The University of the State of New York

The State Education Department
State Review Officer
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No. 15-095

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 Neal Howard Rosenberg, attorneys for petitioner, Marc Gottlieb, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2014-15 school year were not appropriate, that the parents' unilateral placement of the student at the Churchill School (Churchill) was appropriate, and that equitable considerations did not support an award of tuition reimbursement. The district cross-appeals from the IHO's determination that the district failed to provide the student with a free appropriate public education (FAPE). The appeal must be dismissed. The cross-appeal must be sustained.

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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among

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

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

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

III. Facts and Procedural History

The student presents with delays in expressive language skills, social-emotional functioning, and fine motor skills, and has received diagnoses of social anxiety disorder and expressive language disorder (Dist. Exs. 13 at pp. 8-9; 14 at pp. 4-5). The student attended a 12:1+2 special class for preschool during the 2013-14 school year, and received speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Tr. p. 406; Dist. Exs. 3 at p. 1; 13 at p. 2). During the 2013-14 school year, the parents sought and obtained private evaluations of

the student due to their concerns regarding the student's "overall development and upcoming school placement" and "to gain more insight into [the student's] strengths and weaknesses in order to inform educational planning" (Dist. Exs. 13 at p. 1; 14 at p. 1).[1]

A CSE convened on March 27, 2014 to conduct the student's annual review and to develop an IEP for the 2014-15 school year (Tr. pp. 56-57; Dist. Exs. 2 at p. 11; 16 at p. 5).[2] Finding the student eligible for special education as a student with a speech or language impairment, the March 2014 CSE recommended a general education setting with the support of integrated co-teaching (ICT) services in math, English language arts (ELA), social studies, and science (Dist. Ex. 2 at pp. 8, 11). The CSE also recommended related services including two 30-minute sessions per week of counseling (one in a group and one individually), one 30-minute session per week of OT in a group, and three 30-minute sessions per week of speech-language therapy (two in a group and one individually) (id. at pp. 8-9). In addition, the March 2014 CSE developed annual goals and recommended strategies to address the student's needs in the areas of language development, socialization, and fine motor functioning (Dist. Ex. 2 at pp. 3-8).

In an April 8, 2014 letter to the district, the parents noted that they had a number of concerns regarding the CSE's recommendations for the student, but stated they would wait to make a final decision until they had observed the "placement itself" (Parent Ex. C at p. 1). In a final notice of recommendation (FNR) the district summarized the ICT services and related services recommended in the March 2014 IEP and identified the particular school site to which the district assigned the student to attend for the 2014-15 school year (Dist. Ex. 15).

Responding to the district's FNR in a letter dated May 21, 2014, the parents expressed doubts about the appropriateness of a general education class with the support of ICT services in a "full-size public school," and alleged that the March 2014 CSE recommended ICT services "simply as a matter of course, without giving [the student's] case any serious consideration" (Parent Ex. D at p. 1). However, the parents expressed willingness to "[give] the program an honest appraisal" and indicated a desire to visit the school to evaluate its appropriateness (id.). The district school psychologist responded in a letter dated June 3, 2014, and provided information for the parents to coordinate a visit in June or September to view an ICT class (Dist. Ex. 18). The school psychologist provided his contact information and identified the school's parent coordinator as an alternative contact person (id.).

In a letter dated August 18, 2014, the parents indicated that the March 2014 CSE's recommendation for a general education classroom with ICT services was not appropriate for the student, and alleged that there were deficiencies in the description of the student's present levels of performance and management needs, and that the proposed IEP lacked academic goals (Parent Ex. F at p. 3). The letter further alleged deficiencies with the CSE process, asserting that the "CSE

[1] The student underwent a developmental-behavioral evaluation in December 2013 and a neuropsychological and educational evaluation in January 2014 (Dist. Exs. 13; 14).

[2] The district school psychologist, who also acted as the district representative at the March 2014 CSE meeting, described the meeting as part of the "turning five" process (Tr. p. 56). He further described "turning five" as "the generic term that we use to describe those children who are aging out of pre-K services" and stated that in order to reconcile the differences between the CPSE process and the CSE process "all children who are aging out of preschool have to have their IEPs reevaluated" (id.).

had decided everything they were going to do and say in advance" (id.). The parents indicated that they were "neither accepting nor rejecting the IEP at this time" but that they would be unilaterally placing the student at Churchill until such time as they determined whether the assigned school "checks out" (id. at pp. 3-4 [emphasis omitted]). The parents asserted that if the assigned school was appropriate for the student, they would place him there, and if it was not, the parents would "hold the DOE responsible for [the student's] tuition at Churchill" (id. at p. 4).

In a letter dated December 4, 2014, the parents alleged that when the student's mother was "finally permitted to visit" the assigned school, she was informed by the principal that the school was "drastically overcrowded," which caused serious concern for the parents who indicated that the student was "easily overwhelmed by large and chaotic environments" (Parent Ex. G at p. 1). Additionally, the parents alleged that the "workshop model" used at the assigned school was inappropriate for the student, that the school had no OT gym equipment (which the student required in order to make progress), and that the kindergarten ICT "class" was "chaotic" and the instruction "insubstantial" (id. at pp. 1-2). The parents explicitly rejected the assigned school, indicated that they would continue the student's enrollment at Churchill, and reiterated their intent to hold the district financially responsible for the student's tuition (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 8, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (Parent Ex. A). The parents alleged a broad spectrum of procedural and substantive violations, including that the March 2014 CSE was not properly composed; that the CSE denied the parents and outside members a meaningful opportunity to participate and predetermined the student's program recommendations; that the CSE did not properly source, prepare, review, or discuss necessary documentation and available information; that the CSE did not comply with all applicable timetables in the preparation and development of observations, evaluations, and other documentation; that the CSE ignored the available evidence and did not properly consider placing the student in a non-public special education school setting; that the CSE did not properly evaluate the student in all areas of suspected disability; that the CSE did not properly consider whether the student might require a behavioral intervention plan (BIP), assistive technology, and a transition plan; that the March 2014 IEP did not contain an appropriate description of the student's management needs, academic and functional levels, and social/emotional functioning; that the CSE did not properly discuss the student's annual goals; that the goals as reflected in the March 2014 IEP were variously too vague, too difficult, too easy, or incapable of implementation; that the March 2014 CSE's recommended "classroom program and/or related services" were not appropriate for the student; and that the proposed placement was not appropriate and did not constitute the student's least restrictive environment (LRE) (id. at pp. 1-2). The parents additionally asserted that the March 2014 IEP lacked any description of the student's writing or math skills, lacked any goals relating to the acquisition of reading, writing, or math skills, and included the reports of various evaluations but failed to meaningfully discuss them (id. at pp. 2-3). The parents also raised concerns regarding the appropriateness of the student's assigned school (id. at pp. 3-4).

As relief, the parents requested "[t]uition reimbursement and/or prospective funding," as well as transportation and related services, and stated that "the parent also exercises his/her right

to request that the [district] continue to fund the [student's] placement under the pendency provisions of the law as they apply to this case" (Parent Ex. A at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 14, 2015, and concluded on July 10, 2015, after six days of proceedings (see Tr. pp. 1-532). In a decision dated August 19, 2015, the IHO found that the school psychologist, who also acted as district representative, predetermined the program recommendation (IHO Decision at pp. 13-16). The IHO further found that the parents were not given the opportunity to meaningfully participate in the IEP process, that the district failed to offer the student a FAPE for the 2014-15 school year, and that the parents' unilateral placement at Churchill was appropriate (IHO Decision at pp. 13-18). The IHO then concluded that equitable considerations did not favor the parents' request for tuition reimbursement and denied their request in its entirety (id. at pp. 17-18).

In analyzing the parties' arguments related to parental participation and predetermination, the IHO found the student's social/emotional functioning as observed and reported by the district school psychologist was in "stark contrast" to the reports of two private evaluations obtained by the parents (IHO Decision at p. 15). The IHO noted that although the district school psychologist acknowledged the student received a diagnosis of social anxiety disorder, he did not observe it, or believe the data supported such a diagnosis (id.). The IHO determined that the district school psychologist first raised the possibility of ICT services with the student's mother while interviewing her for a social history update, that the school psychologist told the parent he believed ICT services would be a "good fit for [the student]" prior to performing his own classroom observation, that he acknowledged that he "may have told" the parent that he was recommending ICT services prior to the IEP meeting, and that he opened the CSE meeting by recommending ICT services for the student (id. at pp. 15-16). While the IHO found that the parents, teacher, and other service providers' "observations and concerns were heard and duly noted" at the March 2014 CSE meeting, and that they "were given the opportunity to participate," he ultimately determined that their participation was not “meaningful" (id. at p. 16).

Intermixed with the IHO's findings regarding parental participation and predetermination, the IHO also found that the student would not have made progress in the recommended program, specifically "an ICT classroom" (IHO Decision at pp. 15-16). The IHO described the student as "highly anxious and not reaching his academic and social/emotional potential" due to his language deficits and emotional issues (id. at p. 15). The IHO credited the portion of the testimony of the student's preschool teacher, reporting that she did not believe an "ICT classroom" would be appropriate for the student and that she believed it would be overwhelming for the student even with supports (id. at p. 16). The IHO also credited the testimony of the same preschool teacher, the student's mother, and the psychologist who evaluated the student, and found that their testimony supported his determination that the student would not make academic progress in an "ICT classroom" (id. at p. 16). The IHO held that "[t]he testimony and evidence adduced at the hearing overwhelmingly points to a small, nurturing classroom, not an ICT setting with 25 students, in order for [the student] to make progress" (id. at p. 16). Thus, together with the finding that the CSE predetermined the student's educational placement and denied the parents the opportunity to fully participate in the process, the IHO concluded that the district failed to offer the student a FAPE for the 2014-15 school year (id.). Having determined that the district did not

offer the student a FAPE, the IHO went on to find that the parents' remaining allegations did not have merit and also declared "I do not address the remaining allegations" (IHO Decision at p. 16).

The IHO determined the parents' unilateral placement of the student at Churchill for the 2014-15 school year was reasonably calculated to confer educational benefits (IHO Decision at p. 17). The IHO also determined that Churchill was meeting the student's academic and social needs and that the student was making progress academically (id.).

Lastly, the IHO addressed equitable considerations and determined that they did not favor the parents' request for reimbursement of the cost of the student's tuition at Churchill (IHO Decision at p. 17-18). The IHO determined that "the Parents [sic] cooperation with the CSE process was superficial and…she had no intention of placing [the student] in the public school system" (id. at p. 17). In making this determination, the IHO found that the parents applied to Churchill prior to obtaining a private neuropsychological evaluation in January 2014 and prior to the school psychologist's early discussion of ICT services, that the parents signed an enrollment contract with Churchill prior to the CSE meeting, that the parents paid the full tuition by August 7, 2014, that the enrollment contract only provided for prorated reimbursement after June 2, 2014, and that the "escape clause" in the enrollment contract had expired by the time the parents visited the assigned public school in December of 2014 (id. at pp. 17-18). The IHO determined that the parents' visit to the school in December 2014 was a "superficial gesture of going through the motions in order to give the appearance of cooperation with the CSE process" (id. at p. 18). The IHO did not credit the testimony of the student's mother as to her explanation as to why she did not contact the school psychologist to set up a visit (id. at p. 18).

Based on the above, the IHO determined that although the district failed to offer the student a FAPE for the 2014-15 school year, and the parents' unilateral placement was appropriate, the parents were not entitled to reimbursement for the cost of Churchill because the equitable considerations "favor the District" (IHO Decision at pp. 14-18).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn portions of the IHO's decision. As an initial matter, the parents concur with the IHO's determinations that the March 2014 CSE's recommendations were predetermined and the parents were denied meaningful participation in the CSE process, that the district denied the student a FAPE, and that the unilateral placement was appropriate. The parents seek to overturn the IHO's determination that equitable considerations barred the parents' requested relief.

Regarding the matter of the predetermination of the March 2014 CSE's program recommendations, the parents concur with the IHO's determination that the school psychologist, in his capacity as district representative, predetermined his recommendation for ICT services, and further assert that the CSE failed to consider and faithfully record the input of the outside participants. Furthermore, the parents also concur with the IHO's determination that the district failed to recommend an appropriate program for the student.

The parents appeal the IHO's determination that equitable considerations did not favor an award of reimbursement for the cost of the student's tuition at Churchill. The parents allege that

signing a contract with Churchill prior to making their final placement decision did not demonstrate bad faith. The parents further allege that they were merely preserving the student's placement options, and that the timing of their payments to Churchill was not relevant to the analysis. The parents contend that they did not have an obligation to visit the student's placement, and therefore they cannot be considered to have had an affirmative duty to do so. Lastly, the parents assert that they provided more than ostensible cooperation, and that any evidence of the parents' intent was purely circumstantial, claiming that the law does not fault the parents for wishing what was best for the student. The parents conclude by asserting that the IHO erred in finding that equitable considerations weighed in favor of the district and denying the parents' claim for tuition reimbursement, and ask for tuition reimbursement as relief.[3]

In an answer and cross-appeal, the district responds to the parents' petition by variously admitting and denying the allegations raised, and asserts that the IHO correctly determined that equitable considerations favored the district. In its cross-appeal, the district argues that the IHO mistakenly determined that the March 2014 CSE's program recommendation was predetermined, that there was a lack of meaningful participation by the parents, and that the recommendation for ICT services was not substantively appropriate for the student in that he would not make progress. The district further asserts that the recommendation for ICT services was the LRE for the student in that it would have exposed him to a general education setting, while providing supports to allow him to make progress. The parents answer the cross-appeal denying the substance of the allegations therein, and also challenge the accuracy of the reports created by the school psychologist and utilized by the March 2014 CSE in developing the student's program recommendations.

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

[3] Although the IHO did not directly address a number of the parents' claims in detail, her decision addresses the parents' remaining claims in that she did "not find that the remaining allegations of the Parent have merit" (IHO Decision at p. 16). The parents did not appeal from this determination, nor did they address all of the claims raised regarding their allegation that the district did not offer the student a FAPE. These claims include: that the CSE team was improperly composed; that the CSE failed to comply with applicable timelines; that the CSE improperly failed to consider non-public special education settings; that the district failed to properly evaluate the student; that the CSE did not properly consider whether the child required a BIP, assistive technology, or a transition plan; and that the proposed placement was not the student's LRE (Parent Ex. A at pp. 1-2). Having prevailed before the IHO on the issue of whether the district provided the student with a FAPE, the parents were not required to appeal the IHO's dismissal of the parents' alternative grounds for finding a denial of FAPE (J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *10 [S.D.N.Y. Nov. 27, 2012]). However, having failed to raise those issues in their petition or in response to the district's cross-appeal, those matters have not been put at issue in this appeal and I will not search the record to make the parties' arguments for them. In contrast, the parents do maintain on appeal that the CSE failed to discuss the student's management needs, failed to document the student's needs and levels, failed to discuss the student's goals, and erroneously dismissed the student's neuropsychological report. Accordingly, those issues are addressed herein.

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. CSE Process

1. Parental Participation and Predetermination

Turning to the first issue, the district cross-appeals from the IHO's determination that it impeded the parents' ability to participate in the March 2014 CSE meeting because the program recommendations were predetermined by the district school psychologist, who also acted as the district representative.[4] As set forth below, the parents' ability to participate in the development of the March 2014 IEP was not significantly impeded by the behavior of the district school psychologist. Furthermore, the hearing record does not support a conclusion that the March 2014 CSE predetermined the student's placement.

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 T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating 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"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

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.

[4] The same individual acted as both the district school psychologist and district representative throughout the CSE process (Dist. Ex. 2 at p. 14). The school psychologist interviewed the student's mother in the course of performing a social history update, performed a classroom observation, interviewed the student's teacher, and ran the March 2014 CSE meeting (Tr. pp. 56-57, 64-65; see Dist. Exs. 3; 4; 16). He is referred throughout as the district school psychologist, and where appropriate, it is noted that he was also acting in his capacity as district representative.

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).

The record reflects that the district school psychologist formed an opinion regarding what he believed was an appropriate educational placement for the student prior to the March 2014 CSE meeting. The student's mother testified that the school psychologist contacted her to draft a social history update and discussed why he believed ICT services were a good fit for the student (Tr. pp. 412-13). The school psychologist acknowledged that prior to the March 2014 CSE meeting, he may have indicated to the student's mother that he was going to recommend ICT services to the CSE (Tr. p. 156).

It is certainly understandable that the parents had concerns about the school psychologist's early, and potentially premature, estimation of what his recommendation would be at the March 2014 CSE meeting.[5] However, the evidence reflects that at the time of the social history update, although the school psychologist had not yet observed the student in his classroom, he did have access to the bulk of the information that was later available to the March 2014 CSE, including the December 2013 developmental-behavioral pediatrics evaluation, the January 2014 neuropsychological evaluation, teacher progress reports, and other related service provider reports (Tr. pp. 412-14; Dist. Exs. 5-14). The school psychologist, having had significant evaluative material available to him, could permissibly form an initial opinion about the appropriateness of certain services, which, so long as the parents had an opportunity to offer opinions and suggestions at the CSE meeting, would not have risen to the level of predetermination (Dirocco, 2013 WL

[5] A CSE should recommend a placement, "[o]nly after consideration and development of all other components of the student's IEP, including the identification of the student's strengths, needs, goals and the services necessary to meet those goals" ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 57, Office of Special Educ. [Dec. 2010] [indicating that the location for services should be clearly stated], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

25959, at *18). The school psychologist's early opinion may have been concerning to the parents, but it did not amount to a procedural violation.

Turning to the conduct of the March 2014 CSE meeting, the parents maintain that the district predetermined the student's program recommendation, and thereby denied the parents the opportunity to meaningfully participate in the CSE process. The student's mother testified that the school psychologist, in his capacity as district representative "opened the meeting with his recommendation of ICT," and described the "litany of reasons" why he believed it was appropriate (Tr. p. 420-21). She further testified that, after she explained why she believed ICT services would not be appropriate for the student, the school psychologist indicated he "morally can't recommend anything else" (Tr. p. 422).

The parents also appear to have taken issue with the manner in which the school psychologist communicated with them during the CSE meeting—for instance, the student's mother testified that the school psychologist made his case for the appropriateness of ICT services during the CSE meeting at length without adequately explaining to the parents what ICT services actually entailed, and further testified that the school psychologist had to be reminded to hear from the other CSE participants in the middle of going through his recommendations for ICT services (Tr. pp. 414, 420-421). The student's mother also described the CSE meeting as "bizarre" and stated that "it was mostly [the school psychologist] talking" (Tr. pp. 421-22).

Upon review of the hearing record, I note that during the course of his testimony at the impartial hearing, the school psychologist did appear to have a tendency to become excited when speaking, to speak quickly, to anticipate questions, to volunteer additional information, and sometimes talk over other participants (Tr. pp. 50-51, 59-60, 96, 134-35, 202). It is understandable how a parent having to interact with this interpersonal style during a CSE meeting might feel like their input is not being heard or considered. Although the district school psychologist could have been more personally engaging at the outset of the March 2014 CSE meeting, the hearing record, as discussed below, reflects that the parents had ample opportunity to participate during the meeting, and provided input on a range of topics. The student's mother testified that she and the student's pre-school providers "did have an opportunity" to voice their belief that ICT services provided in a general education setting were not appropriate for the student (Tr. pp. 421-22). She also testified that she and the student's teachers and related service providers from his preschool had an opportunity to discuss their belief that the student required a smaller setting than a general education classroom with ICT services (Tr. p. 421). She testified that she explained why she thought ICT services would not have worked for the student (Tr. p. 422). The CSE also discussed the student's evaluations, although the student's mother characterized the school psychologist as "very dismissive of in particular [the neuropsychologist's] report" (Tr. p. 423). According to the parent, she communicated to the CSE that she believed "the problem is the big class…. the sheer volume of children in that class" (Tr. p. 433). The parent shared her fears that the student was "too emotionally fragile to interact in this environment with kids appropriately" (Tr. p. 423). She expressed concerns in the February 2014 social history interview and during the March 2014 CSE meeting regarding the student's pragmatic speech delays, social functioning, and his ability to function in a larger class setting (Dist. Exs. 3 at pp. 1-2; 16 at pp. 5-6). Furthermore, the IEP meeting minutes reflect that the student's mother had an opportunity to express her belief that the student would be completely overwhelmed in a general education setting with ICT services, that he was "noise sensitive" and emotionally fragile, and that she believed the student would do well

to continue in a 12:1+2 class placement (id. at pp. 5-6). Moreover, the parent's concern regarding the appropriateness of the general education setting with ICT services was reflected in the March 2014 IEP (Dist. Ex. 2 at p. 4).

The parents also assert that the March 2014 CSE failed to discuss the student's management needs when developing the 2014-15 IEP. However, this claim is not supported by the hearing record. The March 2014 IEP included a variety of recommendations to address the student's management needs, most notably, placement in a general education class with ICT services which would allow the student to receive increased individualized attention and to participate in small group work as a means of ensuring that he remained attentive to instructional activities and was not withdrawing (Dist. Ex. 2 at p. 4; see Tr. p. 113-15). Additional recommended management strategies included: the use of verbal and non-verbal prompts to maintain the student's attention and engagement; pre-alerts to help with transitions and changes in routine; modeling, facilitated instruction, and guided direction to help the student improve the quality of his language and socialization skills in class; and pre-exposure, chunking, and scaffolding to help with challenging material (Tr. pp. 113-119; Dist. Ex. 2 at p. 4). The record reflects that these issues were discussed at the March 2014 CSE meeting, as the student's mother acknowledged that CSE members "spent a lot of time talking about [the student's] socialization issues," that they discussed peer modeling, and that she expressed concerns about the student's expressive language issues and how they impacted him in the classroom (Tr. p. 426, 432-34, 435-36).

The hearing record further reflects that the district considered additional placement options for the student for the 2014-15 school year. Both the testimony of the district school psychologist and the March 2014 IEP indicated that the March 2014 CSE considered a range of placement options, such as general education, and related services only; however, these options were rejected because they were not sufficiently supportive of the student (Tr. pp. 131, 137-38; Dist. Exs. 2 at p. 12; 16 at pp. 5-8). The March 2014 CSE also considered placing the student in a special class in a community school as well as the option of deferring to the central based support team for placement of the student in a nonpublic school, but these options were rejected because they were determined to be overly restrictive (Tr. pp. 131-40; Dist. Exs. 2 at p. 12; 16 at p. 8). The school psychologist opined that placement in a general education classroom with ICT and related services was the "ideal placement" for the student because of his identified strengths and because it would allow him access to the general education curriculum and typically developing peer role models (Tr. pp. 113-14).

As noted above, the hearing record reflects that the district school psychologist held strong opinions regarding the educational placement he believed was the most appropriate for the student. However, the record also indicates he did keep an open mind and listened to information contrary to his initial impressions, and that changes were incorporated into the March 2014 IEP accordingly—specifically with regard to the student's anxiety.

The student's mother testified that she believed the student had significant issues with anxiety, but that the March 2014 CSE "didn't even acknowledge the diagnosis of social anxiety," and that the issue of the student's anxiety was downplayed or minimized (Tr. pp. 403, 435). However, the parent acknowledged that the CSE meeting minutes reflect her discussion of social anxiety and expressive language disorders, and stated she raised those issues "several times" (Tr. p. 436; Dist. Ex. 16 at p. 5). The school psychologist, in his capacity as district representative,

acknowledged the parent's concerns with the student's anxiety, although he admitted that he did not share her view based upon his own observations, and believed the data on the student's alleged anxiety issues was inconsistent (Tr. p. 100-04; Dist. Ex. 4 at pp. 7-8). Despite this, he noted that he preferred to give credence to the individuals that had direct contact with the student and "take their word for it" (Tr. p. 104). Accordingly, the IEP reflects that counseling was included as a related service, as well as several annual goals to address the student's potential issues with anxiety (Tr. pp. 73, 104-107; see Dist. Ex. 2 at pp. 7-8, 12).

