The University of the State of New York

The State Education Department
State Review Officer
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No. 15-042

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 & Associates, attorneys for petitioners, Diana Gersten, Esq. and Linda Goldman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 the costs of the student's tuition at the Gateway School for the 2014-15 school year. Respondent (the district) cross-appeals from the IHO's determination that the parents' unilateral placement of the student at the Gateway School for the 2014-15 school year was appropriate. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

During the 2013-14 school year, the student attended a nonpublic preschool program, and received special education and related services as a preschool student with a disability pursuant to an IEP developed by the Committee on Preschool Special Education (CPSE) (see Dist. Exs. 3 at p. 1; 4 at p. 1; 6 at p. 1; 7 at p. 1; 8). The student's preschool program consisted of 22 students, 1 "head teacher," and 2 "assistant teachers;" in addition, the student received 10 hours per week of

special education itinerant teacher (SEIT) services at his preschool program and the following related services: two 45-minute sessions per week of individual occupational therapy (OT) "in the home," two 45-minute sessions per week of physical therapy (PT) outside of school, and two 45-minute sessions per week of individual speech-language therapy outside of school (id.).[1]

On February 14, 2014, the parents executed an enrollment contract with the Gateway School for the student's attendance during the 2014-15 school year (see Parent Ex. E at pp. 1, 3).[2]

On April 4, 2014, the CSE convened to conduct the student's "[t]urning [f]ive" conference and to develop an IEP to be implemented beginning September 5, 2014 for the 2014-15 school year (see Dist. Ex. 10 at pp. 1, 10; see also Tr. pp. 15-16, 19-20).[3] Finding the student eligible for special education and related services as a student with a speech or language impairment, the April 2014 CSE recommended that the student receive integrated co-teaching (ICT) services in a general education classroom for instruction in mathematics and English language arts (ELA) at a community school (see Dist. Ex. 10 at pp. 1, 6-7, 10-11).[4] The April 2014 CSE also recommended the services of a full-time, crisis management paraprofessional in a group along with related services consisting of two 30-minute sessions per week of OT in a group, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of speech-language therapy in a group (id. at pp. 7, 11). In addition, the April 2014 CSE developed annual goals targeting the student's needs in the areas of attention; sensory processing; and expressive, receptive, and pragmatic language skills (id. at pp. 4-6). The April 2014 CSE also recommended strategies to address the student's management needs and further indicated that the student needed a behavioral intervention plan (BIP), noting that the student needed a "para-professional to help him stay[] focused throughout the day when engaged in classroom activities" and to "help with processing language and interacting with peers" (id. at p. 3).

In a letter dated August 20, 2014, the parents notified the district of their intentions to place the student at the Gateway School for the 2014-15 school year and to seek funding and transportation services from the district for the student's placement at the Gateway School if the district did not "cure the procedural and substantive errors" in the development of the April 2014 IEP and offer the student an "appropriate school placement" (Parent Ex. A at pp. 1-2). The parents

[1] At times, the evidence in the hearing record also described the student's preschool program as staffed by "2-4 teachers" and "4 teachers" (Dist. Exs. 2 at p. 2; 8 at p. 1).

[2] According to a social history update conducted on February 27, 2014 (February 2014 social history update), the student stopped receiving PT services "two weeks ago" (see Dist. Ex. 7 at p. 2). The February 2014 social history update also indicated that the student had "already been accepted to the Gateway School," the parents had been "informed" that the district must "make a free and appropriate public school recommendation for September," and that the parents were informed that a "non public school recommendation [was] the most restrictive recommendation [the district] c[ould] make" (Dist. Ex. 7 at p. 2).

[3] At the impartial hearing, the district school psychologist who attended the April 2014 CSE meeting described the "[t]urning [f]ive" students as those students transitioning from "pre-K" into "kindergarten" (see Tr. pp. 19-20).

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

further advised the district that they rejected the "IEP and placement proposed" by the CSE because the IEP was not "valid," the April 2014 CSE deprived the parents of the opportunity to meaningfully participate in the development of the IEP, and the April 2014 CSE did not recommend an "appropriate placement" (id.). The parents indicated that their concerns "include[d], but [were] not limited to" the following: the April 2014 CSE's predetermination of the recommended ICT services; the April 2014 CSE's failure to recommend a "full-time program, instead of recommending only 25 periods of ICT per week;" the "inappropriate recommendation" of a full-time paraprofessional within a "large class instead of a small classroom setting;" the lack of meaningful parent participation; the "vague and unmeasurable" annual goals; and the lack of "an appropriate placement to implement this IEP" (id. at p. 2). At that time, the parents requested a class profile "to understand the grouping in the ICT program" and "any other information about ICT" since the parents could not visit the assigned public school site during the summer because it was closed in August (id.). Finally, the parents indicated that "[u]pon information and belief, the program and placement [were] too large" and would not provide "suitable grouping" for the student (id.).

A. Due Process Complaint Notice

By due process complaint notice dated October 7, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Dist. Ex. 1 at pp. 1-3). Specifically, the parents alleged that the recommended ICT services were not appropriate as the student required "additional supports within the framework of a smaller and more supportive educational environmental to address his documented educational, speech/language, and social/emotional needs" (id. at p. 2). The parents also asserted that the April 2014 CSE impermissibly predetermined the recommendation for ICT services based upon district availability rather than the student's "unique special education needs" (id.). Next, the parents alleged that the April 2014 CSE did not allow the neuropsychologist who conducted the parents' privately obtained neuropsychological evaluation of the student to participate in the April 2014 CSE meeting (id.). As a result, the parents asserted that the April 2014 CSE deprived them of the opportunity to meaningfully participate (id.). Further, the parents alleged that the annual goals and short-term objectives in the April 2014 IEP were "generic and vague" and did not "accurately reflect [the student's] educational needs" (id.). Additionally, the parents alleged that the April 2014 CSE failed to recommend any annual goals related to academics (id.).

Next, the parents asserted that the April 2014 CSE failed to recommend "a full-time special education program," noting that the "IEP [was] completely silent as to what program or what curriculum [the student] would be exposed to for the remainder of the school week" (Dist. Ex. 1 at p. 3). The parent further asserted that the April 2014 CSE omitted the date upon which the April 2014 IEP would be implemented (id.). Moreover, the parents alleged that the April 2014 CSE failed to properly consider "all the programs available" to the district on the continuum of services, indicating that the April 2014 CSE did not "consider a non-public school" (id.). The parents also asserted that the April 2014 CSE recommended ICT services "without properly evaluating [the student's] ability to be placed in such a large and less supportive educational environment" (id.). In addition, the parents alleged that the April 2014 "summarily ignored" the input from the parents and the nonpublic school staff regarding the recommended ICT services, and the April 2014 CSE's recommendation for a "community school" was not appropriate (id.).

With regard to the assigned public school site, the parents alleged that the district failed to provide them with a class profile, and "[u]pon information and belief, the program and placement [were] too large and would not provide a suitable grouping" for the student (Dist. Ex. 1 at p. 3). In addition, the parents asserted that after speaking with the principal of the assigned public school site, they learned that the "ICT classrooms" were "already overenrolled" and they had "no option but to reject the placement" (id.).

With respect to the unilateral placement, the parents alleged that the Gateway School was an appropriate placement for the student (see Dist. Ex. 1 at p. 4). The parents indicated that the Gateway School addressed the student's "academic and social/emotional needs" and was reasonably calculated to enable the student to receive educational benefits (id.). With regard to equitable considerations, the parents asserted that they fully cooperated with the district (id.). As relief, the parents requested to be reimbursed for the costs of the student's tuition at the Gateway School for the 2014-15 school year (id.).

B. Impartial Hearing Officer Decision

On December 17, 2014, the parties proceeded to an impartial hearing, which concluded on February 24, 2015 after three days of proceedings (see Tr. pp. 1-341). In a decision dated March 10, 2015, the IHO concluded that the district offered the student a FAPE for the 2014-15 school year, and thus, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition at the Gateway School the 2014-15 school year (see IHO Decision at pp. 2-6, 10-14). Specifically, the IHO found the paraprofessional—regardless of whether designated as a "health" paraprofessional or a "crisis management" paraprofessional—would provide the student with the "necessary one to one attention" he required to address his difficulties with attention, which constituted the student's "primary area of difficulty" (id. at p. 11). In addition, the IHO indicated that the crisis management paraprofessional would attend to the "crises of the [s]tudent's lack of attention and understanding" (id.). The IHO also noted that the "special education teacher in the classroom, as well as the general education teacher and the paraprofessional" would provide the student with the management needs recommended in the April 2014 IEP to address the student's needs "regarding regulation, sensory issues and attention" (id.). Moreover, the IHO indicated that the student's "classroom teachers and the paraprofessional, as well as the speech language provider" would address the student's "receptive language needs, pragmatic language needs and expressive language needs" through the annual goals in the April 2014 IEP (id.). Overall, the IHO concluded that the April 2014 IEP provided "sufficient guidance for the teachers and providers to appropriately address" the student's needs (id.).

With regard to the annual goals, the IHO found that the student did not need annual goals related to academics because the student was "on grade level academically" (IHO Decision at p. 11). The IHO also determined that the OT annual goal addressed the student's "physical needs related to improving quality and endurance with fine motor and classroom activities, including writing" (id.). The IHO also found that the speech-language annual goals addressed the "language aspects of [the student's] writing needs" (id.).

Turning to the recommended ICT services, the IHO determined that the student would have "benefitted from being in a class with general education students" (see IHO Decision at p. 11).

The IHO also noted that the student's "sensory issues would not have prevented him from participating in a class of 26 students with the supports provided" in the April 2014 IEP, especially given the student's participation in his preschool program, which included "22 students and 2-4 teachers" and "10 hours per week" of SEIT support (id. at pp. 11-12). While in preschool, the IHO noted that the student made "gains" with the "supports" in place for him, and the student could "work quietly," he remained attentive and cooperative, and he listened to the teacher (id. at p. 12). In addition, the IHO found that although the student required "supports in the class," the student's "sensory needs" did not prevent him from "functioning appropriately" (id.). The IHO further noted that the student would have "greater supports in the program" recommended by the April 2014 CSE than he had in the "general education pre-school class with a SEIT only ten hours per week" (id.). In addition, the IHO indicated that the April 2014 CSE was "not required to develop a program that ha[d] complete certain[t]y of providing educational benefits" (id.). Consequently, the IHO concluded that the April 2014 CSE's "recommendation" was reasonably calculated to meet the student's educational needs in the "least restrictive environment" (LRE) (id.).

Next, the IHO found that the parents had the opportunity to meaningfully participate at the April 2014 CSE meeting (see IHO Decision at p. 12). Here, the IHO indicated that the hearing record did not include "clear testimony" that the district "refused to allow [the neuropsychologist] to participate" in the April 2014 CSE meeting (id. at pp. 12-13). Moreover, the IHO noted that the March 2014 "Meeting Notice" noted that the parents had the "right to invite other individuals to the IEP meeting" and requested that the district receive "notice of the names of such individuals" (id. at p. 13). Based upon the evidence, the IHO concluded that the parents, the nonpublic preschool staff, and the student's SEIT all had the opportunity to participate in the April 2014 CSE meeting (id.). In addition, the IHO found that although "[district] personnel met in advance of the meeting, they only met to develop ideas" and the CSE members remained "open to the input from the other participants at the CSE" (id.).

Having concluded that the district offered the student a FAPE for the 2014-15 school year, the IHO nonetheless determined that the Gateway School was an appropriate unilateral placement for the student for the 2014-15 school year (see IHO Decision at pp. 13-14). The IHO noted, however, that the student did not "seem" to make "significant progress in reading and mathematics and remain[ed] at a pre-K level despite his potential in those areas" (id. at p. 14). The IHO also found that the student made progress in his ability to "define the main idea" (id.). Overall, the IHO concluded that the "program at Gateway" met the student's needs, but further noted that the student would make "greater progress" if he received individual speech-language therapy services and OT (id.).

IV. Appeal for State-Level Review

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2014-15 school year. More specifically, the parents allege that the IHO erred in finding that the "IEP" was reasonably calculated to enable the student to receive educational benefits and provided him with a suitable peer group. The parents argue that contrary to the IHO's determination, the weight of the evidence in the hearing record did not support a finding that the recommended "general education setting, in a larger community school, with only part-time ICT instruction" would provide the student with more structure. The parents also argue

that they were deprived of the opportunity to meaningfully participate in the development of the IEP because the April 2014 CSE did not discuss the annual goals, the April 2014 CSE did not allow the neuropsychologist to participate in the April 2014 CSE meeting, and the April 2014 CSE impermissibly predetermined the recommended ICT services. Next, the parents assert that the annual goals were not appropriate and the April 2014 IEP failed to include annual goals related to academics. The parents assert that the district failed to present any evidence to establish that the assigned public school site could implement the April 2014 IEP or to refute the evidence that the "ICT classroom in the placement site . . . was over-enrolled." Finally, the parents assert that the Gateway School was an appropriate placement and equitable considerations weighed in favor of the parents' requested relief.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety. The district cross-appeals from the IHO's determination that the parents' unilateral placement of the student at the Gateway School for the 2014-15 school year was appropriate.

In an answer to the district's cross-appeal, the parents respond to the district's allegations and generally argue to uphold the IHO's findings with respect to the appropriateness of the Gateway School.

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 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. April 2014 CSE Process

1. Predetermination/Parental Participation

In support of the assertion that the April 2014 CSE deprived them of the opportunity to meaningfully participate in the development of the student's IEP, the parents assert that the April 2014 CSE impermissibly predetermined the recommended ICT services, the April CSE refused to allow the neuropsychologist to participate in the April 2014 CSE meeting, and the April 2014 CSE failed to discuss the annual goals at the April 2014 CSE meeting. The district rejects the parents' contentions. Upon review, the evidence in the hearing record does not support the parents' assertions, and therefore, the parents' assertions must be dismissed.

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]).[5]

Turning first to the parents' contention that the April 2014 CSE impermissibly predetermined the recommended ICT services, it is well established that the consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] [noting that "predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506-07 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 11-051; Application of the Dep't of Educ., Appeal No. 10-070; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. 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., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

In this case, the evidence in the hearing record indicates that the following individuals attended the April 2014 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, a district social worker, the parents, the student's SEIT, the student's preschool head teacher, the associate director of the student's

[5] "'[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]).

preschool (director), and a school psychologist from the student's preschool (see Dist. Ex. 10 at p. 13; see also Tr. pp. 16-19, 319-20). At the impartial hearing, the district school psychologist testified that prior to the April 2014 CSE meeting, she met with the district special education teacher and the district social worker and they discussed "ideas" about the "program recommendation" based upon the information they had concerning the student, but did not "determine [the program]" at that time (see Tr. pp. 11-12, 25-27, 89-91; see also Tr. pp. 16-18; Dist. Ex. 10 at p. 13; see generally Dist. Exs. 2-8). In addition, the district school psychologist testified that although "some" of the IEP may be written before the CSE meeting occurred, the recommended "services" were "never put down" before the CSE meeting because "[they] have an open mind" and they go into the CSE meeting "open" and "listening" (see Tr. pp. 110-11).

According to the evidence in the hearing record, the April 2014 CSE discussed and considered other placement options in reaching the decision to recommend ICT services for the student. For example, a review of the April 2014 IEP demonstrates that the April 2014 CSE considered a general education setting with related services for the student, but rejected this option because the student required "small group work to help keep him focused throughout the day on classroom activities" (see Dist. Ex. 10 at p. 12). In addition, the district school psychologist testified that although she, herself, "thought" about a 12:1+1 special class placement for the student, she did not think the 12:1+1 special class placement was appropriate because it would not be "academically rigorous enough" for the student and she did not discuss this placement option with the parents (Tr. p. 56; see Tr. pp. 87-88). However, the district school psychologist further testified that the April 2014 CSE discussed a nonpublic school at the April 2014 CSE meeting as a potential placement option, but rejected it as "too restrictive" (see Tr. pp. 56-57, 88, 91-92). In contrast, the parents testified at the impartial hearing that the April 2014 CSE did not discuss "other programs" at the April 2014 CSE meeting (see Tr. p. 305). In addition, the parents testified that when they "inquired about a 12:1:1" at the CSE meeting, the district school psychologist said "this is what we offer and this is the classroom we have" (Tr. pp. 305-06).

With respect to the recommended ICT services, the district school psychologist testified that the parents objected to the recommendation because they believed the student needed a nonpublic school—a "smaller school setting"—due to the student's "language and attention issues" in the classroom (see Tr. pp. 59, 122-23). The district school psychologist did not recall any objections to the recommendation by the preschool staff attending the April 2014 CSE meeting, but acknowledged that "they were "pretty quiet" (Tr. p. 61). The parents described the April 2014 CSE meeting as a "very quick, quiet meeting" without "discussion" and without "collaboratively work[ing] together on putting a plan together" for the student (see Tr. pp. 320-22). In addition, the parents testified that while no one at the April 2014 CSE meeting "engaged" the preschool staff at the meeting or "encouraged" the preschool staff to speak at the meeting, the preschool staff were "not disallowed from speaking" (Tr. pp. 320-22). The parents then clarified that "it's not as if it wasn't a discussion-based meeting," but rather, the parents were not "engaged as much in this determination" (Tr. pp. 321-22). The parents also noted that the student's SEIT attended the April 2014 CSE meeting, and they "tried talking"—"but it wasn't a discussion format" at the meeting (id.).

The parents admitted, however, that at the April 2014 CSE meeting, they "shared everything" with the CSE—including his "school reports," a neuropsychological evaluation

report—and before the CSE meeting, the parents met with the district social worker and "observed the classrooms" (Tr. pp. 300-01). In addition, the parents testified that after introductions at the April 2014 CSE meeting, they "talked about the case," the parents advised the CSE about the student's "placement at Gateway," and the parents "talked to them about the ICT classroom" (Tr. pp. 301-02). The parents further testified that the district school social worker "was engaging with us" and they had "very little interaction" with the district school psychologist who took notes at the April 2014 CSE meeting (Tr. pp. 300-02). In addition, the parents indicated that they understood the April 2014 CSE recommended ICT services, and testified that their "only concern with ICT classroom" at the meeting was with respect to the "big classroom size" (see Tr. pp. 304-05, 328-29). The parents further testified that they inquired about whether the "ICT was a program" that would address the student's "speech impediment," "processing delays," and his need for redirection at the April 2014 CSE meeting (Tr. p. 323). The district school psychologist also testified that the April 2014 CSE added the services of a full-time, shared paraprofessional to the April 2014 IEP because the parents had expressed concerns about the "program['s]" ability to meet the student's needs (see Tr. pp. 137-38; Dist. Ex. 10 at p. 7).

Based upon the foregoing, the evidence in the hearing record supports a finding that although the district special education teacher, the district social worker, and the district school psychologist discussed the student's possible placement recommendation prior to the April 2014 CSE meeting—and may have arrived at the meeting with a pre-formed opinion regarding the best course of action for the student—the April 2014 CSE did not merely determine that ICT services in a general education classroom were appropriate for the student and abruptly end the discussion. Rather, the evidence reveals that the April 2014 CSE maintained the requisite open mind by discussing other program and placement options and by listening to the parents' concerns, as well as considering other options to address the parents' concerns (see Tr. pp 91, 110-11, 137-38). In addition, the evidence reflects that the parents had the opportunity to express their concerns regarding the placement recommendation.

With respect to the neuropsychologist's participation at the April 2014 CSE meeting, the parents testified that when they saw the district school psychologist at the CSE meeting typing information into the April 2014 IEP from the March 2014 neuropsychological evaluation report, they "mentioned" that the CSE "could call [the neuropsychologist] and go over some of the numbers" (see Tr. p. 306). The parents testified that in response to this suggestion, the district school psychologist "very dismissively" stated that she could "read the scores" and that she understood what she saw (id.). At the impartial hearing, the parents explained that they wanted the neuropsychologist to participate at the April 2014 CSE meeting because he could "help explain some of [the student's] evaluation and why he recommended . . . a small classroom setting" (Tr. pp. 306-07).

However, the district school psychologist did not recall anyone at the April 2014 CSE meeting mentioning the neuropsychologist's name at the meeting, and in particular, she did not recall the parents asking "for [the neuropsychologist] to talk about why he was recommending a small class" after the CSE "came up with the recommendation of ICT" for the student (see Tr. pp. 62-63, 65-67). Moreover, the district school psychologist also did not recall if the parents "asked if they could put [the neuropsychologist] on the phone" (see Tr. p. 66). According to the district school psychologist, the April 2014 CSE reviewed the March 2014 neuropsychological evaluation

report and relied upon the same in the development of the April 2014 IEP (see Tr. pp. 64-65, 68; see generally Dist. Ex. 2). The district school psychologist also testified that she did not talk to the neuropsychologist either before or after the April 2014 CSE meeting about how he obtained the scores in the evaluation report because she "kn[e]w" how he obtained them; additionally, the district school psychologist did not talk to the neuropsychologist to inquire about why he recommended a "small, supportive, special ed[ucation] school environment" (see Tr. pp. 67-70).

Here, even assuming for the sake of argument that the parents did ask for the neuropsychologist to participate at the April 2014 CSE meeting, the evidence in the hearing record strongly suggests that the parents sought out his participation because they did not agree with the CSE's decision to recommend ICT services in a general education setting and to further lend support to their preference to place the student in a smaller classroom setting or in a nonpublic school—as recommended in the March 2014 neuropsychological evaluation report (see Tr. pp. 306-07; Dist. Ex. 2 at p. 7). However, while 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, "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 (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]; T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, while a CSE is required to consider reports from privately retained experts, 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]; see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9, 2005 WL 1791533 [2d Cir. July 25, 2005];[6] see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).

Therefore, even if the neuropsychologist participated in the April 2014 CSE meeting to further discuss or explain the information in the March 2014 neuropsychological evaluation report and why he ultimately recommended a small, supportive, special education school for the student, the April 2014 CSE had no obligation to adopt this recommendation. Furthermore, as the IHO

[6] The April 2014 CSE incorporated information from the March 2014 neuropsychological evaluation report into the present levels of performance section of the April 2014 IEP (compare Dist. Ex. 10 at pp. 1, 3, with Dist. Ex. 2 at pp. 3-4, 7, 8; see also Tr. pp. 32-34, 68). Notably, the parents did not allege that the April 2014 IEP failed to adequately or accurately describe the student's needs, or that the April 2014 CSE failed to consider the March 2014 neuropsychological evaluation of the student—or otherwise fail to consider sufficient evaluative information—in the development of the April 2014 IEP (see Dist. Ex. 1 at pp. 1-3).

noted, the March 2014 meeting notice provided the parents with the right to invite other individuals to the April 2014 CSE meeting and the hearing record does not contain any evidence that the parents invited the neuropsychologist to the April 2014 CSE meeting or advised the district that the neuropsychologist would attend (see Dist. Ex. 9 at p. 2; see also Tr. pp. 28-31). Under the circumstances, the evidence in the hearing record supports a finding that even if the April 2014 CSE's failure to contact the neuropsychologist during the CSE meeting constituted a procedural violation, this omission alone, did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Next, the parents argue that the CSE's failure to discuss the annual goals at the April 2014 CSE meeting constitute "prima facie evidence" that the parents were not provided with an opportunity to meaningfully participate in the development of the IEP. At the impartial hearing, the district school psychologist testified that the CSE relied upon a January 2014 speech-language progress report and a January 2014 OT progress report to develop the annual goals (see Tr. pp. 42-46, 51-52, 102-03). Specifically, the district school psychologist testified that, with the exception of the annual goal targeting the student's attention issues, the April 2014 CSE did not create the annual goals but instead used the annual goals written by the student's then-current speech-language and OT providers (see Tr. pp. 45-46, 103-104, 106-07; compare Dist. Ex. 10 at pp. 4-6, with Dist. Ex. 3 at p. 2, and Dist. Ex. 4 at pp. 1-2). However, at the impartial hearing the district school psychologist did not remember whether the April 2014 CSE discussed the annual goals pertaining to the student's speech-language needs at the meeting (see Tr. p. 46). The district school psychologist also testified that she was not responsible for writing the annual goals and typically, the district special education teacher typed the annual goals into the IEP both before and after the CSE meeting (see Tr. pp. 109-11; see also Tr. pp. 41-43, 51-53, 96-98, 100-09). The parents testified that the April 2014 CSE did not "go over the goals," but acknowledged that although they asked about the annual goals, they were "more concerned about whether the ICT was a program that would meet [the student's] needs" (Tr. p. 323).

Here, while the evidence in the hearing record suggests that annual goals ultimately included in the April 2014 IEP may not have been discussed during the April 2014 CSE meeting, the weight of the evidence in the hearing record indicates that because the parents attended the April 2014 CSE meeting and participated in the meeting —and as discussed more fully below, the annual goals were appropriate to meet the student's needs—any failure to discuss the particular annual goals included in the April 2014 IEP at the April 2014 CSE meeting did not significantly impede the parents' opportunity to participate in the decision-making process or in the development of the student's IEP (see Tr. pp. 300-06, 321-23; see also E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

B. April 2014 IEP

1. Annual Goals

The parents allege that the annual goals in the April 2014 IEP were not appropriate and the IEP failed to include academic annual goals or an annual goal to address the student's writing needs. In addition, the parents argue that the annual goals were "vague," "generic," "broadly constructed," and failed to include short-term objectives. The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parents' contentions, and thus, there is no reason to disturb the IHO's finding that the annual goals were appropriate.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[7]

Upon review of the evidence in the hearing record—and as identified in the April 2014 IEP—the student exhibited needs in the areas of attention, self-regulation, language, social/emotional, sensory, fine motor planning, and graphomotor control and precision (see Dist. Exs. 2 at pp. 2-8; 3-8; 10 at pp. 1-2; see also Tr. pp. 32-41, 50, 155-56, 158-63, 170-71, 193-94, 202-07, 209-10). To address the student's identified needs, the April 2014 CSE included approximately 6 annual goals and approximately 11 short-term objectives in the IEP (compare Dist. Ex. 10 at pp. 1-3, with Dist. Ex. 10 at pp. 4-6). Specifically, the annual goals targeted the student's attention skills, organizational skills, and self-awareness skills; his expressive, pragmatic, and receptive language skills; and his body strength for improved quality and endurance with fine motor and classroom activities, as well as his ability to participate in non-preferred activities with good toleration and emotional regulation (id.; see Tr. pp. 43-44, 51-52, 96-98).[8] Additionally, except for the annual goal addressing the student's attention skills, the remaining annual goals

[7] Although the April 2014 CSE did not recommend that the student participate in alternate assessments, the CSE nonetheless included short-term objectives in the April 2014 IEP (see Dist. Ex. 10 at pp. 4-6, 9).

[8] A review of the annual goals reveals that each annual goal included an evaluative criteria (i.e., 80 percent accuracy, 3 out of 4 trials), an evaluation schedule (i.e., 1 time per quarter, 4 times per quarter), and a procedure to measure the student's progress toward the goals (i.e., teacher or provider observation, performance assessment task) (see Dist. Ex. 10 at pp. 4-6).

included corresponding short-term objectives (see Dist. Ex. 10 at pp. 4-6). For example, the annual goal addressing the student's expressive language skills included short-term objectives designed to improve his ability to answer "wh-questions," to "ask for assistance" with moderate support, and to "express his feelings" with moderate support (id. at p. 4; see Tr. pp. 43-44). Similarly, the annual goal addressing the student's receptive language skills included short-term objectives targeting his ability to follow one-step directions with minimal support, to follow two-step "related directions" with moderate support, and to "maintain attention during structured tasks" with moderate support (see Dist. Ex. 10 at p. 5). The annual goal addressing the student's pragmatic skills included short-term objectives designed to improve his ability to "initiate interactions with familiar adults and peers" with moderate support, to use three to four conversational exchanges with the clinician with moderate support, and to participate in group or classroom activities with moderate support (id.). To address the student's body strength, sensory needs, and emotional regulation needs, the annual goals incorporated short-term objectives designed to improve his body strength through a "wheel-barrow walk . . . to retrieve puzzle pieces," and to improve participation in non-preferred activities with good toleration and emotional regulation by participating in a "challenging, therapist directed activity" with minimal assistance (id. at pp. 5-6; see also Tr. pp. 51-52).

In this case, while a review of the annual goals, alone, may support the parents' allegations that the annual goals were "vague and generic" and "broadly constructed," the annual goals—consistent with the aforementioned regulations—nonetheless address the student's identified needs. Moreover, courts generally have been reluctant to find a denial of a FAPE on the basis of deficient annual goals where the corresponding short-term objectives cure the defect by providing sufficient specificity to evaluate the student's progress (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]). As described above, five out of six annual goals in the April 2014 IEP included between one and three corresponding short-term objectives identifying and targeting specific skills for the student to work on related to the particular annual goal (see Dist. Ex. 10 at pp. 4-6). Thus, although not perfect, the annual goals and short-term objectives are sufficient to guide a teacher in providing the student with instruction and any deficiencies do not rise to the level of a denial of a FAPE (B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *11 [S.D.N.Y. Dec. 3, 2014]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13-*14 [S.D.N.Y. Sept. 27, 2013]).

While it is undisputed that the April 2014 IEP failed to include an annual goal to address the student's writing needs, the failure to address each of a student's needs by way of an annual goal does not necessarily constitute a denial of a FAPE (J.L., 2013 WL 625064, at *13; see Tr. p. 100; Dist. Ex. 10 at pp. 4-6). In this instance, the April 2014 CSE described the student's fine motor and graphomotor skills as weak (see Dist. Ex. 10 at p. 1). However, the April 2014 CSE did address the student's fine motor needs by recommending two 30-minute sessions per week of OT services in a group, as well as through the inclusion of an annual goal targeting the improvement of the student's fine motor endurance (id. at pp. 6-7). Therefore, the absence of an

annual goal to address the student's writing needs does not support a finding that the district failed to offer the student a FAPE.

Finally, while the parents assert that the April 2014 CSE failed to develop annual goals related to the student's academic skills, the evidence in the hearing record shows that the student did not demonstrate needs in academic areas because he was considered to be on grade level in his mathematics and reading skills (see Dist. Exs. 2 at pp. 6-7; 7 at p. 2; 10 at p. 1-2; see also Tr. pp. 32-34, 37, 99-100). According to the March 2014 neuropsychological evaluation report, an administration of the Woodcock-Johnson III Tests of Achievement to the student to assess his early academic readiness revealed that the student attained standard scores in the average range on all of the selected subtests administered to him (see Dist. Ex. 2 at pp. 6, 10-11). Furthermore, the March 2014 neuropsychological evaluation report described the student as "functioning at or above age expectancies in all areas of pre-academic skills" (see Dist. Ex. 2 at p. 6). Overall, the evaluator described the student's "pre-academic skills" as "solidly developed in most areas," indicating further that the student demonstrated "early reading skills" within the "average to superior range" and "early mathematics and spelling abilities" within the "solidly average" range (id. at p. 7). At the impartial hearing, the district school psychologist also described the student's academic skills as "solidly developed" with "average to superior early reading skills" and "average early mathematics and spelling abilities" (Tr. pp. 32-34).

Thus, overall the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the April 2014 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S., 454 F. Supp. 2d at 146-47; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

2. ICT Services with a Crisis Management Paraprofessional

The parents argue that the IHO ignored the preponderance of evidence in this case, which established that the student required a "full-time special education program." In addition, the parents assert that contrary to the IHO's finding, the "part-time ICT instruction" at a "large community school" would not provide the student with "more structure." The district rejects the parents' contentions. A review of the evidence in the hearing record does not support the parent's contentions; therefore, there is no reason to disturb the IHO's finding that ICT services in a general education setting, along with the support of a crisis management paraprofessional, was appropriate.

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 "shall minimally include a special education teacher and a general education teacher," and each class "shall not exceed 12 students" with disabilities (8 NYCRR 200.6[g][1]-[2]).

In this case, the April 2014 CSE recommended ICT services in a general education classroom—together with related services and the services of a full-time, crisis management paraprofessional—to address the student's needs (see Dist. Ex. 10 at pp. 6-7; see also Tr. p. 48). At the impartial hearing, the district school psychologist described the "integrated co teaching program" as a classroom with approximately 22 to 26 students and as staffed by one regular education teacher and one special education teacher (see Tr. pp. 13, 49-50). According to the district school psychologist, the April 2014 CSE also recommended the services of a paraprofessional to provide the student with "extra support, to help scaffold for him when he needed it, for the attention to repeat directions if he needed it, to help him stay engaged on task, to help him with social relations, to take him on breaks if he needed it—sensory breaks," and "just for extra support" (see Tr. p. 50).

The district school psychologist testified that the student would receive ICT services in a general education setting for mathematics and for ELA, which consisted of "all the English language arts subjects," including "writing, reading, spelling, social studies," and "science;" furthermore, the crisis management paraprofessional would provide the student with additional support during both mathematics and ELA, as well as accompany the student to all of his specials and to lunch (see Tr. pp. 49-50, 100-01, 112-13, 124-25; see also Dist. Ex. 10 at pp. 6-7).[9] She further explained that the student would receive ICT services in a general education setting for 25 periods per week, which the April 2014 CSE reflected in the April 2014 IEP as a frequency of "5 time(s) per day" and as a duration of a "[p]eriod" (Dist. Ex. 10 at p. 6; see Tr. pp. 112-13). The district school psychologist also testified that the school day consisted of a total of seven periods (see Tr. p. 115). Therefore, she explained that the student would receive five periods per day of ICT services in a general education setting; one period per day for lunch; and one period per day allotted to his "specials," which included art, music, or physical education (Tr. pp. 115-16).[10]

At the impartial hearing, the district school psychologist testified that the April 2014 CSE recommended ICT services in a general education setting, in part, because the student was "functioning on grade level academically" and because the CSE must "find the least restrictive setting" for the student (Tr. pp. 56-58, 94-95). Notwithstanding the student's needs in the areas of

[9] The April 2014 CSE did not specify the size of the "group" for the crisis management paraprofessional; the district school psychologist testified that the student would receive the services of a "shared" paraprofessional, meaning that one paraprofessional would assist two students (see Tr. pp. 137-38; Dist. Ex. 10 at p. 7).

[10] The recommendations in the April 2014 IEP are consistent with the district school psychologist's testimony (compare Tr. pp. 115-16, 124-25 with Dist. Ex. 10 at pp. 6-7, 9-10). More specifically, other than the five periods per day of ICT services in a general education setting, the April 2014 IEP reflected that the student would not be removed from the general education environment for any "extracurricular and other nonacademic activities" during the school day (Dist. Ex. 10 at pp. 9-10).

attention, language processing, and expression, the district school psychologist testified that the student's "solidly developed" academic skills—as reflected in the March 2014 neuropsychological evaluation report—supported the decision to recommend ICT services in a general education setting (Tr. pp. 32-34, 80; see Dist. Ex. 2 at p. 7; see also Tr. pp. 25-26, 129-30). The district school psychologist also testified that ICT services in a general education setting was "better" than a "small class" recommendation for the student because an "ICT" would provide the student with peers as role models, as well as "more opportunities to learn a lot" (see Tr. pp. 58-59). The district school psychologist further testified that a "small class program" was not appropriate for the student, especially given that the student did not exhibit "much inconsistency in his I.Q. scores or his academic performance"—as reflected by the testing results reported in the March 2014 neuropsychological evaluation of the student (Tr. pp. 57-58; see Tr. pp. 80-81; Dist. Ex. 2 at pp. 3-6, 10-13). In addition, the March 2014 neuropsychological evaluation report—noting that the student looked to peers and attempted to follow their lead—supported the decision to recommend a placement where the student had access to peers as role models (see Dist. Ex. 2 at p. 2). As already mentioned, the April 2014 CSE considered but rejected a general education classroom with related services as not supportive enough and a nonpublic school as "too restrictive" for the student (see Tr. pp. 56-57, 87-88, 91-92; Dist. Ex. 10 at p. 12).

To further support the student's attention, language processing, and expression needs, the April 2014 CSE recommended related services of OT and speech-language therapy, along with the following strategies and supports to address the student's management needs: support in the classroom to initiate and sustain interactions with his peers as well as engage with a persist through activities that are challenging for him; use of visual schedule and visual prompts; preferential seating; directions and instructions repeated; focusing prompts; regular breaks to assist with sensory modulation so he can maintain his attention; provide a sensory diet using tools such as a wedge cushion, sensory ball, verbal and tactile prompts; small group work; and a multi-sensory approach to teaching (see Dist. Ex. 10 at pp. 3, 7; see also Tr. pp. 31-41, 48).

Based upon the foregoing, the evidence in the hearing record supports a finding that the ICT services in a general education setting—together with the services of a full-time, crisis management paraprofessional, related services, and strategies to address the student's management needs recommended in the April 2014 IEP—were appropriate to meet the student's needs and were reasonably calculated to enable the student to receive educational benefits.

C. Challenges to Assigned Public School Site

The parents assert that the district failed to present evidence at the impartial hearing to establish that the assigned public school site could implement the April 2014 IEP or to refute evidence that the "ICT classrooms" at the assigned public school site were "over-enrolled." The district argues that the parents' assertions about the assigned public school site were wholly speculative. 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 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 [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. Mar. 4, 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]).[11] 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

[11] 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [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.

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 parents cannot prevail on their claims regarding implementation of the April 2014 IEP because a retrospective analysis of how the district would have implemented the student's April 2014 IEP at the assigned public school site is 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 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 April 2014 IEP (see Parent Ex. A at pp. 1-2). 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. 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 parents cannot prevail on their claims that the assigned public school site would not have properly implemented the April 2014 IEP.[12]

[12] 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., 12 F. Supp. 3d at 370-72; 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, 271-72 [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], vacated, 2015 WL 2146092 [2d Cir. May 8, 2015]; R.B., 2013 WL 5438605, at *17; 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., 964 F. Supp. 2d at 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., 2013 WL 1155570, at *13; J.L., 2013 WL 625064, at *10; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012], rev'd, 760 F.3d 211[2d Cir. 2014]; 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., 2014 WL 2722967, at *12-*14 [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., 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).

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 2014-15 school year, the necessary inquiry is at an end and there is no need to reach the district's cross-appeal regarding whether the student's unilateral placement at the Gateway School was an appropriate placement or whether equitable considerations supported the parents' 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.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 25, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER