The University of the State of New York

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

No. 15-063

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:
Thivierge & Rothberg, PC, attorneys for petitioners, Randi M. Rothberg, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the IVDU School (IVDU) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

According to the hearing record, at the time the challenged IEP was developed the student demonstrated delays in the areas of academic performance, behavioral regulation, fine and gross motor abilities, and self-help skills (see Parent Ex. B; Dist. Exs. 3; 4; 5).

Regarding the student's educational history, the student began receiving early intervention services at the age of one and continued to receive special education services through the committee on preschool special education (CPSE) (Tr. pp. 139-40). The student subsequently attended a bilingual 12:1+1 special class in a district public school from kindergarten through the third grade (Tr. pp. 141-42; Dist. Ex. 4). For the 2011-12 school year (fourth grade), the parent

enrolled the student at IVDU, where she continued to attend through the 2013-14 school year, the year in dispute in this proceeding (Tr. p. 142).[1]

A CSE convened on May 7, 2013, to develop the student's IEP for the 2013-14 school year (Parent Ex. B). Attendees at the May 2013 CSE meeting included the parent, a district representative who also participated as a regular education teacher, a district school psychologist, a district social worker, and, by telephone, the IVDU principal (id. at pp. 12-14). Finding that the student remained eligible for special education as a student with a speech or language impairment, the May 2013 CSE recommended a program consisting of a 12:1+1 special class placement in a community school with individual occupational therapy (OT), individual physical therapy (PT), group (3:1) speech-language therapy, counseling, and adapted physical education (id. at pp. 7, 10, 12).[2] The IEP further indicated that the student would participate in the same State and district-wide assessments that were administered to regular education students and provided modified promotional criteria, requiring the student to meet 25 percent of grade-level standards (id. at pp. 9, 12).

By final notice of recommendation dated June 18, 2013, the district summarized the special education placement 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 (Dist. Ex. 2). By letter dated June 26, 2013, the parent advised the district that, after visiting the assigned public school site identified in the final notice of recommendation, she was rejecting the recommended "program" and "placement offer" (Parent Ex. D at p. 1). More specifically, the parent expressed concern that the student "would not receive the level of individualized instruction and appropriate small group instruction that she require[d]" in a 12:1+1 special class at the assigned public school site (id.). The parent indicated that, during her observation of a 12:1+1 special class in the school, the paraprofessional was not present in the classroom and that she was informed "that the students help each other learn" (id.). In addition, the parent indicated that the school had no "plans in place to transition" the student into the assigned school (id.). The parent also stated that the students in the 12:1+1 special class had "a variety of classifications and skills levels" (id.). In addition, the parent indicated that speech-language therapy services at the school were sometimes provided simultaneously to multiple students in a small room and that the assigned school did not have a designated location for the delivery of OT services, but instead the services took place in different locations (id.). The parent also expressed concern with regard to the size of the school, particularly with respect to the number of students in the lunchroom and participating in physical education at the same time (id.). Lastly, the parent advised the district that, subject to an "appropriate program and placement" for the student, the student would attend IVDU for the 2013-14 school year and the parent would seek public funding for the costs of the student's tuition (id.).

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

[2] 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 200.8[11]; 8 NYCRR 200.1[zz][11]).

On September 13, 2013, the parent executed an enrollment agreement with IVDU for the student's attendance during the 2013-14 school year (Parent Ex. O).

A. Due Process Complaint Notice

In a due process complaint notice dated July 31, 2014, the parent alleged that the district failed to offer the student a FAPE for the 2013-14 school year, IVDU was an appropriate unilateral placement, and equitable considerations supported an award of tuition reimbursement (Parent Ex. A). Initially, the parent asserted that the May 2013 CSE members lacked "sufficient knowledge" of the program recommended for the student (id. at p. 2). Additionally, the parent argued that the May 2013 CSE failed to report the results of evaluations in the May 2013 IEP (id.). The parent further argued that the IEP contained annual goals that were inappropriate, vague, and unmeasurable and that the goals did not include short-term objectives (id.). The parent further asserted that portions of the May 2013 IEP were developed outside of the May 2013 CSE meeting without the input of the parent or the IVDU principal (id. at p. 4). Next, the parent contended that the CSE's recommendation for a 12:1+1 special class placement was not appropriate because it would not provide the student with a sufficient level of support and the CSE did not recommend any individual instruction (id. at p. 3).[3] The parent further contended that the CSE failed to recommend individual sessions of speech-language therapy for the student (id.). Additionally, the parent alleged that the IEP failed to include individualized parent counseling and training (id.). Next, the parent argued that the CSE improperly recommended that the student participate in the same assessments as regular education students and that the IEP set inappropriate promotional criteria for the student (id.).[4]

With respect to the assigned school, the parent reasserted the concerns expressed in her June 2013 letter in which she rejected the assigned public school site (compare Parent Ex. A at p. 4, with Parent Ex. D at p. 1). Lastly, the parent alleged that IVDU was an appropriate unilateral placement for the student, and that no equitable considerations precluded an award of

[3] The parent apparently uses the word "individualized" to refer both to the modification of services to meet particular needs and to the provision of instruction or services on a 1:1 basis. Where the context indicates the parent is referring to services provided on a 1:1 basis, this decision refers to "individual" services.

[4] The parent also alleged that the May 2013 CSE: (1) developed the May 2013 IEP based on district policies rather than the student's needs; (2) failed to "meaningfully discuss[]" the recommendations for related services; (3) failed to treat the parent and IVDU principal as "full and equal" members of the CSE and failed to consider the parent's requests with respect to the student's programming and classification; (4) recommended inappropriate criteria for goal mastery and failed to specify how the student's progress toward her annual goals would be monitored; (5) failed to consider and discuss the programs available within the district's continuum of services; (6) failed to include supports for the student's transition to the recommended public school program; (7) failed to include appropriate, individualized testing accommodations; (8) failed to specify a student-to-teacher ratio for the recommended adapted physical education; and (9) failed to list the accommodations and services recommended to address the student's special education transportation needs (Parent Ex. A at pp. 2-4). These allegations were not addressed by the IHO and are not advanced on appeal by the parent. Under the circumstances, the parent has effectively abandoned these claims by failing to identify them in any fashion or make any legal or factual argument as to how they rise to the level of a denial of a FAPE. Therefore, these claims will not be further considered (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

reimbursement (Parent Ex. A at pp. 1-2). As relief, the parent requested reimbursement or direct funding for the costs of the student's tuition at IVDU for the 2013-14 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

On November 24, 2014, the parties proceeded to an impartial hearing, which concluded on April 15, 2015 after two days of proceedings (see Tr. pp. 1-172). In a decision dated May 18, 2015, the IHO concluded that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at pp. 8-10). More specifically, the IHO found that the May 2013 IEP was "comprehensive and detailed" and provided the student with "a means or method of achieving educational progress" (id. at pp. 8-9). Next, the IHO found that the parent's observations of the assigned public school site could not "serve as substantive evidence of the alleged inadequacy" of the assigned school (id. at pp. 9-10).

Having concluded that the district offered the student a FAPE for the 2013-14 school year, the IHO found it was not necessary to determine whether the student's unilateral placement at IVDU was appropriate or whether equitable considerations weighed in favor of the parent's request for relief (IHO Decision at p. 10). Nevertheless, the IHO noted his concerns with the student's program at IVDU (id.).

IV. Appeal for State-Level Review

The parent appeals and seeks to overturn the IHO's determination that the district offered the student a FAPE for the 2013-14 school year. First, the parent contends that the IHO improperly placed the burden of proof on the parent and that his decision did not comport with State regulations, was not well-reasoned, included minimal citations to the hearing record, and failed to provide reasoning for his determinations. The parent next contends that the district representative lacked familiarity with the student and had not taught or observed a 12:1+1 special class placement prior to the May 2013 CSE meeting. The parent further contends that the student's standardized test scores were not reported in the student's May 2013 IEP. Additionally, the parent argues that the annual goals were not discussed during the CSE meeting, were developed without the input of the parent and the IVDU principal, and were not appropriate for the student. Next, the parent argues that the recommendation for a 12:1+1 special class placement was not appropriate because the student would not receive the level of support needed to meet her needs. Additionally, the parent argues that the May 2013 CSE failed to offer the student sufficiently intensive speech-language therapy, despite her classification as a student with a speech or language impairment. The parent also contends that the May 2013 CSE improperly failed to recommend parent counseling and training. The parent further contends that the CSE improperly recommended that the student participate in the same assessments as regular education students and that the IEP included improper promotion criteria for the student.

Additionally, the parent argues that the IHO erred in failing to address her concerns with respect to the assigned public school site. More specifically, the parent argues the student might not have been appropriately grouped with students with similar needs, the student's speech-language therapy might have been provided in a small space with multiple sessions occurring simultaneously, the school did not have a designated location for providing OT services, and the school was too large.

With regard to the unilateral placement, the parent alleges that the program at IVDU was appropriate because it was tailored to meet the student's needs and the student made progress. Lastly, the parent asserts that equitable considerations should not preclude her request for reimbursement, as she cooperated with the district and provided the district with notice of her concerns. Consequently, as relief, the parent requests direct funding or reimbursement for the costs of the student's tuition at IVDU for the 2013-14 school year.

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]). 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 [2d Cir. Aug. 16, 2010]).

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]). 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).

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]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). "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).

VI. Discussion

A. Sufficiency of the IHO Decision

On appeal, the parent argues that the IHO's decision did not comport with State regulations, was not well-reasoned, and lacked minimal citations to the record. The parent also argues that the IHO failed to address the parent's claims and impermissibly shifted the burden of proof.

After reviewing the IHO's decision, I agree with the parent that it did not comport with State regulations. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to the hearing record and to applicable law and application of that law to the facts of the case are the norm in "appropriate standard legal practice," and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn. Here, the IHO failed to cite to specific portions of the hearing record that supported his determinations and concluded that the district offered the student a FAPE for the 2013-14 school year without any meaningful analysis. While the IHO cited to relevant transcript pages and exhibits in the portion of the decision describing the background of the case, his failure to cite with specificity to the facts in the hearing record and to provide the reasons for his determinations, are not helpful to the parties in understanding the decision (IHO Decision at pp. 2-7). Additionally, a review of the IHO's decision reflects that he did not specifically address many of the allegations raised in the parent's due process complaint notice (compare Parent Ex. A at pp. 2-5, with IHO Decision at pp. 8-10). Notwithstanding the foregoing, I have conducted an impartial review of the entire hearing record and rendered an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]), and have found no reason to disturb the IHO's finding that the district offered the student a FAPE for the 2013-14 school year.

With respect to the parent's contention that the IHO impermissibly shifted the burden of proof, under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). However, New York State has placed the burden of proof 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]). Here, although the IHO did not cite to Schaffer or reference the State statute, the hearing record does not support a conclusion that the IHO misapplied the burden of proof (see IHO Decision at pp. 8-10). Moreover, even if the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Rather, as previously mentioned, an independent review of the entire hearing record supports the IHO's determination that the district offered the student a FAPE (see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. Allegations Regarding the District Representative

The parent alleges on appeal that the district representative lacked familiarity with the student and that the parent and IVDU principal were the only members of the May 2013 CSE who had direct knowledge of the student. The parent also alleges that the district representative never taught or observed a 12:1+1 special class prior to the CSE meeting. Initially, it appears that the parent is arguing that, because the district representative was not familiar with the student, his testimony cannot be used to support the recommendations made by the CSE. However, the parent

cites to no authority for the proposition that a district cannot establish that it offered a student a FAPE without eliciting testimony in support of the CSE's recommendation.

Furthermore, the hearing record establishes that, during the May 2013 CSE meeting, the parent and the IVDU principal participated in the CSE's discussion of the student's progress reports and related services reports from IVDU, the promotion criteria, the student's eligibility classification, and the student's reading and math levels (see Tr. pp. 110, 116, 143; Dist. Ex. 5). In addition, the May 2013 IEP indicates that the IVDU principal provided the CSE with input regarding the student's academic functioning and social development (Parent Ex. B at pp. 1-2). Moreover, the May 2013 IVDU progress report prepared by the student's then-current teacher at IVDU contained information regarding the student's functioning that was reflected on the May 2013 IEP and related services goals that were included verbatim on the IEP (compare Dist. Ex. 5, with Parent Ex. B at pp. 1-6). As the parent and IVDU principal were able to participate in the May 2013 CSE meeting, the facts that the district representative did not have direct personal knowledge of the student and had not taught in or observed a 12:1+1 special class—even assuming they resulted in a procedural violation of the IDEA—do not support a finding that any such inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or 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]; A.H., 394 Fed. App'x at 720-21; M.C v. New York City Dep't of Educ., 2015 WL 4464102, at *5 [S.D.N.Y. July 15, 2015]; see R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 430-31 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 280 [S.D.N.Y. 2013]).

C. May 2013 IEP

1. Present Levels of Performance

In this case, although the adequacy of the present levels of performance in the May 2013 IEP is not in dispute, with the exception of the omission of certain standardized test scores, a brief discussion thereof provides context for the discussion of whether the recommended program was appropriate to meet the student's needs for the 2013-14 school year.

The hearing record indicates that the May 2013 CSE had available to it a January 2013 psychoeducational evaluation report, a January 2013 social history update, and a May 2013 school progress report with information about the student's present levels of performance completed by the student's then-current IVDU teacher and related service goals prepared by IVDU (Dist. Exs. 3-5; see Tr. pp. 28-29, 116; Parent Exs. B at pp. 1-6; J-M).

With regard to the student's current levels of performance and academic, developmental, and functional needs, the May 2013 IEP reflected the results of cognitive testing administered by the district as part of the January 2013 psychoeducational evaluation, which showed that the student's overall cognitive ability, as measured by the Wechsler Abbreviated Scales of Intelligence (WASI), was in the "borderline" range (Parent Ex. B at p. 1). Consistent with the January 2013 psychoeducational report, the IEP noted that the student demonstrated good verbal cognitive skills but lagged in perceptual areas (compare Parent Ex. B at p. 1, with Dist. Ex. 3 at p. 3). With respect to the student's academic achievement, functional performance, and learning characteristics, the

IEP indicated that the student was administered the Wechsler Individual Achievement Test–Third Edition as a means of assessing her academic skills (Parent Ex. B at p. 1; see Dist. Ex. 3 at pp. 4-6). The results of the assessment indicated that the student's reading skills were in the mid second grade range, while her math skills were at a kindergarten level (Parent Ex. B at p. 1). The IEP noted that, according to an update provided by the IVDU principal, the student's math skills were very weak and estimated to be at a beginning first grade level (id.). The IVDU principal explained that the student often became frustrated when presented with something new and that the student required the use of manipulatives and "constant repetition" (id.). According to the IEP, the principal reported that the student demonstrated stronger decoding skills that fell within the third grade level (id.). She also reported that the student's reading comprehension skills were at a second grade level when reading independently (third grade instructional level) (id.). The IEP also noted that the student read quickly and without expression, but was able to read fluently because of her good decoding abilities (id.). The student read chapter books and was able to answer literal questions but "show[ed] deficits in inferencing" (id.). With respect to writing, the IEP indicated that the student was able to write three sentence paragraphs with teacher support, but was unable to stay within the margins (id.). As reported by IVDU, the student's writing was estimated to be at a first grade level (id.).

In discussing the student's social needs, the social development section of the present levels of performance in the May 2013 IEP noted that the student's social/emotional functioning appeared to be within "acceptable ranges" and indicated that, during testing, the student "displayed appropriate affect, relatedness and was oriented in time and space," and was able to give "basic self and familial information" (Dist. Ex. B at p. 2).[5] The May 2013 IEP further noted that, according to the IVDU principal, the student got along with peers and was respectful to adults (id.). The present levels of performance also indicated that the student could become frustrated when presented with new material, would "put[] her head down and pout[]" when the student did not want to do something, and, at times, would "shut down verbally" but could recover "relatively quickly" (id. at pp. 1-2).[6] Lastly, the IEP noted that the student was receptive to encouragement (id. at p. 2).

In describing the student's physical needs, the present levels of performance in the May 2013 IEP conveyed that the student was in good health, and no strengths or needs were reported

[5] While not specified in the IEP, the description of the student's presentation during testing referred to in the social development section of the present levels of performance was taken from the January 2013 psychoeducational evaluation (Dist. Ex. 3 at p. 6).

[6] Although the IVDU principal testified that the student's frustration "manifested when she [didn't] understand something," that, once the student was frustrated, it was "very hard to get her back," and that the student would become anxious and could "shut[] down not for five minutes, but . . . for 15 minutes," it appears as though the principal was referring to the student's behaviors during the 2013-14 school year (Tr. pp. 114-15). In addition, the principal did not testify with regard to the frequency with which these episodes occurred, and nothing in the hearing record indicates that the May 2013 CSE was made aware that the student's frustration reached this level at the time the May 2013 IEP was developed.

(Parent Ex. B at p. 2).[7] As noted in an earlier section of the IEP, when writing the student had difficulty staying within the margins (id. at p. 1).

With respect to the parent's argument that the student's standardized test scores were not reported in the present levels of performance, this omission does not rise to a denial of a FAPE as the May 2013 IEP reflects the results of these tests. For example, administration of the WASI revealed that the student's cognitive functioning fell within the borderline range, and yielded the following standard scores: verbal IQ, 86 (low average); performance IQ, 65 (defective); and full-scale IQ, 73 (borderline range) (Dist. Ex. 3 at pp 3-4). Similarly, the May 2013 IEP indicated that the student's "Overall cognitive intellectual abilities, as measured by the WASI [we]re in the Borderline ranges. Verbal skills fell within the Low Average range while Performance skill[s] fell within the Low range" (Parent Ex. B at p. 1). Moreover, in addition to the standardized testing, during the CSE meeting, the IVDU principal provided the committee with estimated levels of academic functioning for the student (see id.). Thus, the hearing record does not support a finding that the failure to include the student's standardized test scores in the May 2013 IEP resulted in a denial of a FAPE in this case (see L.O. v. New York City Dep't of Educ., 2015 WL 1344759, at *11 [S.D.N.Y. Mar. 24, 2015] [holding that an IEP need not recite the student's specific standardized test scores so long as it conveys the substantive results of the tests]).

2. Annual Goals

Initially, the parent argues that the annual goals contained in the May 2013 IEP were developed without her input after the May CSE meeting, thus "bypassing the cooperative process" envisioned by the IDEA.

In developing the annual goals in the May 2013 IEP, the district representative testified that, during the May 2013 CSE meeting, the CSE took "notes" of the student's weaknesses as reported by the IVDU principal (Tr. p. 48). The district representative further testified that his practice was to discuss the goals with the parent "in a general outline and . . . transform the goals specifically to the IEP after the meeting" (Tr. pp. 48-49). The district representative noted that the district school psychologist "wrote the goals" subsequent to the CSE meeting (see id.). Under these circumstances, courts have held that it is permissible to finalize the precise text of a student's annual goals after the CSE meeting so long as it does not seriously infringe on the parent's opportunity to participate in the meeting (S.B. v. New York City Dep't of Educ., 2015 WL 3919116, at *6-*7 [S.D.N.Y. June 25, 2015]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]). Here, the IVDU principal testified that to her "recollection," the May 2013 CSE did not discuss the goals explicitly, but "went over [the student's] progress" (Tr. pp. 110-11). Furthermore, the IVDU principal testified that the May 2013 CSE also "went over the school progress report," "related service reports," "related services that were being given on the IEP," "promotion criteria," "[the student's] classification," and the student's reading and math levels (Tr. p. 116). A review of the related service goals provided by IVDU establishes that the goals were adopted for use on the May 2013 IEP (compare Parent Ex.

[7] Although the present levels of performance indicated that the student did not have any physical needs, the May 2013 IEP included related services and annual goals related to gross and fine motor deficits (Parent Ex. B at pp. 4-7).

B at pp. 3-5, with Dist. Ex. 5 at pp. 2-4). Therefore, while the annual goals in the May 2013 CSE may not have been discussed specifically during the May 2013 CSE meeting, the weight of the evidence in the hearing record indicates that the parent and IVDU principal attended and participated during the CSE meeting and, as discussed more fully below, the annual goals were appropriate to meet the student's needs, such that the failure to draft the annual goals included in the May 2013 IEP during the CSE meeting did not significantly impede the parent's opportunity to participate in the development of the student's IEP (see E.A.M., 2012 WL 4571794, at *8).

Turning to the parent's arguments regarding the appropriateness of the annual goals in the May 2013 IEP, 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 is required to include the evaluative criteria, evaluation procedures, and schedules to be used to measure the student's progress toward meeting the annual goal (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]).

Here, a review of the May 2013 IEP reveals that the May 2013 CSE included 18 annual goals to address the student's deficits in the areas of academics, speech-language skills, fine and gross motor skills, and social/emotional development (Parent Ex. B at pp. 3-6). For example, the academic goals addressed the student's weaknesses in math computation, reading comprehension, math reasoning, and writing skills (id.). The language and focus of these goals were consistent with the student's needs identified in the January 2013 psychoeducational evaluation and the May 2013 school progress report completed by the student's IVDU teacher (compare Parent Ex. B at pp. 5-6, with Dist. Exs. 3 at pp. 4-6; 5). The speech-language goals focused on the student's ability to describe objects, improve reasoning and inferencing skills, and increase comprehension of spoken narratives and conversational skills, and reflect verbatim the speech-language goals in the May 2013 IVDU school progress report (compare Parent Ex. B at pp. 3-4, with Dist. Ex. 5 at p. 4). The fine and gross motor goals contained in the May 2013 IEP targeted improving the student's attention, pencil grasp, and dressing skills, as well as motor planning and coordination, and mirror the OT goals submitted to the district by IVDU (compare Parent Ex. B at p. 4, with Dist. Ex. 5 at p. 3). The counseling goals recommended by the May 2013 CSE centered on conversational skills, identifying the causes of specific emotions, and compromising during conflict, and correspond directly with the counseling goals submitted by IVDU (compare Parent Ex. B at p 5, with Dist. Ex. 5 at p. 2). Additionally, the annual goals contained in the May 2013 IEP included evaluation criteria (i.e., three out of four trials, 80% accuracy), a method for evaluating progress (i.e., teacher made materials, teacher/provider observations), and an evaluation schedule (i.e., one time per quarter) (Parent Ex. B at pp. 3-6).

With respect to the parent's contentions that a number of the goals were "unrealistic and inappropriate," a review of the hearing record reveals that this claim was particularized to two reading comprehension goals, two math goals, and one writing goal that included projected growth of one grade level within the school year (Parent Ex. B at pp. 5-6). The IVDU principal testified that "it was very hard for [the student] to go up even six months on a grade level let alone a year" (Tr. p. 114). A review of the hearing record reveals that, while these goals were ambitious for the student, they were not inadequate and the goals addressed specific skills that correlated to the

student's identified needs in reading comprehension, math, and writing. For example, the first reading comprehension goal consisted of the student using a graphic organizer to write one sentence for the main idea and three sentences about the details of a story read aloud (Parent Ex. B at p. 5). The second reading comprehension goal consisted of the student answering literal and inferential comprehension questions (id. at p. 6). With respect to math, the first math goal consisted of the student adding and subtracting double digit numerals with carrying (id. at p. 5). The second math goal consisted of locating and identifying pertinent information and solving word problems (id. at p. 6). Lastly, the writing goal consisted of the student writing two sentences from the beginning, middle, and end of three stories (id.). Under these circumstances, the hearing record does not support a finding that the reading comprehension, math, and writing goals were inappropriate for the student, particularly where they were designed to address the student's needs as identified in the May 2013 IEP and the January 2013 psychoeducational evaluation (compare Parent Ex. B at pp. 5-6, with Parent Ex. B at p. 1, and Dist. Ex. 3 at pp. 4-6). While ambitious, the hearing record does not indicate that the goals were thereby inappropriate to meet the student's needs, particularly given the management strategies set forth in the May 2013 IEP that would be available to help the student succeed (see (Parent Ex. B at p. 2; see also A.M., 964 F. Supp. 2d at 285).

With respect to the parent's contentions that the May 2013 IEP lacked goals related to reading fluency, telling time, and money skills, an IEP does not need to identify goals for every one of a student's deficits to offer a FAPE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]), and the issue when assessing whether a FAPE has been offered to a student is not whether an IEP is perfect, but whether as a whole it is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; see also Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Moreover, as mentioned above, the May 2013 IEP contains goals which addressed the student's primary areas of need. Specifically, the May 2013 IEP identified the student's fluency as a relative strength and included three reading goals that focused on reading comprehension, consistent with the results of the January 2013 psychoeducational evaluation and a progress report completed by her then-current IVDU teacher (Parent Ex. B at pp. 1, 5-6; Dist. Exs. 3 at pp. 3-4; 5 at p. 1). In addition, the IVDU principal opined that, while she believed that there should be an additional goal for reading fluency, she considered the other reading goals contained in the May 2013 IEP to be appropriate for the student (Tr. pp. 112-13, 120). With respect to time and money skills, the IVDU principal testified that these were "goals that [IVDU] had on progress reports" (Tr. p. 113). However, these goals are included in January 2014 and June 2014 IVDU student progress reports, neither of which was available to the May 2013 CSE (Parent Exs. H at p. 2; I at p. 2).[8]

[8] A January 2013 IVDU progress report indicates that the student was working on money skills, but does not identify it as an area of particular need, nor does the progress report completed by the student's teacher for the district (Parent Ex. J at p. 1; Dist. Ex. 5 at p. 1).

Overall, the evidence in the hearing record supports a finding that the annual goals in the May 2013 IEP targeted and appropriately addressed the student's identified areas of need and would enable the student to receive educational benefits (see, e.g., J.L., 2013 WL 625064, at *13).

3. 12:1+1 Special Class Placement

On appeal, the parent argues that the recommendation for a 12:1+1 special class placement was not appropriate because the student would not receive the level of support necessary to meet her needs.

State regulations provide that a 12:1+1 special class placement is intended for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs must be determined with respect to the student's academic achievement, functional performance and learning characteristics, social development, and physical development (8 NYCRR 200.1[ww][3][i][d]). Despite the parent's assertion that the student would not receive the level of support necessary to meet her needs, a review of the hearing record demonstrates that the recommended a 12:1+1 special class placement was reasonably calculated to enable the student to receive educational benefit.

The district representative recalled that, at the time of the May 2013 CSE meeting, the student was attending a class of seven or eight students (Tr. p. 56).[9] As noted above, the IVDU principal informed the CSE that, within this setting, the student: was functioning academically between a first and third grade level; was often frustrated when presented with something new; required the use of manipulatives and constant repetition in math; was well liked and got along well with peers; put her head down and pouted when she did not want to do something; and, at times, shut down verbally but recovered quickly (Parent Ex. B at pp. 1-2). The present levels of performance indicated that the student exhibited learning and functional deficits that required added supports, such that the student required an additional adult within the classroom in order to benefit from instruction. As discussed previously, the student demonstrated delays in academic performance, speech-language skills, fine and gross motor skills and social/emotional development (id. at pp. 1-6).

To address the student's academic and social management needs, the May 2013 IEP indicated that the student required a review of previously taught information, repetition and paraphrasing of information, instruction broken down into discrete units of learning, use of multi-sensory materials, praise and encouragement, pre-instruction with emphasis on the main ideas to be presented; positive feedback, and encouragement (Parent Ex. B at p. 2). Moreover, the IEP

[9] Although the hearing record contains no other evidence regarding the student's classroom at IVDU during the 2012-13 school year, the IVDU principal testified that during the 2013-14 school year, the student was in a classroom of six students, with staff including one teacher, one teaching assistant, and one classroom paraprofessional, as well as two health paraprofessionals (who presumably were assigned to individual students) (Tr. pp. 82-83, 85-86).

recommended testing accommodations including extended (double) time, separate location in a group of no more than 12 students, revised test formats, revised test directions, and use of a calculator (id. at p. 8). To further support the student, the May 2013 CSE recommended the related services of OT, PT, speech-language therapy, and counseling as part of the student's program (id. at p. 7) and, as discussed above, included annual goals to address the student's needs in the areas of academics, speech-language, fine and gross motor development, and social/emotional development. The parent noted testimony of the district representative that the 12:1+1 special class would follow a sixth grade curriculum (see Tr. p. 62). However, there is nothing in the hearing record to indicate that, with the modifications and accommodations recommended by the CSE, such a curriculum would not be appropriate for the student.

In support of the May 2013 CSE's recommendation, the district representative testified that the CSE recommended a 12:1+1 special class because the student "needed the additional teach[ing] assistant within the room to give her the support she needed . . . ." (Tr. pp. 55-56). According to the May 2013 IEP, the CSE also considered a general education setting with related services, a general education setting with special education teacher support services, and integrated co-teaching services, but these options were rejected as being insufficient to address the student's "cognitive, academic, language and fine and motor delays" (Parent Ex. B at p. 12).

The parent argues that the student failed to make progress in a 12:1+1 special class setting in the past in further support of her assertion that the May 2013 CSE's placement recommendation was not appropriate. A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a future IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P, 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). In this instance, however, the alleged negative experience of the student in the public school program was sufficiently distant in time from the May 2013 CSE meeting (as, at the time of the meeting, the student was attending IVDU for a second school year) and sufficiently different (on account of the bilingual aspect of the 12:1+1 special class that the student attended) that the comparison carries less weight in the analysis of the May 2013 IEP (see Tr. pp. 141-42; Dist. Ex. 4).

In conclusion, in view of the evidence, I find insufficient reason to depart from the IHO's conclusion that the May 2013 IEP was appropriate, in that the May 2013 CSE's recommendation for a 12:1+1 special class placement—in conjunction with the modifications, accommodations, management strategies, related services, and annual goals in the May 2013 IEP—was tailored to address the student's unique needs and was reasonably calculated to enable her to receive educational benefits for the 2013-14 school year.

4. Related Services

a. Speech-Language Therapy

The parent claims that the May 2013 CSE inappropriately failed to recommend individual speech-language therapy for the student, despite the student's classification as a student with a speech or language impairment.

As an initial matter, the parent's argument that the student's eligibility classification should dictate a particular type of special education services is without merit. The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]).

Moreover, the parent's assertion that the student required individual speech-language therapy services is made without reference to evidentiary support, and a review of the hearing record does not indicate that individual services were required for the student to receive benefits from speech-language therapy. The January 2013 psychoeducational report indicated that the student had "good" receptive and expressive language skills during testing, spoke in "complete short sentences," and was easily understood by the examiner (Dist. Ex. 3 at p. 2). Additionally, the student's receptive and expressive language skills were found to be within normal limits and adequate to understand directions and for social interaction (id. at pp. 2-3). Also, on the verbal subtest of the WASI, administered as part of the January 2013 psychoeducational evaluation, the student obtained a standard score of 86 (percentile rank 18), in the "low average" range (id. at pp. 3-4). The May 2013 CSE recommended speech-language therapy two times per week for 30 minutes in a group of three (Parent Ex. B at p. 7). The May 2013 IEP also included goals related to improving verbal expression, improving reasoning and inferencing increased comprehension of spoken narratives, and initiating and maintaining conversation (id. at pp. 3-4). Thus, none of the information available at the time of the May 2013 CSE meeting indicated the student's needs were such that the failure to recommend individual speech language therapy constituted a denial of a FAPE, but rather supports a conclusion that the May 2013 IEP adequately and appropriately addressed the student's speech-language needs.[10]

[10] Although the student received individual speech-language therapy at IVDU (Tr. pp. 92, 96), the hearing record contains no indication of why the decision was made to provide the service individually.

b. Parent Counseling and Training

Next, the parent asserts that the May 2013 CSE failed to recommend parent counseling and training in the May 2013 IEP. Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). State regulations require that an IEP indicate the extent to which parent counseling and training will be provided (8 NYCRR 200.4[d][2][v][b][5]). State regulations further require the provision of parent counseling and training to the parents of students with autism, or of students for whom certain special class placements are recommended, for the purpose of enabling the parents to perform appropriate follow-up intervention activities at home (8 NYCRR 200.6[h][8]; 200.13[d]; see 8 NYCRR 200.6[h][4][ii], [iii]).

First, the hearing record reflects that the student was classified as a student with a speech or language impairment, not as a student with autism (Parent Ex. B at p. 1). Additionally, the CSE recommended a 12:1+1 special class placement for the student, which is not one of the special classes enumerated in State regulation (id. at p. 7; see 8 NYCRR 200.6[h][8]; see 8 NYCRR 200.6[h][4][ii], [iii]). Accordingly, neither the student's classification nor the placement recommendation automatically required the provision of parent counseling and training. However, while not automatic, the CSE remained obligated to recommend any related services, including parent counseling and training, if the CSE determined such services were necessary for the student to receive a FAPE (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]; see Parent Counseling and Training, 71 Fed. Reg. 46573 [Aug. 14, 2006]) and any testimony of the district representative implying otherwise is unpersuasive (see Tr. pp. 57). Nonetheless, the parent does not argue, and the hearing record does not reflect, that the parent required parent counseling and training or that she requested the service be included on the May 2013 IEP.[11] Thus, while it is undisputed that the May 2013 CSE did not recommend parent counseling and training as a related service in the student's IEP, the hearing record in this case does not contain any evidence upon which to conclude that such omission resulted in whole, or in part, in a failure to offer the student a FAPE for the 2013-14 school year (R.E., 694 F.3d at 191 [finding that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a

[11] Rather, the parent contends that the district improperly only considers providing parent counseling and training when the provision of such services is mandated by State regulation. To the extent that the parent's argument in this regard relates to a district policies, I am not endowed with the authority to rule on systemic claims, as an SRO's jurisdiction is limited to the review of individual matters relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such a student (see Educ. Law § 4404[2]).

denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement"]).[12]

5. State and Local Assessments

The parent also asserts that the May 2013 CSE's recommendation that the student participate in the same State and district-wide assessments as regular education students was not appropriate because the student's abilities were too low to take such assessments.

The IDEA requires that students with disabilities must be included in all general State and local assessment programs with appropriate accommodations, and that alternate assessments provided to students who cannot participate in regular assessments must be indicated in their IEPs (20 U.S.C. §§ 1412[a][16][A], [C]; 1414[d][1][A][i][VI]; 34 CFR 300.160[a]; 300.320[a][6]; 8 NYCRR 200.4[d][2][vii]; see generally "The State Alternate Assessment for Students with Severe Disabilities," Office of Special Educ., Policy No. 01-02 [Jan. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/alterassess.htm). The CSE cannot exempt students with disabilities from participating in State or local assessments (Letter to State Directors of Special Education, 34 IDELR 119 [OSEP 2000]). If the CSE determines that a student cannot participate in State or local assessments even with accommodations, then the CSE must recommend that the student participate in alternate assessments (id.). To be eligible for the New York State Alternate Assessment, a student must be found to have:

> a severe cognitive disability and significant deficits in communication/language and significant deficits in adaptive behavior; and . . . require[] a highly specialized educational program that facilitates the acquisition, application, and transfer of skills across natural environments . . .; and . . . require[] educational support systems, such as assistive technology, personal care services, health/medical services, or behavioral intervention.

("Eligibility and Participation Criteria – NYSAA," Office of State Assessment [Aug. 2011], available at http://www.p12.nysed.gov/assessment/nysaa/nysaa-eligibility.pdf; see 8 NYCRR 100.1[t][2][iv]; "The State Alternate Assessment for Students with Severe Disabilities," supra).

With respect to the student's participation in State and district-wide tests, to address the student's specific needs, the May 2013 IEP contained testing accommodations including extended (double) time, separate location (in a group of no more than 12 students), revised test formats and directions (questions and directions read aloud, answers recorded in any manner), and use of a calculator (Parent Ex. B at p. 8). The district representative testified that that the May 2013 CSE determined that, with these testing accommodations, the student would be able to take the State and district-wide assessments given to regular education students (Tr. p 54). The hearing record

[12] Notwithstanding the foregoing, upon reconvening this student's next CSE meeting, if the parent requests that the CSE consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction, the CSE shall do so, and after due consideration, the district shall provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training in the student's IEP, together with an explanation of the basis for the CSE's recommendation, in conformity with the procedural safeguards of the IDEA and State regulations (see 34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo], 200.5[a]).

contains no evidence indicating that the student would not be able to participate in State and district-wide tests with the aforementioned accommodations. Furthermore, even assuming that the student met aspects of the criteria for eligibility for alternate assessment, such as demonstration of a severe cognitive disability, significant deficits in communication and adaptive behavior, and a need for an educational program that facilitated the acquisition and transfer of skills across environments, the hearing record does not support a finding that the student required assistive technology, personal or health/medical care services, or behavioral interventions (see 8 NYCRR 100.1[t][2][iv]). Based on the foregoing, the May 2013 CSE appropriately determined that the student was able to participate in State and district-wide tests and was not eligible for the New York State Alternate Assessment.[13]

6. Promotion Criteria

The parent also contends that the promotion criteria in the May 2013 IEP was not appropriate because the student would not be able to meet sixth grade standards with her academic skills, which were on the first and second grade level. Initially, State law grants the district broad authority "[t]o prescribe the course of study by which the pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant" (Educ. Law §§ 1709[3]; 2554[1]; 2590-h[17]). Accordingly, matters relating to a student's promotion from grade to grade are committed to the discretion of the district and will not be disturbed absent evidence that the determination was arbitrary or capricious (Appeal of A.R., 54 Ed. Dep't Rep., Decision No. 16,665; Appeal of Y.R., 51 Ed. Dep't Rep., Decision No. 16,270; see Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955]).

In any event, neither the IDEA nor federal or State regulations require that an IEP include promotion criteria (see 20 U.S.C. § 1414[d]; 34 CFR 300.320; 8 NYCRR 200.4 [d][2]). Guidance from the New York State Education Department's Office of Special Education indicates that "[i]f the [CSE] determines that the criteria for the student to advance from grade to grade needs to be modified, the IEP would indicate this as a program modification," and further, that such "information would most appropriately be indicated in the IEP in the 'Supplementary Aids and Services/Program Modifications/Accommodations' section of the IEP" ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Documents," at p. 51, Office of Special Educ. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

Here, the district representative testified that the promotion criteria were determined by the student's chronological grade level equivalent (Tr. p. 52). The May 2013 IEP provided that, in order for the student to be promoted, she would be required to meet 25 percent of the sixth grade English language arts and math standards, as evidenced by student work, teacher observation, assessments/grades, and attendance (Parent Ex. B at p. 12). When asked whether the student would be capable of meeting sixth grade academic standards, the district representative clarified that

[13] Even if the student were eligible for the New York State Alternate Assessment, the parent has cited to no basis for concluding that the student would be precluded from receiving educational benefits by taking regular assessments.

promotional criteria were not based on the student's academic goals, which related to her present levels of performance (Tr. pp. 51-52). The district representative explained that the student would be required to meet 25 percent of the State English language arts and math standards for sixth grade, which did not relate to her academic abilities (id. at pp. 52-53, 62-63). Furthermore, there is nothing in the IEP's description of the promotion criteria that altered how instruction would be delivered to the student, and there is no evidence in the hearing record indicating that the promotion criteria would impede the student's ability to receive educational benefits. Accordingly, the hearing record contains no evidence to support a finding of a denial of a FAPE on this basis.

D. Challenges to the Assigned Public School Site

On appeal, the parent asserts that, based on her visit to the assigned public school site, it was not appropriate to implement the May 2013 IEP because the student would not have been appropriately functionally grouped and the school was too large. The parent also asserts that the student's related services would not have been appropriately implemented because she observed multiple speech language-therapy sessions occurring in a small space and the assigned school did not have a designated space for OT services.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[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 E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). The Second Circuit has also stated that when parents have rejected an offered program and unilaterally placed their child prior to implementation of the student's IEP, "[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 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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's speculative concerns that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 2015 WL 2146092, at *3). However, the Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 2015 WL 4256024, at *6-*7 [2d Cir. July 15, 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir.

2014]). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 2015 WL 4256024, at *7; see Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In view of the foregoing, the parent cannot prevail on her claims regarding the assigned public school site. First, it is undisputed that the parent rejected the recommended program and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. D at pp. 1-2; O). Next, the only indication in the hearing record regarding the assigned public school site's purported inability to implement the May 2013 IEP comes from the parent's observation of the assigned school (see Tr. pp. 148-49; Parent Ex. D at p. 1). While the petition indicates that the parent rejected the assigned public school based on her observations and information provided by the parent coordinator at the school, the hearing record contains no indication that the parent coordinator informed the parent that the assigned school was incapable of implementing the student's IEP. Further, although the parent briefly discussed her observation of the assigned school during the impartial hearing, this evidence provides support only for what the parent believed might occur at the assigned school, rather than evidence of the assigned school's capacity to implement the student's IEP (Tr. pp. 146, 148-49; see Parent Ex. D at p. 1). Accordingly, the parent's claims based on her observation of the assigned public school site, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]).

With regard to functional grouping, the parent argues that based on her observation of a 12:1+1 classroom at the assigned school in June 2013, she "learned" that the students had a "variety of classifications and skill levels" and that there was also a "large age spread" (Parent Ex. D at p. 1; see Tr. p. 146). The parents alleged observations do not overcome the speculative nature of grouping claims when a student never attends the assigned public school site (M.C., 2015 WL 4464102, at *7; R.B., 15 F. Supp. 3d at 436; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L., 2013 WL 625064, at *11 [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Even assuming the parent's observations were accurate, there is no basis in the hearing record to find that the range of skills in the particular classroom she observed violated State regulations requiring that students be grouped by similarity of needs (8 NYCRR 200.6[a][3], [h][2]), or that such a violation would impede on the student's ability to receive a FAPE. Furthermore, even if the students were inappropriately grouped at the time that the parent observed the 12:1+1 class, any claim based on this observation during a prior school year would necessarily be speculative in that classroom groupings may

change over time (see, e.g., M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]), providing no assurance that the students observed by the parent during the 2012-13 school year would have been the same students in the classroom had the student enrolled in the assigned public school for the 2013-14 school year. Similarly, parental concerns regarding school or class size, when not contrary to a requirement in a student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 2015 WL 4256024, at *7; Y.F., 2015 WL 4622500, at *6).[14]

With regard to delivery of related services at the assigned school, the parent alleges that she observed multiple speech-language therapy sessions being provided simultaneously in a small space. However, the parent's claim regarding the speech therapy room does not quantify how many students she observed, the number of sessions taking place in the room, how small the speech therapy room was, or explain how, if at all, the provision of speech-language therapy in such an environment might have affected the student or the implementation of the May 2013 IEP. Thus, it would be speculative to attempt to determine how the student would have reacted in this environment (see, e.g., N.K., 961 F. Supp. 2d at 591). The parent also argues that the assigned school did not have a designated space for OT services and that OT was provided in different locations, including hallways, while the May 2013 IEP indicated that the student would receive OT in a "separate location provider's office" (Parent Ex. B at p. 7). However, there is no allegation or evidence in the hearing record that the student would not have received OT services in a provider's office had she attended the assigned school, or that she would not have received any benefit from OT provided elsewhere. Thus, the hearing record provides no basis for a finding that the student was denied a FAPE on these grounds (see Y.F., 2015 WL 4622500, at *6 [holding that "even if the IEP's requirement that related services be provided in a '[s]eparate [l]ocation therapist room' could be read to require the services be provided at the school . . . the use of an outside provider was not such a material deviation from the student's IEP that she was denied a FAPE"]).

Accordingly, as the May 2013 IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the functional grouping within the classroom, the effect of the size of the school on the student's ability to learn, or the provision of the recommended related services, would necessarily be based on impermissible speculation. The district was thus not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 2015 WL 4256024, at *7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

VII. Conclusion

In summary, having found no basis in the hearing record to depart from the IHO's ultimate conclusion that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether IVDU was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

[14] These claims were not raised as challenges to the adequacy of the IEP except to the extent addressed above.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

Dated: **Albany, New York**
August 28, 2015

SARAH L. HARRINGTON
STATE REVIEW OFFICER