by the Commissioner (34 CFR 300.503; 8 NYCRR 200.5[a]).

[7] The student's SEIT also participated in the March 2013 CSE meeting and her input was recorded in both the March and May 2013 IEPs (Tr. pp. 41, 44-45; Dist. Exs. 6 at p. 1; 10 at p. 1).

WPPSI-IV composite scores, the student's overall IQ of 103 (58th percentile), which was within the average range, was "likely an underestimate of [the student's] potential" (id.). Additionally, the neuropsychological evaluation stressed that the student benefitted from "structure and routine" and "redirection and prompting to aid with attention and language difficulties" (id. at p. 2). Although the November 2012 neuropsychological evaluation report recommended that the student attend a "small, language-based special education class" (id. at p. 8) and the parents assert that the student required a smaller class than the recommended general education setting with ICT services, what constitutes a "small class" is not defined in the hearing record, and it is questionable whether or not a small class size, in and of itself, constitutes special education (see Frank G. v. Bd. of Educ., 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; see also M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] ["That the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"]).

An observation report by the social worker indicated that the student attended to and participated in small and larger group activities, and with limited prompting, the student served as the "weather helper" during a whole class lesson (Dist. Ex. 5 at pp. 1-2). The May 2013 IEP also incorporated input from the student's SEIT, who participated in the March 2013 CSE meeting; specifically, the IEP denotes that the student was able to engage during teacher-led activities for "at least 10 minutes," could follow single-step directions with ease, and was progressing towards following multi-step commands, observations noted in the SEIT's report (Dist. Exs. 10 at p. 1; 20 at pp. 1-2). The student's increasing ability to maintain focused attention and motivation was echoed in the student's OT annual review report as well as in the May 2013 IEP (Dist. Exs. 10 at p. 1; 18 at p. 1). Information from the student's OT annual review indicating the student did "not display any difficulties processing tactile (touch) input," was also reflected in the student's May 2013 IEP, as was the therapist's assertion that continued delays in fine-motor, visual-perceptual, and self-help skills hampered the student's "ability to function effectively" (Dist. Exs. 10 at pp. 1-2; 18 at p. 1-2).

The May 2013 IEP present levels of performance, which are not in dispute, reflect, among other things, that the student is social and responds well to praise and breaks (Dist. Ex. 10 at pp. 1-2). The May 2013 IEP also indicated that the student has issues with distractibility and impulsivity, but that he benefits from instructional strategies, such as repeating directions and questions, providing visual cues and prompts to refocus the student's attention to the task at hand, all of which are consistent with recommendations and observations recorded in multiple evaluative reports, including the neuropsychological evaluation, October 2012 speech-language pathology assessment, November 2012 CPSE speech-language progress report, and the OT annual review (Dist. Exs. 2 at pp. 2, 9; 3 at p. 8; 10 at p. 1; 18 at p. 2; 19 at pp. 1-2). In addition, the student demonstrated the ability to function effectively and benefit from instruction in his integrated preschool classroom, as documented in classroom observations by the neuropsychologist and the district social worker (Dist. Exs. 2 at pp. 2-3; 5 at pp. 1-2). Within the integrated preschool classroom setting, with approximately twelve students, one teacher and three additional staff, the student demonstrated growth across academic and social-emotional domains, and was estimated to be functioning at or near expected levels for a child his age (Tr. pp. 59-60; Dist. Exs. 2 at pp. 2-3; 5 at pp. 1-3).

Thus, given the student's relative cognitive and academic strengths and growth in his integrated preschool classroom, the hearing record supports a finding that the May 2013 CSE's recommendation for ICT services, along with related services, was reasonably calculated to enable the student to receive educational benefit (Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

D. Challenges to the Assigned Public School Site

Finally, the parents assert, that the IHO erred in "minimizing" the district's obligation to defend the assigned public school site. The district argues that any claims regarding the appropriateness of the assigned public school site are speculative insofar as the parents rejected the May 2013 IEP prior to the time when the district became obligated to implement the May 2013 IEP. As explained more fully below, the parents' assertions must be dismissed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see R.B. v. New York City Dep't of Educ., 2014 WL 5463084, at *4 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the determination of the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]; Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).[8]

[8] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's

In view of the foregoing, the IHO properly concluded that the parents could not prevail on claims regarding implementation of the May 2013 IEP because a retrospective analysis of how the district would have implemented the student's May 2013 IEP at the assigned public school site was not an appropriate inquiry under the circumstances of this case. Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the May 2013 IEP (see Dist. Exs. 10; 15). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims regarding the assigned public school site.[9]

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Churchill was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 5, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

[9] Furthermore, the parents do not assert any claims on appeal with regard to why the assigned public school site would not have been capable of implementing the student's IEP.