Although the IHO concluded that the parents' participation at the March 2014 CSE meeting was not meaningful, she did note that "the Parent, teacher and service providers were given the opportunity to participate" and "[t]heir observations and concerns were heard and duly noted" (IHO Decision at p. 16). While, the school psychologist held a different opinion of what was appropriate for the student than the parents and some of the other CSE members and the final recommendations of the CSE were not what the parents desired, the parents' opportunity to participate in the decision making process was not significantly impeded (see T.F., 2015 WL 5610769, at *5 [disagreement with the opinions of the parents and outside professionals does not support finding that parents were denied the opportunity to participate in the development of the IEP or that the recommendations were predetermined]; E.F., 2013 WL 4495676, at *17 [parents had opportunity for meaningful participation, even though district did not agree to the parents' preferred placement]; Dirocco, 2013 WL 25959, at *18 [districts may come to a CSE meeting with pre-formed opinions as to the best course of action, "as long as they listen to the parents and parents have the opportunity to make objections and suggestions"). Considering the student's mother's multiple, varied contributions to the discussion at the CSE meeting, the parents' opportunity to participate in the March 2014 CSE meeting was not significantly impeded. Similarly, with the inclusion of counseling and goals related to the student's anxiety in the March 2014 IEP, which were contrary to the school psychologist's initial opinions and personal observations of the student, the IHO's determination that the March 2014 IEP's program recommendations were predetermined is contrary to the hearing record. Therefore the IHO's determinations that the CSE's program recommendation was predetermined and that the parents did not have the opportunity to meaningfully participate in the IEP process must be reversed.

2. Evaluative Information and Present Levels of Performance

Although not specifically addressed by the IHO, the parents maintain that the March 2014 CSE failed to consider input, reports, and documentation from outside participants. The parents further allege that the March 2014 CSE failed to properly document the student's present levels of performance in the IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district must reevaluate a student at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In

particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

An IEP is required to include a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]).

A review of the hearing record indicates that the March 2014 CSE reviewed and considered sufficient evaluative information to identify the student's needs, including: a February 2014 parent interview/social history, a March 2014 teacher interview and classroom observation, updates and reports from the student's preschool teacher and related service providers, and two privately obtained evaluations, a December 2013 developmental evaluation and a January 2014 neuropsychological evaluation (Tr. pp. 64-69, 74, 90-91; Dist. Exs. 2 at pp.1-2; 3-14). In addition, the student's mother, teacher, speech therapist, occupational therapist, and physical therapist participated in the March 2014 CSE meeting (Tr. pp. 60-61, 266; Dist. Ex. 2 at pp. 13-14). The school psychologist testified that there was "an abundance of very good clinical data" available to the CSE to develop the IEP for the 2014-15 school year and multiple parties, including the parent, teacher, and outside evaluators, provided information to the CSE regarding the student's functioning (Tr. pp. 72, 74). Additionally, the hearing record reveals that the March 2014 IEP included the results from the January 2014 neuropsychological report, as well as information from classroom observations and input from the student's preschool teacher and therapists, which provided detailed information regarding the student's cognitive skills, pre-academic skills, fine motor skill, adaptive behavior, and social/emotional functioning (compare Dist. Ex. 2 at pp. 1-4, with Dist. Exs. 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14).

The March 2014 IEP reflected the results of standardized testing conducted as part of the January 2014 neuropsychological evaluation; notably it indicated that, as measured by the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV), the student functioned cognitively in the above average range, with a full scale IQ of 110 and composite scores ranging from average to above average and additionally that the student demonstrated very strong working memory skills (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 13 at pp. 4, 13-14). The IEP noted, as indicated in the January 2014 neuropsychological evaluation, that the student exhibited variable performance with respect to language development, scoring in the average range on verbal comprehension subtests of the WPPSI-IV, several language subtests on the NEPSY Developmental Neuropsychological Assessment-II (NEPSY-II) (i.e. comprehension of instructions, phonological processing, word generation), and on the listening comprehension subtest of the Oral and Written Language Scales (OWLS); however, the student scored below average (tenth percentile) on the oromotor sequences subtest of the NEPSY-II and on the oral expression subtest of the OWLS (fifth percentile) (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex.

13 at pp. 5, 12-13). The IEP also noted that the student had delays with respect to articulation and oral motor skills (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 13 at pp. 5, 12).

With respect to the student's academic achievement, the present levels of performance section of the March 2014 IEP reflected the student's average to above average scores from a January 2014 administration of the Woodcock-Johnson-III: Cognitive and Achievement Abilities Tests and the Test of Early Reading Ablility-3 (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 13 at pp. 7-8, 13-14). The IEP reported that the student's standard scores on subtests of the Woodcock-Johnson III, which ranged from 97 to 121, "strongly point[ed] to an extremely robust and strong pattern of academic skill acquisition" (Dist. Ex. 2 at pp. 2-3). While the IEP did not detail the student's specific academic abilities, information obtained from the student's preschool teacher, along with his parents and their private evaluators, confirmed that the student's academic skills were age appropriate (Dist. Exs. 2 at pp. 1-3; 3 at p. 1; 4 at pp. 10, 11; 13 at pp. 7-9, 14; 14 at p. 4; 16 at p. 5). The March IEP noted that, based on information provided by the student's classroom teacher, student's adaptive behavior and daily living skills were also age appropriate (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 4 at pp. 11, 13).

With respect to the student's social/emotional functioning, the present levels of performance described the student as having a variable pattern of development (Dist. Ex. 2 at p. 3). The March 2014 IEP included at-risk and clinically significant scores from parent and teacher forms of the Behavior Assessment System for Children-Second Edition (BASC-II) administered during the January 2014 neuropsychological evaluation, as well as scores ranging from the mild range to within normal limits on the Social Responsiveness Scale administered during the December 2013 developmental-behavioral pediatrics evaluation (compare Dist. Ex. 2 at pp. 1-2, with Dist. Exs. 13, 14). Consistent with the January 2014 neuropsychological report, the March 2014 IEP described the student as being kind, good-natured, and socially motivated, as well as "struggling with feelings of anxiety", which could be "heightened due to language difficulties" (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 13 at p. 8). The March 2014 IEP reflected that the student had a history of difficulty functioning in a larger group setting and would often withdraw as a means of coping (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 13 at p. 2). The March 2014 IEP also included teacher comments, noting that the student was "much more related and connected with his teacher", "pretty much engaged in every class activity", and that the student tended to socialize with two preferred friends, but demonstrated the capacity to interact with the other children in the room (Dist. Ex. 2 at p. 3). The March 2014 IEP indicated that while there continued to be concerns, the student had made gains in the area of social/emotional development and based on parent and teacher responses on behavioral questionnaires, the vast majority of the student's behaviors, experiences, attitude, and feelings were age appropriate (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 13 at pp. 2-3, 11-12).

With respect to the student's physical development needs, the present levels of performance section of the March 2014 IEP indicated that the student was a healthy child with normal hearing and vision (Dist. Ex. 2 at p. 4). According to the March 2014 IEP, the student had met his PT goals and PT services were no longer necessary (Dist. Ex. 2 at p. 4). CSE meeting minutes indicated that the student's mother and physical therapist agreed that the student no longer required PT services (Dist. Ex. 16 at p. 7). Consistent with a February 2014 OT report prepared by the student's occupational therapist, the March 2014 IEP stated that the student continued "to require

OT services to address issues with motor planning, fine-motor, and grapho-motor functioning (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 11 at p. 4).

The parents challenge the accuracy of the school psychologist's report of his interview with the student's preschool teacher (Dist. Ex. 4 at pp. 1-6, 10-13). The student's mother testified that the description of the student—as having "two very close friends in class," as tending to stay with them, and as interacting with other students—did not match her understanding of the student's social-emotional levels (Tr. pp. 416-19). In contrast to the report, the student's mother testified that the student "had no friends in preschool" (Tr. pp. 418-19). She also challenged the report's description of the student as being engaged in classroom activities (Tr. p. 417). She testified that the description of the student's reading skills as "very strong," was inaccurate, and indicated that the student's language communication skills were not "age appropriate" as reported (Tr. p. 418).[6] The parent also stated that contrary to the teacher interview report, the student's concentration skills had "always been an issue for him" (Tr. p. 419). While the parents challenge the accuracy of the contents of the teacher interview, the student's mother conceded that she was not asserting that the teacher interview did not reflect the statements made by the student's preschool teacher, only that the report was not "reflective of my understanding of how [the student] was then" (id.). This admission by the student's mother strongly undercuts the parents' challenge to the accuracy of the information relied upon by the March 2014 CSE.

The student's mother also testified that the March 2014 CSE was "very dismissive of . . . [the neuropsychologist's] report" and did not acknowledge the student's diagnosis of social anxiety (Tr. p. 423, 435, see Dist. Ex. 13 at p. 9). It is well settled that a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]). As discussed above, contrary to the parents' assertion, the March 2014 CSE included counseling as a related service for the student, as well as several goals to address the student's issues with anxiety (Tr. pp. 73, 104-107; Dist. Ex. 2 at pp. 7-8). In addition, the March 2014 IEP includes both standardized test scores and narrative summaries of the student's strengths and needs that are reflective of the January 2014 neuropsychological evaluation (Dist. Ex. 2 at pp. 1-2). Accordingly, although the March 2014 CSE did not adopt all of the recommendations included in the January 2014 neuropsychological evaluation, there is sufficient information within the IEP to indicate that it was considered by the CSE (see A.M. v. New York City Dep't of Educ., 2015 WL 8180751, at *4 [S.D.N.Y. Dec. 7, 2015] [holding that the evaluative reports supported the CSE's program recommendations even though the CSE's recommendations were not consistent with the evaluators' recommendations]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch.

[6] While the report of the teacher interview includes a check next to a box identifying the student's language/communication skills as age appropriate (Dist. Ex. 4 at pp. 3, 11), the March 2014 IEP did not report this information (Dist. Ex. 2). Instead, the IEP reported the student's language skills as variable, indicating that the student's development of receptive language skills was unremarkable but that he had delays in expressive language and oral motor function (Dist. Ex. 2 at p. 3). This information is consistent with the results of the January 2014 neuropsychological evaluation (Dist. Ex. 13 at pp. 4, 9).

Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. 2005]).

While the March 2014 CSE did not adopt the specific recommendations from private evaluators (most notably, the recommendation for placement in a small, special education classroom), the evidence in the hearing record indicates that documentation from outside participants was considered and the student's present levels of performance on the March 2014 IEP were consistent with the evaluative data available to the CSE at the time of the meeting.

3. Annual Goals

The parents further contend that the March 2014 CSE failed to discuss the student's annual goals and management needs.

According to the parents, during the March 2014 CSE meeting the district school psychologist and special education teacher talked to each other about what they thought were appropriate goals, wrote them down quickly, and did not ask the parent or preschool providers for their opinions (Tr. pp. 431-32). The student's mother testified that she did not have an opportunity to review the annual goals because nothing was written down and the conversation was moving too quickly (Tr. p. 464). She also testified that when she told the school psychologist she was having a hard time following along, he replied by indicating that she would get everything in writing and could comment later (Tr. pp. 464-65). In contrast, the school psychologist testified that goals were reviewed and developed at the March 2014 CSE meeting to address the student's executive functioning, attention, oral language, fine motor, and social/emotional needs (Tr. pp. 79-80, 89-94, 104-07, 188-90). The minutes also reflect that the CSE discussed the annual goals during the CSE meeting (Dist. Ex. 16 at pp. 4, 8). Based on the above, the hearing record supports finding that the annual goals were discussed during the CSE meeting (see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *11 [S.D.N.Y. Nov. 9, 2011] [there is no requirement that parents be allowed to see the annual goals on paper during the CSE meeting or that they be allowed to draft the goals by hand or on the computer themselves]).

Additionally, after the parents received a copy of the IEP the only objection they raised regarding the annual goals was that the IEP lacked goals in reading, math, or writing (Parent Ex. F at p. 3). The school psychologist testified that academic goals did not address subject areas such as reading, writing, or math because the student did not have deficits in those areas; instead, academic goals focused on executive functioning, attentional delays, and oral language (Tr. pp. 79-80). A review of the hearing record reflects that the annual goals included on the March 2014 IEP correspond to the student's identified needs (compare Dist. Ex. 2 at pp. 5-8, with Dist. Exs. 5; 7; 11; 13). Specifically, the March 2014 IEP included the following annual goals: four academic goals that addressed attention, self-advocacy, and oral language, including improving oral language skills with peers; three fine motor goals that focused on pre-writing skills, visual-perceptual skills, and motor planning skills; three speech-language goals that addressed oral-motor strength, expressive language, and sentence structure; and three counseling goals (Dist. Ex. 2 at pp. 5-8). Finally, a review of the annual goals reveals that each annual goal included an evaluative criteria (i.e. 80% accuracy), an evaluative procedure (i.e. teacher/provider observations), and a

schedule to measure the student's progress toward meeting the annual goals (i.e. one time per semester) (see Dist. Ex. 2 at pp. 5-8).

Based on the foregoing, the annual goals were discussed during the March 2014 CSE meeting and as the parents received a copy of the IEP and had an opportunity to review the annual goals, any failure to provide a copy of the goals at the CSE meeting cannot be said to have denied them an opportunity to participate in the development of those goals. Additionally, the annual goals included in the March 2014 IEP were consistent with the student's identified needs.

B. Integrated Co-Teaching and Related Services

In addition to the above challenges to the CSE process, the parents contend that the March 2014 CSE's recommendation for ICT services in a general education class with related services was not reasonably calculated to address the student's needs. More specifically, the parents argue that the student required a smaller class with more support. State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

Given that the student was described as attentive, engaged, and compliant; he participated in class and transitioned easily; and he presented with average to above average intellectual abilities and pre-academic skills, the March 2014 CSE's recommendation for placement in a general education classroom with the support of ICT services and related services was appropriate (Dist. Exs. 4 at pp. 7-13; 5; 13). While the parents expressed concerns regarding the student's play and social skills, and results of the January 2014 neuropsychological evaluation "point to significant emotional vulnerabilities," the supports and services recommended by the March 2014 CSE were reasonably calculated to address the student's social/emotional needs (Dist. Exs. 2 at pp. 3, 4, 6-8; 3; 13 at p. 9).

The district representative testified that he relied, at least in part, on the student's preschool teacher's statement during the March 2014 CSE meeting that ICT services "might be a great placement for [the student]" if he received the support of a special education teacher (Tr. pp. 139-40). The minutes reflect that, during the CSE meeting, the student's teacher expressed the opinion that ICT services would be appropriate for the student (Dist. Ex. 16 at pp. 2, 6). However, during a March 2014 teacher interview, the same teacher opined that the student required high levels of support and was not yet ready for a general education class (Dist. Ex. 4 at pp. 10). She also indicated that she preferred that the student remain in a "small, nurturing, self-contained class" (id.). Additionally, the teacher testified that, during the CSE meeting, she recommended that the student be placed in a similar class as she had taught him in, specifically a 12:1+2 class with 12 students, one teacher, and two teacher assistants (Tr. pp. 268-69). She testified that a general education class would be too large and overwhelming for the student, even with the support of ICT services (Tr. pp. 278-79). Accordingly, it appears that any reliance on the student's teacher's reported statement that ICT services might be a good placement for the student was misplaced. However, the school psychologist's recommendation for ICT services was not solely based on the

teacher's statement, but was rather based on an analysis of the student's functioning as shown in the evaluative data available to the CSE (Tr. pp. 198-99, 215-16, 231-32).

Additionally, although the evaluator who conducted the January 2014 neuropsychological report recommended that the student be placed in a small special education classroom, the report of the evaluator's observation of the student indicated that the student was able to engage with peers, was able to participate in group activities, and was able to complete work with prompting (Dist. Ex. 13 at p. 2-3, 10). The school psychologist testified that, based on his observations and contradicting pieces of information in assessment results, he did not find the student to be highly anxious, as was reported by the parent and outside evaluators; however, he also indicated that he gave credence to the people who had direct contact with the student (Tr. pp. 100-07; Dist. Ex. 2 at pp. 7-9). Although the parents contend that the "the CSE didn't even acknowledge the diagnosis of social anxiety", that the anxiety "was downplayed or minimized", and that the school psychologist did not "appreciate the severity of his issues," the March 2014 CSE included two 30-minute sessions of counseling per week and annual goals focused on social language, pro-social interactions with peers, and managing the student's anxiety (Tr. pp. 104-107, 435-36; see Dist. Ex. 2 at pp. 7-8). Additionally, the March 2014 IEP included modifications and strategies to address the student's management needs (Tr. p. 112; Dist. Exs. 2 at p. 4; 16 at p. 8). As discussed above, those strategies included the use of prompts; pre-alerts, modeling, facilitated instruction, guided direction, pre-exposure, chunking, and scaffolding (Tr. pp. 113-119; Dist. Ex. 2 at p. 4). To further support the student's speech and language needs, in addition to the support provided by the special education teacher in the classroom, the CSE recommended speech-language therapy and indicated that the student's providers should engage in frequent collaboration with the classroom teacher to transfer skills across settings (Tr. pp. 118-19; Dist. Ex. 2 at pp. 4, 9). The school psychologist testified that the student's fine motor needs were addressed in a similar manner, with support from the special education teacher in the classroom and provision of OT services (Tr. pp. 94-95; Dist. Ex. 2 at p. 9).

Based on the above, the CSE's decision to place the student in a general education classroom with the support of ICT and related services was reasonably calculated to provide the student with an educational benefit. It is also consistent with principals of LRE, which require that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Newington, 546 F.3d at 120-21). The school psychologist opined that, when provided with the necessary supports, the student presented with intellectual, academic, and even social strengths that would enable him to function in a general education classroom with ICT services in a community school and this recommendation would provide the student access to the general education curriculum and typically developing peers (Tr. pp. 130, 140). Although the student may have received added academic and even social benefits from inclusion in a special education classroom, as was conceded by the district school psychologist (Tr. pp. 221-22), in this instance, the CSE's decision to provide supports for the student to see if he could be successful in a general education setting was nevertheless reasonable in light of the available evaluative information. Additionally, once the district determined that placement in a general education class with ICT services was the least restrictive environment in

which the student could be educated, it was not required to thereafter consider other more restrictive placements along the continuum (see B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. 2014]; E.F., 2013 WL 4495676 at *15).

C. Assigned Public School Site

The parents also alleged that the assigned public school would not have met the student's needs and in particular asserted that the school did not have space for movement breaks, that the instruction in the school's ICT class was "superficial" such that the student's mother could not "tell whether the instructor was a teacher or an assigned paraprofessional," and that the school utilized a "workshop model" of instruction (Parent Ex. A at pp. 3-4). On appeal, the parents do not repeat their allegations regarding movement breaks or the competence of the instructors; however, they do challenge the "workshop model" of instruction utilized by the school as being inappropriate for the student and contend that it is in conflict with the school psychologist's description of ICT services as a "class within a class."

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., 611 Fed. App'x at 731; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). Furthermore, when parents have rejected an offered program and unilaterally placed their child prior to the time for 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 "'[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. 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 suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, at 731 [2d Cir. May 8, 2015]).

However, the Second Circuit has held that although a district's assignment of a student to a particular public school site is an administrative decision, it 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., 793 F.3d 236, 244-45 [2d Cir. 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, at 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., 793 F.3d at 244; see T.F., 2015 WL 5610769,

at *7 [holding that for claims regarding an assigned school not to be speculative, the hearing record should contain "definitive evidence that [the student] would not have received the services set forth in her IEP"]; 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 of courts 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]).

Based on the above, the parents cannot prevail on their claims regarding the assigned public school site as the parents rejected the district's recommended program and elected to enroll the student in a nonpublic school of their choosing (see Parent Exs. F at pp. 3-4).[7] Furthermore, the parents' allegations do not indicate that the assigned school would have been incapable of providing the services included in the March 2014 IEP.

The student's mother testified regarding her visits to the assigned public school in December 2013 and December 2014 (Tr. Pp. 408-10, 439-41). The parent described the "workshop model" as mini-lessons followed by independent and small group work and indicated that it would not have worked for the student because of the independent work required (Tr. pp. 409-410, 429-30).[8] The parents contend that the school would not have been able to accommodate the student's management needs, such as chunking, scaffolding, multisensory instruction, prompting, and modeling due to the use of "workshop model." However, the assigned school's principal testified as to the supports available in the "workshop model," including shorter lessons in small groups and working individually with support from the teachers, providing prompts, and adjusting instruction to meet a student's level (Tr. pp. 237-38, 241-42). The principal also testified that the teachers continually assess the progress of the students, and adjust instruction to individual students (Tr. p. 245). The principal further testified that while the school is "above capacity," that all of the classes are within normal parameters (Tr. pp. 238-39). The information that the student's mother obtained during her visits to the assigned public school regarding the use of the "workshop model" does not impugn the school's capacity to implement the IEP, including the management

[7] Although the parents' August 18, 2014 letter to the district indicated that they were waiting to visit the assigned public school site prior to making a final determination, the hearing record indicates that the parents had already visited the school in December 2013 and that the parent did not believe another visit to the school was necessary (Tr. p. 437). Additionally, the school psychologist responded to the parent's initial request to visit the school in June 2014 (Dist. Ex. 18). The parent testified that she did not contact the school psychologist but did attempt to contact the school's parent coordinator on a few occasions (Tr. pp. 438-39, 466-67). However, the parent only visited the school in December 2014 because there was going to be an open house (Tr. pp. 439).

[8] Churchill's assistant principal testified that academic instruction in the student's class at Churchill also consisted of whole group instruction followed by the students breaking up into groups to complete tasks (Tr. pp. 309-10). In addition, the student's mother testified that during the March 2014 CSE meeting she raised her complaints regarding her December 2013 observation of the assigned school and stated "[t]he problem is the sheer volume of children in that class" (Tr. pp. 432-33). Based on the above, the parents' concern with the "workshop model" is likely based more on the size of the class, which relates more to the program offered, general education with the support of ICT services, rather than the methodology utilized within the class.

needs, mandated by the March 2014 IEP and accordingly, any conclusion that the assigned public school site would not meet the student's needs would necessarily be based on impermissible speculation (M.O., 793 F.3d at 244; see T.F. 2015 WL 5610769, 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).

D. Equitable Considerations

Having determined that the district offered the student a FAPE, I need not address whether equitable considerations favor tuition reimbursement; however, in light of the IHO's findings and in the interests of fully addressing the parties' arguments on appeal, equitable considerations are briefly addressed.

The IHO held that the parents' cooperation with the CSE process was superficial, and concluded that the parents had no intention of placing the student in the public school system, citing to the timing of the parents' signing a contract with Churchill, making payments to Churchill, and visiting the student's assigned school (IHO Decision at p. 17).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parents or private school]). The Supreme Court has stated that "[t]he core of the [IDEA] is the cooperative process that it establishes between parents and schools" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06). The Second Circuit has held that where parents cooperate with a district in its attempts to develop an appropriate educational program for their child, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

The IHO found that the parents never intended to place the student in a public school based on the parents having signed a contract with Churchill, on the parents having paid Churchill in full prior to the start of the school year, and on the timing of the parents' rejection of the student's IEP and visit to the student's assigned public school (IHO Decision at pp. 17-18). However, based on recent Second Circuit precedent, so long as the parents cooperate with the district, and do not impede the district's efforts to effectuate a FAPE, the pursuit of a private placement does not

provide a basis in equity to deny tuition reimbursement—even if the parents never intended to enroll the student in a public school (C.L., 744 F.3d at 840). The record reflects that the parents did cooperate with the district's efforts to evaluate the student, they provided privately obtained evaluative information to the CSE, and the student's mother fully participated with and meaningfully contributed to the March 2014 CSE discussions (Tr. pp. 65-68, 214; see generally Dist. Exs. 3; 13; 14;). The school psychologist described the student's mother as "a delight to work with" during the March 2014 CSE meeting, which he described as "very cooperative…very casual…very relaxed" and "a very thoughtful meeting" (Tr. p. 214). Further, the student's mother was clear about her concerns with the proposed ICT setting and was transparent with her intentions regarding the student's acceptance and enrollment at Churchill throughout the CSE process (Tr. pp. 138-39, 141-42, 159, 174, 215-16, 228, 421-22; see Dist. Exs. 2 at p. 3; 16 at pp. 5-6; Parent Exs. C-D; F-G). The parents had particular views regarding the type of placement that they believed would be appropriate for the student and they followed through on those beliefs by going through the steps to place the student at Churchill.

While the IHO's determination that the parents never intended to place the student in a public school could be supported by the hearing record, the hearing record is also clear that the parents did not stand in the way of the district's efforts to develop an IEP for the student, and therefore the parents' actions do not support a complete denial of tuition reimbursement based on equitable considerations (C.L., 744 F.3d at 840). As the district offered the student a FAPE, it is unnecessary to further consider the precise extent to which equitable considerations may have warranted a reduction in the relief awarded. However, the IHO is advised to carefully consider the above factors and binding authority from the Second Circuit Court of Appeals in evaluating future equitable matters.

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district offered the student a FAPE for the 2014-15 school year. Having made this determination, it is not necessary to consider the appropriateness of Churchill or to consider whether equitable factors favor an award of tuition reimbursement (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd 2012 WL 6684585 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 19, 2015, is modified by reversing those portions which found that the district denied the student a FAPE for the 2014-15 school year.

Dated: **Albany, New York**
December 23, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER