The University of the State of New York

The State Education Department
State Review Officer
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No. 15-039

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

Appearances:
The Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied the parent's request to be reimbursed for the costs of the student's tuition at the Jewish Center for Special Education (JCSE) for the 2012-13 and 2013-14 school years. 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

In this case, the student began attending JCSE in September 2010 (see Tr. pp. 191-92, 305).[1] During the 2011-12 school year, the student attended an ungraded classroom at JCSE, which consisted of approximately eight students, one "teacher," and two "assistants," and which reportedly followed a "second grade curriculum" (see Dist. Ex. 6 at p. 1; see also Tr. pp. 43-46, 51-53).[2]

On May 8, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (fourth grade) (see Dist. Ex. 7 at pp. 1, 10; see also Tr. pp. 51-53, 189-90). Finding that the student remained eligible for special education and related services

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

[2] Chronologically, the student was a third grade student during the 2011-12 school year (see Tr. pp. 51-53, 189-93; Dist. Ex. 6 at p. 1).

as a student with a learning disability, the May 2012 CSE recommended integrated co-teaching services (ICT) in a general education classroom at a community school, in addition to the following related services: two 30-minute sessions per week of speech-language therapy in a group, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of individual occupational therapy (OT) (see Dist. Ex. 7 at pp. 1, 7-8, 10-11).[3] The May 2012 CSE also developed annual goals to address the student's needs (id. at pp. 3-7).

In a final notice of recommendation (FNR) dated August 8, 2012, the district summarized the special education and related services recommended in the May 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 9).

In a letter dated August 22, 2012, the parent advised the district that she could not visit the "placement recommendation for a CTT class" at the assigned public school site because it was closed for the summer (see Dist. Ex. 10).[4] The parent requested information regarding the assigned public school site, including a "class profile" to "determine if this placement would appropriately meet [the student's] needs" (id.). In addition, the parent noted that she continued to have "concerns" regarding the ICT "class," based upon previous visits, including the number of students in the classroom and that the students "followed [a] grade-level curriculum" (id.). According to the parent, the student would not receive the "level of individualized instruction and support" she required in such a "large class" (id.). In addition, the parent indicated that the student was "very distractible and need[ed] significant academic support in a small setting" (id.). Moreover, the parent expressed concern that the student could not "follow instruction in a class that follow[ed] grade-level curriculum" (id.). Although the parent indicated that she would visit the assigned public school site when it opened, she notified the district of her intention for the student to attend JCSE (id.). Lastly, the parent informed the district that if the "program and IEP" were not appropriate, she would seek reimbursement of or funding for the costs of the student's tuition at JCSE (id.).

On August 29, 2012, the parent executed an enrollment contract with JCSE for the student's attendance for the 2012-13 school year (see Parent Ex. B; see also Parent Ex. C).

In a letter dated October 23, 2012, the parent advised the district that she visited the assigned public school site in September 2012, and based upon the visit and her observations, the parent rejected the May 2012 IEP and assigned public school site (see Dist. Ex. 13). According to the parent, the "classroom was much too large" for the student, and as discussed at the May 2012 CSE meeting, the student needed a "very small class with a lot of individualized support" (id.). In addition, the parent described the "classroom lesson" she observed as "much more advanced than [the student] would be able to handle" and further noted that the "class follow[ed] grade level instruction" (id.). The parent also noted that based upon the observed "math lesson" at the assigned public school site, the student "would be incredibly lost in this classroom setting" given her difficulties with academics, as well as her difficulties with comprehension (id.). In addition, the

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

[4] Although the parent referred to the "placement recommendation" in the August 22, 2012 letter as a "C[ollaborative] T[eam] T[eaching] class" (CTT), for consistency with State regulations, this decision will refer to the recommended placement as "ICT services" (see 8 NYCRR 200.6[g]).

parent indicated that the student would not be able to "transition throughout the day" as expected, and the school building was "much too large and overwhelming" for the student (id.). As such, the parent advised the district that she had "no choice but to keep" the student at JCSE for the 2012-13 school year and to seek reimbursement of or funding for the costs of the student's tuition (id.).

The student attended JCSE for the 2012-13 school year (see generally Parent Exs. D-F).

On May 7, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (fifth grade) (see Dist. Ex. 18 at pp. 1, 9-10; see also Tr. pp. 189-90).[5] Having found that the student remained eligible for special education and related services as a student with a learning disability, the May 2013 CSE recommended a 12:1+1 special class placement at a community school with related services consisting of two 30-minute sessions per week of individual OT, two 30-minute sessions per week of speech-language therapy in a group, and one 30-minute session per week of individual speech-language therapy (see Dist. Ex. 18 at pp. 1, 6-7, 9-10). The May 2013 CSE also developed annual goals to address the student's needs (id. at pp. 3-6).[6]

In an FNR dated July 25, 2013, the district summarized the special education and related services recommended in the May 2013 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (see Dist. Ex. 19).

In a letter dated August 22, 2013, the parent advised the district that she could not visit the "placement" at the assigned public school site because it was closed for the summer (see Dist. Ex. 20). The parent requested information regarding the assigned public school site, including a "class profile" to "determine if this placement would appropriately meet [the student's] needs" (id.). Additionally, the parent indicated that she had "concerns with the size of the class" recommended for the student, who required "a lot of 1:1 support throughout the day" (id.). According to the parent, the student was "very distractible" and needed "significant academic support in a small class setting" (id.). The parent further indicated that the student "should be placed with students who [we]re on a similar level" (id.). Next, the parent noted that the district assigned the student to attend the same public school site for the prior school year, "but for a different program," and she questioned whether the student would be expected to "transition for every class in a school of over 600 students" (id.). The parent noted that the student would be "completely overwhelmed in this setting" and she required a "small, structured program for the entire school day" (id.). With respect to the May 2013 IEP, the parent expressed concern that the annual goals did not address the student's needs, noting that the IEP included only two annual goals related to mathematics and failed to include any annual goals to improve the student's ability to read sight words (id.). Additionally, the parent indicated that the student already met one of the annual goals in the May 2013 IEP, and the annual goal related to reading comprehension—as well as additional annual goals on the following page of the IEP—did not "specify grade level" (id.). The parent further described the management needs in the May 2013 IEP as "inadequate" and indicated that the promotion criteria was a "low standard" (id). Lastly, the parent indicated that the May 2013 IEP

[5] As noted on the May 2013 IEP, the student currently attended an "ungraded class" at JCSE, and as reported by the student's teacher, the student was "being taught a 4th grade curriculum" (Dist. Ex. 18 at p. 1). The May 2013 IEP further noted that "[n]ext year the student would enter a "5th grade class" (id.).

[6] The district provided the parent with a prior written notice, dated May 7, 2013 (see generally Dist. Ex. 14).

failed to "give sufficient information" to a teacher responsible for implementing the IEP (id.). Although the parent indicated that she would visit the assigned public school site when it opened, she notified the district of her intention for the student to attend JCSE (id.). Also, the parent informed the district that if the "program and IEP" were not appropriate, she would seek reimbursement of or funding for the costs of the student's tuition at JCSE (id.).

On September 9, 2013, the parent executed an enrollment contract with JCSE for the student's attendance for the 2013-14 school year (see Parent Ex. G; see also Parent Ex. H). The student attended JCSE during the 2013-14 school year (see generally Parent Exs. J-L).

In a letter dated September 23, 2013, the parent advised the district that she visited the assigned public school site in September 2013, and based upon the visit and her observations, the parent rejected the "recommended placement" (see Dist. Ex. 21). According to the parent, the observed "class" combined fifth, sixth, and seventh grade students, and used seventh grade textbooks that "would be far too much of a challenge for [the student]" (id.). The parent also noted that there was "no behavior intervention plan in place" (id.). Moreover, the parent indicated that because the student was "easily distracted" and had "focusing issues," the student needed a "behavior plan with frequent rewards at frequent intervals to stay on task and complete assignments" (id.). According to the parent, the student would not receive the "attention she need[ed] in this environment" (id.). As such, the parent indicated that the student would enroll the student at JCSE and request an impartial hearing for the costs of tuition for the 2013-14 school year (id.).

A. Due Process Complaint Notice

By due process complaint notice dated December 8, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years (see Parent Ex. A at p. 1). With respect to the 2012-13 school year, the parent indicated that the May 2012 CSE did not "test the student in preparation for the IEP meeting and relied upon reports and input from the school personnel in creating the body of the IEP" (id. at p. 2). In addition, the parent noted that although the student's "speech and language skills" constituted her "greatest area of deficit," the May 2012 CSE "classified the student as [l]earning [d]isabled" (id.). Next, the parent asserted that the May 2012 CSE did not meaningfully consider the parent's input or input provided by JCSE personnel attending the CSE meeting with regard to the recommended ICT services and in the development of the IEP (id.). The parent further asserted that the recommended ICT services were not appropriate in light of the student's "severe expressive and receptive speech and language delays and anxiety," noting that the student would be "totally overwhelmed [in] a large ICT class," and she would be grouped with students who were on "grade level" (id.). Additionally, the parent alleged that the May 2012 CSE failed to include "any goals objectives" to address the student's "communication of her feelings without whining, sulking or attempting to leave the classroom or escape the social situation" (id. at pp. 2-3). Overall, the parent indicated that the May 2012 IEP failed to include sufficient annual goals related to the student's speech-language needs and failed to include any annual goals to address the student's social communication needs or her attention and focus needs (id. at p. 3). Finally, the parent alleged that the assigned public school site was not appropriate for the student because it was "too large and overwhelming" for the student (id.). The parent further asserted that the assigned public school site was not appropriate because the parent observed a mathematics lesson in "ICT class" and she was concerned that the "manner in which the lesson was being taught would be too advanced for [the student] to follow" (id.).

Regarding the 2013-14 school year, the parent continued to assert that although the student's "speech and language skills" constituted her "primary disability," the May 2013 CSE continued to "classify the student as a student with a learning disability" (Parent Ex. A at p. 3). Additionally, the parent alleged that the May 2013 IEP lacked "social communication goals," in addition to annual goals to address the student's "immature behaviors, anxiety and frustration stemming from her language and communication deficits" (id. at pp. 3-4). The parent further alleged that the assigned public school site was not appropriate for the student because there was "no classroom behavioral plan" and the textbook in use during the parent's visit to the assigned public school site "would be far too advanced" for the student (id. at p. 4). As relief for the district's failure to offer the student a FAPE for the 2012-13 and 2013-14 school years, the parent requested reimbursement of or funding of the costs of the student's related services and tuition at JCSE for the 2012-13 and 2013-14 school years, as well as the provision of transportation services (id.)

B. Impartial Hearing Officer Decision

On January 16, 2014, the IHO conducted a prehearing conference, and on March 10, 2014, the parties proceeded to an impartial hearing, which concluded on December 14, 2014 after three days of proceedings (see Tr. pp. 1-462). In a decision dated February 24, 2015, the IHO concluded that the district offered the student a FAPE for the 2012-13 and 2013-14 school years (see IHO Decision at pp. 10-14). Initially, the IHO found that the evidence in the hearing record did not support the parent's contention that the student's "anxiety and behavior"—as described at the CSE meeting by the parent or "school personnel"—warranted a "more restrictive setting or a behavior modification plan" (id. at pp. 10-11). Moreover, the IHO found that based upon the information provided to the CSE by the parent and "private school personnel," the annual goals for the 2012-13 and 2013-14 school years were appropriate to meet the student's needs (id. at p. 11). Additionally, the IHO determined that the "program recommendations where the goals would be delivered" were reasonably calculated to enable the student to receive educational benefits; therefore, the IHO "dismissed" the parent's challenge to the district's programs (id.). Next, the IHO found that the "IEP reflect[ed] accurate information," provided "for the most part" by the student's JCSE "teachers and related service providers (id. at p. 14). Regarding the student's "social or behavioral difficulties," the IHO concluded that the description of the student's "functioning was clearly more severe" as described during the impartial hearing than the information shared at the May 2012 CSE or May 2013 CSE meetings (id.). In addition, the IHO found that the parent and "school staff participated" in the meeting and "shared current information" about the student; therefore, the IHO concluded that the parent was not precluded from "sharing the information necessary for the CSE to develop an appropriate program" (id.). Lastly, the IHO found that the evidence in the hearing record supported the district's recommendations for ICT services during the 2012-13 school year, as well as the recommendation for a 12:1+1 special class placement during the 2013-14 school year (id.).

Although the IHO concluded that the district offered the student a FAPE for the 2012-13 and 2013-14 school years, the IHO nonetheless determined that JCSE was not an appropriate unilateral placement for the student (see IHO Decision at pp. 14-15). In addition, the IHO further found that the hearing record did not contain any evidence to support a finding that equitable considerations warranted a reduction or denial of relief in this instance (id. at pp. 15-16).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in concluding that the district offered the student a FAPE for the 2012-13 and 2013-14 school years. Generally, the parent asserts two bases for the appeal: first, the district failed to sustain its burden of proof to establish that the "program recommendation and placement" were reasonably calculated to provide the student with "personalized instruction with sufficient support services" to enable the student to receive educational benefits; and second, the IHO erred in finding that the student did not make academic progress at JCSE, which resulted in the IHO's determination that JCSE was not an appropriate unilateral placement. More specifically and with respect to the 2012-13 school year, the parent alleges that the evidence in the hearing record did not support the IHO's finding that the student did not require a more restrictive setting or a behavior modification plan. In addition, the parent argues that the May 2012 CSE—as evidenced, in particular, by the testimony of the district's sole witness at the impartial hearing—impermissibly predetermined the recommended ICT services and ignored the parent's concerns about the size of the class, which deprived the parent of the opportunity to meaningfully participate in the "CSE program development process."[7] The parent further asserts that the May 2012 CSE's decision to recommend ICT services without behavioral supports was not reasonably calculated to enable the student to make "meaningful progress." Regarding the 2013-14 school year, the parent alleges that the May 2013 IEP failed to address the student's "anxiety, behavioral issues," and "focusing issues," as well as her "frustration." The parent also alleges that the district failed to establish that the assigned public school site was appropriate for the student. In particular, the parent argues that during a visit to the assigned public school site, she observed a class using a seventh grade textbook, which was not appropriate for the student, and the assigned public school site could not address the student's "speech delays, anxiety and behavioral issues." The parent also alleges that the IHO erred in concluding that JCSE was not an appropriate unilateral placement for the student. Finally, the parent contends that the IHO

[7] The parent also alleged that the district's witness at the impartial hearing—namely, the district special education teacher who attended both the May 2012 CSE meeting and the May 2013 CSE meeting—demonstrated bias in favor of recommending ICT services and bias against recommending behavioral supports for the student, and overall, lacked credibility (see Dist. Exs. 7 at p. 12; 18 at p. 12; Pet. ¶¶ 54-56, 58-59, 61-62, 65, 68-69). Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the parent does not allege that the IHO erred in making any credibility findings; rather, the parent's allegations appear to challenge the weight that should be afforded to the district special education teacher's testimony (see generally Pet. ¶¶ 54-56, 58-59, 61-62, 65, 68-69).

correctly found that equitable considerations weighed in support of the requested relief for both the 2012-13 and 2013-14 school years.[8]

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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

[8] While adverse to the parent, the parent did not appeal the IHO's findings that the annual goals in the May 2012 IEP and the May 2013 IEP were appropriate, the "program recommendations where the goals would be delivered" were reasonably calculated to enable the student to receive educational benefits, the IEPs reflected accurate information provided for the most part by the student's teachers and related service providers, and that the hearing record did not contain sufficient evidence to support that the psychoeducational evaluation of the student was "flawed in any way" (compare IHO Decision at pp. 11, 14-15, with Pet. ¶¶ 7-8, 11, 13, 45-88). Therefore, the IHO's determinations as set forth above are final and binding on the parties and will not be further addressed (see IHO Decision at p. 11; 34 CFR 300.514[a]; 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]). Similarly, to the extent that the parent challenged whether the May 2012 CSE and May 2013 CSE properly identified the student's disability category as learning disabled as opposed to speech or language impairment, the IHO found that the evidence in the hearing record did not "support a finding concerning [the student's] classification" (compare Parent Ex. A at pp. 2-3, with IHO Decision at p. 3). On appeal, the parent does not challenge the IHO's finding or continue to advance any arguments related to the student's disability category (compare IHO Decision at p. 3, with Pet. ¶¶ 6-15, 45-88). As such, the issue will not be further addressed upon review.

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. May 2012 CSE Process--Parental Participation/Predetermination

The parent alleges that by ignoring her concerns and the JCSE program director's concerns expressed at the May 2012 CSE meeting about the "large class size, the [s]tudent's need for individual attention, and the [s]tudent's behavioral needs," the May 2012 CSE impermissibly predetermined the recommended ICT services and deprived the parent of the opportunity to "meaningfully participate in the CSE program development process." The district rejects the parent's contentions, arguing that the May 2012 CSE considered other placement options for the student and allowed the parent and the JCSE attendees to voice their concerns at the May 2012 CSE meeting. As explained more fully below, a review of the evidence in the hearing record fails to support the parent's allegations.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella v. Dist. of Columbia, 210 Fed. App'x 1, 2006 WL 3697318, *1 [D.C. Cir. Dec. 6, 2006]). "'[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of

Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

A 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 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, at 506 [S.D.N.Y. 2008]). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco, 2013 WL 25959, at *18).

In this instance, the evidence in the hearing record demonstrates that the May 2012 CSE provided the parent and the JCSE personnel with an opportunity to participate at the May 2012 CSE meeting, and more specifically, in the decision to recommend ICT services for the student. At the impartial hearing, the JCSE program director testified that she attended the May 2012 CSE meeting "primarily to support" the parent and to "make sure that [the CSE] really got a general picture of who [the student] was and what her needs were" (Tr. pp. 365-66; see Tr. p. 298; Dist. Ex. 7 at p. 12). The parent testified that she and the JCSE personnel attending the meeting actively participated in the May 2012 CSE meeting, and she further confirmed that the information in the May 2012 IEP was consistent with her recollection of what they shared during the May 2012 meeting (Tr. pp. 234-35; see Dist. Ex. 7 at p. 2). Regarding the decision to recommend ICT services, the parent testified that throughout the discussion she repeatedly reminded the district special education teacher that the student currently attended a "'class of eight children'" and both the JCSE program director and the student's then-current teacher voiced disagreement with the recommended ICT services (Tr. pp. 235-36; see Tr. pp. 199-200). In addition, the parent testified that she advised the May 2012 CSE that the student required a "smaller setting" but, according to the parent, the district special education teacher was not "really listening" to her while she explained to the parent why the ICT services were appropriate for the student (Tr. p. 240). The JCSE program director testified that she voiced her objections to the recommended ICT services during the May 2012 CSE meeting; however, the May 2012 CSE indicated that "anything else would be too restrictive" for the student, and she recognized that the CSE considered her viewpoint (Tr. pp. 396-97).

In addition to the foregoing, the May 2012 IEP indicates that the CSE considered but rejected other placement options for the student, including a special class placement at a community school, because the student had "higher skills" and could "benefit from an ICT program" (Dist. Ex. 7 at p. 11; see Tr. pp. 68, 123-24). Although the parent could not recall at the impartial hearing whether the May 2012 CSE discussed a smaller class setting for the student, the district special education teacher testified that the CSE described a 12:1 special class or 12:1+1

special class placement to the parent—denoted simply as "special class" in the IEP—and that the parent understood (Tr. pp. 123-24, 239; see Dist. Ex. 7 at p. 11). The May 2012 IEP also documented that the parent expressed concerns about whether the student would receive "adequate attention within a larger class setting (Integrated Co-Teaching) as recommended" and that the student required "multi-step directives broken down for her" (Dist. Ex. 7 at p. 11). Accordingly, the hearing record contains sufficient evidence to demonstrate that the parent and the JCSE program director were afforded an opportunity to participate at the May 2012 CSE meeting, in part, by expressing their disagreement with the recommended placement, and although May 2012 CSE did not adopt the parent's preferences in this regard, "[m]eaningful participation does not require deferral to parent choice" (Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7). In addition, the evidence in the hearing record indicates that the May 2012 CSE remained open minded and listened to the parent's objections to the recommended ICT services, and thus, the hearing record does not support the parent's contention that the May 2012 CSE impermissibly predetermined the recommended ICT services.[9]

B. May 2012 IEP—ICT Services

The parent next asserts that the recommended ICT services in a general education setting—without behavioral supports—was not reasonably calculated to enable the student to make "meaningful progress." The district argues that while the student exhibited "some social and learning deficits", the May 2012 IEP addressed these needs through various strategies, and in light of the student's overall cognitive, academic, social, and physical strengths, ICT services in a general education setting was an appropriate recommendation for the student. As explained more fully below, a review of the evidence in the hearing record does not support the parent's contentions.

In this instance, although the sufficiency of the student's present levels of performance and individual needs as described in the May 2012 IEP are not disputed, a discussion thereof provides context for the issue to be resolved—namely, whether the ICT services in a general education classroom—together with related services, annual goals, and strategies to address the student's management needs—were appropriate to meet the student's needs. According to the evidence in the hearing record, the May 2012 CSE relied upon and considered the following evaluative information in the development of the May 2012 IEP: a February 2012 JCSE progress report, a February 2012 JCSE speech-language progress report, a March 2012 classroom observation report, and an April 2012 JCSE OT update (see Tr. pp. 49-50, 129, 134; Dist. Exs. 3-6). Overall and as described more fully below, the May 2012 IEP accurately identified and reflected the student's

[9] Once the May 2012 CSE determined that ICT services in a general education setting was appropriate for the student, the CSE was not obligated to consider a more restrictive placement or a placement with a smaller class size as the parent suggests (see, e.g., B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]).

needs as presented in the evaluative information available to the May 2012 CSE (compare Dist. Ex. 7 at pp. 1-2, with Dist. Ex. 4, and Dist. Ex. 5 at pp. 1-2, and Dist. Ex. 6 at pp. 1-2).

Initially, the May 2012 IEP characterized the student as "conscientious" and as someone who completed her homework everyday (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 1). With respect to reading, the May 2012 IEP reflected the student's decoding skills as at the end of the second grade level, and the IEP further noted that her decoding skills could be characterized by deficits in phonemic awareness (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 4, and Dist. Ex. 5 at p. 1, and Dist. Ex. 6). According to the May 2012 IEP, the student's providers employed rhyming games to address phonemic awareness, which helped the student to decode pairs of rhyming words (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 4). In addition, the May 2012 IEP reflected that the student presented with deficits in reading comprehension and that she had difficulty with figuring out the main idea of a passage (id.). While the May 2012 IEP indicated that the student was not a fluent reader, it also noted improvement in her ability to read faster (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 5 at p. 1). Moreover, the May 2012 IEP noted that despite a 25-word increase in the student's sight word vocabulary, the student struggled when reading multisyllabic words (id.). Consistent with the February 2012 JCSE progress report, the May 2012 IEP noted that the student's providers used a "motivation system" to help the student read multisyllabic words and that the student's comprehension skills had improved (id.). The May 2012 IEP further indicated that the student could answer literal and "'wh'" questions, as well as sequence the events in a story when she read in the reading center along with her teacher (id.). According to the IEP, the student could also "state the cause and the effective parts of the story," and would often make "personal connections between her life and parts of a story" (id.). The May 2012 IEP further noted that the student had a harder time discriminating between the main idea and supporting details of a story and that small group instruction helped keep the student focused (id.).

According to the May 2012 IEP, the student correctly formed her letters and wrote neatly, clearly and on the line (Dist. Ex. 7 at p. 1). The IEP further noted that the student had begun to learn cursive handwriting (id.). In addition, the May 2012 IEP indicated that although the student had a difficult time editing her work, she could list the five steps of the writing process (id.). In addition, the May 2012 IEP reflected that, with prompting, the student could write a four to five sentence paragraph, and she worked well with a story starter (id.). The May 2012 IEP also indicated that the student could write a personal narrative and was learning the steps of letter writing (id.). Although the May 2012 IEP revealed that, at times, the student showed reluctance to write, she appeared more motivated to write by incorporating a structured writing contest (id.). Regarding spelling, the May 2012 IEP noted that daily practice through games and activities helped the student encode correctly (id.). Although the IEP noted that the student had a harder time applying words that she could encode to writing, it also revealed that the student consistently studied for her spelling tests and received a 90 percent average (id.).

In addition, the May 2012 CSE incorporated information from the February 2012 JCSE progress report regarding the student's needs and abilities in mathematics (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 5 at p. 2).[10] According to the May 2012 IEP, the student could subtract three-digit numbers with regrouping and borrowing, and could compute single-digit multiplication (see Dist. Ex. 7 at p. 1). The May 2012 IEP further revealed that the student could read clocks by

[10] The May 2012 IEP reflects that based upon classroom performance and informal testing, the student exhibited a third grade instructional or functional level in mathematics (see Tr. pp. 52, 74, 78, 317-18; Dist. Ex. 7 at p. 10).

"minutes and by five minute intervals," though at times, she would confuse the hour and the minutes (id.). Furthermore, the May 2012 IEP indicated that the student could read and write numbers up through "10,000" (id.). The May 2012 IEP also included teacher suggestions to incorporate mathematics manipulatives and activities into the mathematics lesson to aid the student's comprehension, and further, that hands-on activities, games, and contests also helped with the student's motivation and focus (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 5 at p. 2). The May 2012 IEP also included information derived from the February 2012 JCSE progress report regarding the student's progress in social studies and science (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 2).

In the area of speech-language, the May 2012 IEP described the student's needs in the area of receptive and expressive language skills (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 4). According to the May 2012 IEP, the student demonstrated difficulty with word retrieval, retelling a story, and formulating descriptive sentences during writing activities (id.). The May 2012 IEP also reflected that the student's speech-language pathologist addressed abstract thinking with the student through idioms, and while the student had learned some idioms and could now understand and explain them, she continued to have difficulty with abstract language (id.). In addition, the May 2012 IEP indicated that the student could make predictions during reading comprehension tasks; however, she had difficulty figuring out vocabulary from context and the main idea (id.). According to the May 2012 IEP, the student's speech-language pathologist used a "visualization/verbalization program" to help her recall what she read (id.). The IEP also revealed that the student exhibited strengths with respect to her fine motor skills, and that her gross motor skills were reportedly age appropriate (see Dist. Ex. 7 at p. 2).

With respect to the student's social development, the May 2012 IEP described the student as a sociable, well-behaved, cooperative sweet child, someone who had many friends in the class, interacted appropriately with her peers, and was well-liked by everyone (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 1, and Dist. Ex. 6). The May 2012 IEP indicated that the student could maintain and initiate age-appropriate conversations with her peers; however, at times, she had a negative attitude toward different areas in school (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 1). According to the May 2012 IEP, the student was learning to identify her feelings and express them appropriately through modeling and role-playing (id.).

In addition, the May 2012 CSE incorporated information from the February 2012 JCSE progress report regarding the student's general behavior (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 1). The May 2012 IEP noted that the student participated in class, enjoyed sharing information with her classmates, and further described her as someone who responded well to responsibility and was efficient in carrying out classroom jobs (see Dist. Ex. 7 at p. 2). Nevertheless, the May 2012 IEP also described the student as someone who was, at times, "anxious about completing her work" and that she needed encouragement (id.). In accordance with the February 2012 JCSE progress report, the May 2012 IEP noted that, at times, the student had an inappropriate reaction to certain situations—for example, she would rip up her test paper when she did not get a perfect score (compare Dist. Ex. 7 at p. 2, with Dist. Ex. 5 at p. 1). The May 2012 IEP also noted that the student worked at a slower pace, often needed extra time to complete her work, and often became overwhelmed when expected to do her work (id.). The IEP further indicated, however, that the student responded well to motivation and positive reinforcement such as prizes and contests (id.). Lastly, the May 2012 IEP included the parent's concerns that the student could be easily distracted and needed prompts (see Dist. Ex. 7 at p. 2).

In order to address the student's needs, the May 2012 CSE recommended ICT services in a general education setting—together with annual goals targeting the areas of reading, mathematics, writing, expressive and receptive language, visual and perceptual motor skills, and decoding; related services; and strategies to address the student's management needs—for the 2012-13 school year (see Dist. Ex. 7 at pp. 1-8). According to State regulation, school districts 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 ICT services "shall minimally include a special education teacher and a general education teacher," and each such class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

In reaching the decision to recommend ICT services in a general education setting, the May 2012 CSE relied upon information, in part, provided by the student's teacher attending the May 2012 CSE meeting (student's teacher) who reported that the student "was functioning not too far from grade level" and functioned on a "third grade level in math" (Tr. pp. 51-53). Although the district special education teacher noted that the student attended an ungraded class at JCSE, the student's teacher reported that the class followed a second grade curriculum (Tr. pp. 52-53). According to the district special education teacher, the student's teacher also reported that the student functioned a "little bit below" the third-grade level in reading due to difficulty with decoding and comprehension (Tr. p. 52-53). Evidence in the hearing record indicates that at the time of the May 2012 CSE meeting the student participated in a "mainstream" setting at JCSE for nonacademic subjects, but the student did not participate in a "mainstream" setting at JCSE for academic subjects, and consequently, the district special education teacher explained that the student "really didn't have the opportunity in that school to . . . be with typically developing children of her own age" (Tr. pp. 52-53; see Dist. Ex. 11 at p. 2). In light of this information, the May 2012 CSE believed that ICT services in a general education setting offered the student "two teachers" to provide the student with the "individualized instruction necessary," and that the ICT services in a general education setting provided the student with the "opportunity to have good modeling from typically developing children (Tr. pp. 52-53). In addition, the district special education teacher testified that the "determining factor" for the May 2012 CSE's decision to recommend ICT services as opposed to a "self-contained setting" for the student was the "fact that the [student] seemed to be functioning close to grade level;" she was a "social, well adjusted, well liked student, who knew how to behave within a classroom setting;" and she "responded to encouragement and positive reinforcement" (Tr. pp. 125-26).

With respect to the student's social/emotional and behavior needs, the parent testified that she told the May 2012 CSE that student continued to have "anxiety" and she required a "small contained classroom" because she "definitely ha[d] anxiety" and got "nervous" when taking tests or quizzes (Tr. pp. 198-99). In addition, the parent testified that the student would "sort of" have a "tantrum," she would get "crazy" and "walk out of the classroom," the student would not "do the work," and she needed "constant help with her behavior[] in that way" (id.). As a result, the parent also testified that she told the May 2012 CSE that the recommended ICT services would not "benefit" the student or meet her needs (id.). At the impartial hearing, the JCSE program director testified that the recommended ICT services were not appropriate because the student got "very, very easily frustrated," and she could "become extremely anxious and overwhelmed" (Tr. p. 310). The JCSE program director further testified that the student "used to whine excessively and very often when she felt that she couldn't do something," and the student would "walk away or crumple

up her paper or cross her arms and just shut down and cry" (Tr. pp. 310-11). As a result, the JCSE program director testified that the student needed a "lot of support to keep her focused and to keep her from becoming frustrated and to reduce the anxiety" the student felt related to "all of the academic expectations" (id.).

Contrary to the parent's allegations, the weight of the evidence in the hearing record does not support a finding that the student required additional behavioral supports in order to make progress in an ICT setting. In particular, a review of the evidence in the hearing record supports the IHO's finding—as noted in the decision—that the parent's description of the student's social/emotional and behavior needs and the JCSE program director's description of the student's social/emotional and behavior needs at the impartial hearing were not consistent with the evaluative information presented to the May 2012 CSE (see IHO Decision at pp. 8, 14; compare Tr. pp. 198-99, 310-11, with Dist. Exs. 5 at p. 1; 6; 7 at pp. 1-2). For example, according to the March 2012 classroom observation report, the student's teacher described the student as "usually cooperative in class" (Dist. Ex. 6 at p. 1). Moreover, the district special education teacher testified that based upon her observation of the student, "[s]ocially, she was fine," the student "knew her place in the classroom," she "raised her hand," and she understood "proper classroom behavior" (Tr. p. 47; see generally Dist. Ex. 6). The district special education teacher further testified that during her observation, the student exhibited "good classroom behavior" and "had respect for the other students" (Tr. p. 47). She also testified that the while the student needed "some prompting . . . to elaborate on answers," the student did not require "repetition," and moreover, "positive reinforcement and compliments went a long way with [the student]"—as well as "positive statements" and "encouragement" (Tr. pp. 47-48).

The district special education teacher also testified that the May 2012 CSE did not "draft any behavioral goals to address the student's ripping up papers" or these "type[s] of behaviors" because the student, generally, "just need[ed] a little positive reinforcement" and "some recognition from a teacher, from an assistant, from the principal, [or] from her parent" that she did a good job (Tr. pp. 126-27). Moreover, the district special education teacher explained that the student did not exhibit "dangerous" behaviors, she did not "run[] out of the class," she did not "hit[] other students," and she was not "abusive" (Tr. pp. 127-28). Furthermore, based upon the student's teacher report to the May 2012 CSE—which described the student as "well-adjusted," "respectful," "a pleasure," and as a student who "g[ot] along with the adults in the class" and had "many friends—the May 2012 CSE did not find a basis to recommend counseling as a related service for the student (Tr. p. 128). In any event, a review of the evidence in the hearing record demonstrates that the May 2012 CSE incorporated strategies into the May 2012 IEP to address the student's frustration tolerance and "inappropriate reaction to certain situations, i.e. . . . rip[ping] up her test paper when she does not get a perfect score," such as dividing her work into parts, and using motivation, positive reinforcement, and encouragement (see Dist. Ex. 7 at p. 2). In addition, to the extent that the student exhibited anxiety during test taking, the May 2012 CSE recommended testing accommodations, such as extended time, tests to be administered in a separate location with no more than seven students, and directions to be read and reread aloud (id. at p. 8).

Based on the foregoing, the evidence in the hearing record demonstrates that the May 2012 CSE's decision to recommend ICT services in a general education setting—together with annual goals, related services, and strategies to address the student's management needs—was reasonably

calculated to enable the student to receive educational benefits for the 2012-13 school year and offered the student a FAPE.[11]

C. May 2013 IEP

Turning to the 2013-14 school year, the parent asserts that although the recommended 12:1+1 special class placement was appropriate and met the student's special education needs, the May 2013 IEP failed to address the student's "anxiety, behavioral issues, focusing issues, [and] frustration." The district asserts that the May 2013 IEP appropriately addressed the student's deficits related to frustration, anxiety, focusing, and behavior. As explained more fully below, a review of the evidence in the hearing record fails to support the parent's contentions.

Similar to the analysis of the May 2013 IEP, although the sufficiency of the student's present levels of performance and individual needs as described in the May 2013 IEP are not disputed, a discussion thereof provides context for the issue to be resolved—namely, whether the May 2013 IEP adequately addressed the student's social/emotional and behavior needs. Here, the evidence in the hearing record indicates that the May 2013 CSE considered and relied upon the following evaluative information in the development of the May 2013 IEP: a January 2013 JCSE OT update, a February 2013 speech-language progress report, a February 2013 teacher progress update, and a March 2013 psychoeducational evaluation, as well as input from the student's providers (see Tr. pp. 72-73, 80, 328; see Dist. Exs. 2; 16-17; Parent Ex. K). Overall, and as described more fully below, the May 2013 IEP accurately identified and reflected the student's academic, cognitive, speech-language, OT, and social/emotional needs as presented in the evaluative information available to the May 2013 CSE (compare Dist. Ex. 18 at pp. 1-2, with Dist. Ex. 2 at pp. 1-3, and Dist. Ex. 16, and Dist. Ex. 17, and Parent Ex. K at pp. 1-3).

The May 2013 IEP indicated that an administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) to the student yielded the following scores: a full-scale IQ, 81 (low average range); verbal reasoning index, 87 (upper low average range); non-verbal reasoning index, 79 (upper borderline range); working memory index, 86 (middle low average range); and processing speed index, 88 (upper low average range) (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 2 at p. 2). In addition, the May 2013 IEP also reported the student's instructional levels in reading and mathematics based upon the administration of the Woodcock-Johnson III Tests of Achievement (WJ-III) to the student (id.). Consistent with the March 2013 psychoeducational evaluation, the May 2013 IEP described the student as cooperative and communicative; however, the May 2013 IEP further indicated that during the evaluation, the student was, at times, "impulsive" and "careless" and that she "gave up too quickly" (compare Dist. Exs. 18 at p. 1, with Dist. Ex. 2 at p. 1).

With respect to social/emotional needs, the May 2013 IEP described the student as a "generally motivated student who participate[d] in class activities with creativity and enthusiasm," and further characterized the student as "well behaved and generally conform[ing] to rules" (compare Dist. Ex. 18 at p. 1, with Parent Ex. K at p. 1). The May 2013 IEP further reflected that the student came to class "prepared with her homework assignments and supplies" (id.). However,

[11] While it is likely that the student may have received a greater quantity of individual support at JCSE than she may have received had she attended the assigned public school site in an ICT setting, the IDEA guarantees "an appropriate education, not one that provides everything that might be thought desirable by loving parents" (see J.S. v. New York City Dep't of Educ., 2015 WL 2167970 at *16 [S.D.N.Y. May 6, 2015]).

the May 2013 IEP also noted that when given "independent work," the student "often" became "anxious or overwhelmed prior to checking, if she knew what to do" (id.). Furthermore, the May 2013 IEP characterized the student as a "sociable youngster . . . who d[id not] like school" (compare Dist. Ex. 18 at p. 2, with Dist. Ex. 2 at pp. 1-2). The May 2013 IEP further indicated that the student liked most of her classmates and teachers, although she found one teacher was "very strict" (compare Dist. Ex. 18 at p. 2, with Dist. Ex. 2 at p. 2). Lastly, the IEP noted that most of the student's responses on the personality measures were "age appropriate" (compare Dist. Ex. 18 at p. 2, with Dist. Ex. 2 at p. 3). Finally, the IEP indicated that the student was learning to ask for assistance without whining (compare Dist. Ex 18 at p. 2, with Parent K at p. 1).

Contrary to the parent's contentions, the May 2013 IEP addressed the student's difficulties related to anxiety, focusing, and behavior (see Dist. Ex. 18 at pp. 1-2). According to the May 2013 IEP, the student could independently begin worksheets with "prompting" (compare Dist. Ex 18 at p. 1, with Parent K at p. 1). Moreover, the IEP noted that the student benefitted from "hands on games and activities to keep her motivated and attentive" (compare Dist. Ex 18 at p. 2, with Parent K at p. 1). In addition, the May 2013 IEP reflected—as reported by the student's teacher—that to improve the student's "focusing, [the student's] desk need[ed] to be completely clear" (id.). The May 2013 IEP also noted that, per teacher report, the student's "positive behavior [was] consistently reinforced through a point reward system," which the student could redeem for "prizes of her choice" (id.). Finally, the May 2013 CSE recommended testing accommodations, such as extended time, tests to be administered in a separate location with minimal distractions, and revised test directions, to further address the student's anxiety related to taking tests (see Dist. Ex. 18 at p. 8; see also Tr. pp. 214-15; Dist. Ex. 2 at p. 1). Based on the foregoing, a review of the evidence in the hearing record supports a finding that the May 2013 IEP contained strategies used by the student's providers and appropriately addressed the student's social/emotional and behavior needs.

D. Challenges to the Assigned Public School Sites

To the extent that the parent continues to advance arguments related to the assigned public school sites for both the 2012-13 school year and the 2013-14 school year, for the reasons explained more fully below, such allegations are speculative and not supported by the evidence in the hearing record.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP

implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[12] When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning 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'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the May 2012 IEP and the May 2013 IEP because a retrospective analysis of how the district would have implemented the student's May 2012 IEP and the May 2013 IEP at the assigned public school sites was not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected both of the assigned public school sites that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing prior to the time the district became obligated to implement the May 2012 IEP and the May 2013 IEP (see Dist. Exs. 10; 20). Therefore, the arguments asserted by the parent with respect to the assigned public school sites 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

[12] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y., 584 F.3d 412 at 420; see K.L.A. v. Windham Se. Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). 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., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's 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.

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. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [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 parent cannot prevail on her claims that the assigned public school sites would not have properly implemented the May 2012 and May 2013 IEPs.[13]

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 and 2013-14 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at JCSE was an appropriate placement or whether equitable considerations supported 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]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
June 19, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

[13] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 370-72 [E.D.N.Y. 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 996 F. Supp. 2d 269, 270-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286; N.K., 961 F. Supp. 2d at 588-90; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295, 300-01 [E.D.N.Y. 2014]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-45 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).