



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-148

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Howard Friedman, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Shebitz Berman & Delforte, P.C., attorneys for respondents, by Benjamin E. Cain, Esq. and Matthew J. Delforte, Esq.

### **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 district) appeals from the decision of an impartial hearing officer (IHO) which determined that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered the district to reimburse the parents for their daughter's tuition costs at the Yeshiva Education for Special Students (YESS) for the 2016-17 and 2017-18 school years. The 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and therefore, will not be recited in detail here. Briefly, the parents requested that the CSE evaluate the student and in August 2015 the district conducted a social history and psychoeducational evaluation (Dist. Exs. 16; 17). At that time, the student was eligible to receive special education programming as a student with a learning disability and she had been attending a "mainstream setting" in a private school where she received five "periods" per week of special education teacher support services (SETSS) in a group according to an individualized

education services plan (IESP) "and related services" (Dist. Exs. 16 at p. 1; 17 at p. 1; see Tr. p. 219).<sup>1</sup> In the August 12, 2015 social history the parent reported that the student continued to "struggle in all areas of school" and she could not remain in her then-current educational placement due to "both academic and social reasons" (Dist. Ex. 16 at p. 1). According to the parent the student had "barely passed" first grade at the private school and the parent had asked the school to "hold her back" (id.). The parents reported that the student needed an "emergency placement," and therefore they had enrolled her at YESS (id.).<sup>2</sup>

According to a June 29, 2018 due process complaint notice, the CSE convened on August 20, 2015 and recommended a 12:1+1 special class placement in a public school for the student (Dist. Ex. 1 at p. 2). The parent contacted the school to which the student was assigned to attend and was told that there were no 12:1+1 special classes at the school; rather, the student would be placed in a general education or an "ICT" classroom if she attended (id.).<sup>3</sup> The parent did not consider either option appropriate for the student, therefore he "notified the CSE" and the student attended YESS for the 2015-16 school year (third grade) (Dist. Exs. 1 at p. 2; 14 at p. 1; 16 at p. 1).<sup>4</sup> A May 2016 speech-language evaluation report indicated that during the 2015-16 school year the student received ICT services in English language arts (ELA), math, science and social studies (Dist. Ex. 14 at p. 1).

As relevant to this appeal, a CSE convened on April 6, 2016, to formulate the student's IEP for the 2016-17 school year (fourth grade) (see generally Dist. Ex. 10). The CSE determined that the student was eligible for special education as a student with a learning disability and recommended a 10-month program of ICT services in ELA, math, science and social studies for 20 hours per week in a public school (Dist. Ex. 10 at pp. 1, 8).<sup>5</sup> According to the parent, he visited the assigned school but was told the student was "not on their list" and therefore they could not register the student (Tr. pp. 331-34; Dist. Ex. 13 at p. 4). The parent also indicated that he "notified" the district, and on August 20, 2016 signed an enrollment contract with YESS for the 2016-17 school year (see Parent Ex. C; Dist. Ex. 1 at p. 2). The student attended YESS during the

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<sup>1</sup>The hearing record reflects that in this matter SETSS consisted of teacher support provided by a special education teacher for one period per day to students in a general education classroom (see Tr. pp. 123, 164-65, 194).

<sup>2</sup> The Commissioner of Education has not approved YESS as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

<sup>3</sup> State regulations define integrated coteaching (ICT) services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

<sup>4</sup>According to the due process complaint notice, for the 2015-16 school year "the case settled," but no further details about the settlement were provided (Dist. Ex. 1 at p. 2).

<sup>5</sup> The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

2016-17 school year and received two 30-minute sessions per week of in-school speech-language therapy (see Parent Exs. B; I; K).

A CSE convened on June 15, 2017 to develop the student's IEP for the 2017-18 school year (fifth grade) (see generally Parent Ex. M). The June 2017 CSE again recommended for the student a 10-month program of ICT services in ELA, math, science, and social studies for 20 hours per week in a public school (*id.* at p. 10). The parents have asserted that they contacted the assigned school, which they found "to be very large" and the setting to be inappropriate for the student (Dist. Ex. 1 at p. 3). The parents rejected the district's recommended placement and enrolled the student in YESS for the 2017-18 school year (see Parent Ex. Q; Dist. Ex. 1 at p. 3). The student attended YESS during a portion of the 2017-18 school year where she received two 30-minute sessions per week of speech-language therapy (see Parent Exs. N; P; S).<sup>6</sup>

### **A. Due Process Complaint Notice**

In a due process complaint notice dated June 29, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see Dist. Ex. 1).<sup>7</sup> Specifically, the parents alleged the following procedural and substantive errors: the April 6, 2016 CSE was missing mandated members, including a general education teacher and a parent member; the ICT services recommendation was inappropriate, and the April 2016 IEP annual goals were inappropriate and vague (*id.* at p. 2). Regarding the 2017-18 school year the parents argued that the June 15, 2017 CSE was missing mandated members; the recommendation of an ICT "class" for 20 periods per week did not provide adequate support for the student; the annual goals did not address all of the student's needs—lacking goals to address the student's pragmatic language delays; the CSE failed to recommend counseling; and the assigned school was too large (*id.* at pp. 1-2). The parents sought tuition reimbursement or direct payment for the student's programming and transportation costs at YESS for the 2016-17 and 2017-18 school years (*id.* at p. 3).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on January 8, 2020 and concluded on June 22, 2020 after four days of proceedings (Tr. pp. 1-344). In a decision dated August 4, 2020, the IHO determined that the parents' claims regarding the 2016-17 school year were not barred by the statute of limitations because the 2016-17 school year began in September 2016, which allowed the parents

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<sup>6</sup> The evidence in the hearing record indicates that the student attended YESS from approximately November 1, 2017 to June 21, 2018 (see Parent Exs. Q at p. 2; R; S).

<sup>7</sup> This proceeding was commenced by the parents' advocate in an initial due process complaint notice dated June 29, 2018 regarding the 2016-17 and 2017-18 school years (Dist. Ex. 1). On July 3, 2018 another due process complaint notice was filed, but during the impartial hearing it was deemed duplicative of the June 2018 due process complaint notice and withdrawn (see Tr. pp. 36-43). The parents changed representation and on February 22, 2019, the second advocate filed a due process complaint notice regarding only the 2017-18 school year, which, according to the district, was withdrawn on February 4, 2020 (IHO Ex. I at p. 1; Parent Exs. E; L). Therefore, during the impartial hearing the parties proceeded pursuant to the June 29, 2018 due process complaint notice (see IHO Decision at pp. 1-2; Tr. pp. 35, 40; Dist. Ex. 1 at p. 1).

to "have until September 2018 to file a claim for the denial of FAPE for the 2016-17 school year" and the parents' due process complaint notice was filed in June 2018 (IHO Decision at pp. 6-7).

The IHO next found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, entirely because the district "failed to come anywhere remotely close to meeting their burden of proof to prove to this Hearing Officer that by a preponderance of the evidence a FAPE was provided for the school years at issue" (IHO Decision at pp. 7-8). Specifically, the IHO determined that the district "failed to present any witnesses to detail and explain how the proposed IEPs provided this student with a FAPE," and concluded that the hearing "record [was] devoid of any evidence explaining the type of class offered, the cohorts present, and how such [a] class would provide this student with a meaningful educational benefit" (*id.* at p. 8). The IHO further stated in his decision that the district failed in its burden of proof because none of the district witnesses "instructed or even knew the subject student," they "merely reviewed" the IEP, and "[t]hey all provided self-serving testimony without a scintilla of factual support" (*id.* at p. 7). In addition, the IHO determined that "[h]ad the [d]istrict been serious in its effort to meet its burden of proof," it would have introduced testimony from "the proposed ICT special education teacher who actually taught the class recommended for the subject student in the years at issue to give testimony as to what type of instruction was provided to the students in such recommended ICT class" (*id.*). In fact, the IHO stated in the decision that the testimony of a district ICT teacher from the assigned school would "probably" have "lead to" the district "meeting their burden of proof" (*id.*). However, the IHO found that "[a]written IEP by itself does not explain, detail or specify how such IEP would have provided this student a FAPE" (*id.* at p. 8).

The IHO also found that YESS was an appropriate unilateral placement for the student for the school years at issue, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 9-14). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at YESS for the 2016-17 and 2017-18 school years, less 25 percent to account for the amount of time the student received "purely religious instruction" (*id.* at pp. 14-15).

#### **IV. Appeal for State-Level Review**

The specific details of the district's arguments in the request for review are familiar to the parties and will not be discussed here in detail. The gravamen of the district's appeal is that the IHO erred by denying its motion to dismiss the parents' 2016-17 claims as barred by the statute of limitations, by finding that the district was required to present specific testimony to satisfy its burden on the issue of FAPE, and by determining that it failed to offer the student a FAPE during the 2016-17 and 2017-18 school years. In an answer, the parents respond to the district's allegations and argue that the evidence in the hearing record supports a finding that the district failed to offer a FAPE, that YESS was an appropriate unilateral placement for the student, and that equitable considerations support the IHO's tuition reimbursement award for the 2016-17 and 2017-18 school years.

#### **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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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 Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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]).<sup>8</sup>

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

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<sup>8</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

## VI. Discussion

### A. 2016-17 School Year - Statute of Limitations

On March 4, 2020 the district submitted a motion to dismiss the portion of the June 29, 2018 due process complaint notice pertaining to the 2016-17 school year as time-barred by the two-year statute of limitations and indicated that it was appropriate for the IHO to consider and make a determination on this motion to dismiss prior to the commencement of any substantive due process hearings (IHO Ex. I at p. 1). The district argued that the parents participated in the April 6, 2016 CSE meeting by telephone, the CSE's recommendations were finalized in an IEP and sent with a prior written notice to the parents on June 7, 2016, and therefore, they knew or should have known about any alleged deficiencies with the student's IEP by June 10, 2016 (*id.* at p. 3). Additionally, the district asserted that the parents had been informed of their due process rights and were represented by advocates at the time the due process complaint notices were filed; as such, the June 29, 2018 due process complaint notice was "clearly filed outside the time limit set by law" (*id.* at pp. 3-4). The district further argued that the limited exceptions to the statute of limitations did not apply, as the parents had not alleged any facts that supported the requirements of misrepresentation or that the district withheld specific information that resulted in the parents' unknowing waiver of rights (*id.* at pp. 4-5).<sup>9</sup>

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; *see also* 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).<sup>10</sup> Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at \*16 [E.D.N.Y. Aug. 6, 2014]; *see* K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at \*14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had

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<sup>9</sup> At the hearing held on March 10, 2020 the parties discussed the district's motion to dismiss and the IHO decided to "hold the motion to dismiss in abeyance" until he issued his final decision, stating that he would determine whether the statute of limitations applied at that time (Tr. pp. 51-61).

<sup>10</sup> New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).



resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Here, the CSE meeting was held on April 6, 2016 and the student's mother participated by telephone (Dist. Exs. 10 at p. 12; 11; 12). The parents filed their due process complaint notice on June 29, 2018 (Dist. Ex. 1). The IHO held that under the two-year statute of limitations the parents had until the school year began in September 2018 to file a claim for the denial of a FAPE for the 2016-17 school year, and therefore the complaint was timely filed (IHO Decision at pp. 6-7; Tr. pp. 339-40). The IHO's determination appears to follow parents' counsel's contention that the parent could not visit the public school to which the student was assigned until school opened in September 2016 because the parent "could not possibly know that there was a deprivation of FAPE until he observed, which he did, the recommended public school and determined that" (Tr. p. 54). However, the allegations of a denial of a FAPE for the 2016-17 school year included in the parents' due process complaint notice predominantly related to the April 2016 IEP being procedurally and substantively flawed, i.e. CSE composition, appropriateness of the recommended ICT services, and appropriateness of the student's annual goals (Dist. Ex. 1 at p. 2). All of those claims accrued either at the time of the April 2016 CSE meeting or when the parents received a copy of the April 2016 IEP.<sup>11</sup>

Additionally, neither exception to the two-year statute of limitations was applicable in this matter; therefore, the IHO erred in his decision that the parents' claims related to the April 2016 IEP and the 2016-17 school year were not barred by the statute of limitations. Accordingly, any claims regarding the 2016-17 school year will not be addressed further in this decision.

## **B. 2017-18 School Year**

### **1. June 2017 CSE Composition**

Turning to the parents' allegation that the June 2017 CSE meeting was procedurally flawed because the CSE "was missing crucial mandated members including the student's teacher, a general education teacher and a parent member," I find that the district correctly asserts that the June 2017 CSE included all required members.

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; not less than one special education teacher of the student, or, if

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<sup>11</sup> The only allegation contained in the due process complaint notice that could relate to something other than the IEP, was the allegation that the parent visited the assigned public school, but the student was not on the school's list and the school could not register the student on that particular day (Dist. Ex. 1 at p. 2). The parent testified that although he did not remember the date, he visited the school and someone at the school told him the student was not on the school's list of students (Tr. pp. 332-34). The assistant principal for the assigned school did not know if the parents had visited the school (Tr. pp. 221-22). However, she testified that a seat was available at the school for the student if she would have attended the school beginning on the first day of the 2016-17 school year, September 8, 2016 (Tr. pp. 219-21). Accordingly, to the extent that the parents' allegation could be read as an allegation that the assigned school could not implement the April 2016 IEP, it was rebutted by the assistant principal's testimony that the school had a seat available for the student at the start of the 2016-17 school year.

appropriate, not less than one special education provider of the student; a school psychologist; a district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

Here, a CSE convened on June 15, 2017 for the student's annual review and to develop an IEP for the 2017-18 school year (Dist. Exs. 5 at p. 15; 6; 7). Participants at the student's June 2017 CSE meeting included a district school psychologist who also served as the district representative, and a district regular education teacher who was also dually certified as a special education teacher (Tr. pp. 75-76, 78-80; Dist. Ex. 6). The parent, the student's special education teacher at YESS, and the director of education at YESS participated by telephone (Tr. pp. 78-80; Parent Ex. J at p. 1; Dist. Ex. 6). Regarding the parents' claim that the absence of the student's special education teacher and a regular education teacher at the June 2017 CSE meeting resulted in substantive flaws with the IEP due to the ICT services recommendation, a district regular education teacher and the student's YESS special education teacher participated at that meeting, therefore, that assertion is not supported by the evidence in the hearing record (compare Dist. Ex. 1 at p. 2, with Tr. p. 78, Parent Ex. J at p. 1, and Dist. Ex. 6).

The parents are correct that the June 2017 CSE did not include a parent member; however, there is no evidence in the hearing record that the parents requested the attendance of a parent member, and they do not otherwise indicate how the lack of a parent member at the CSE meeting resulted in a procedural violation that rose to the level of a denial of a FAPE (see generally Dist. Ex. 1).

## **2. June 2017 IEP**

### **a. Evaluative Information and Present Levels of Performance**

While the sufficiency of the evaluative information and resultant June 2017 IEP present levels of performance are not directly in dispute on appeal, the parents asserted the June 2017 CSE used the same evaluative information to recommend ICT services that had previously been used to recommend a special class placement for the student during the 2015-16 school year (see Dist. Ex. 1 at p. 2).<sup>12</sup> In order to address this claim, as well as the parents' assertions discussed below that the June 2017 IEP annual goals and ICT services recommendation were not appropriate, a review of the evaluative information available to the CSE and the IEP present levels of performance is necessary.

The evidence in the hearing record shows that in addition to the student's April 6, 2016 IEP (which included the results of the August 12, 2015 district psychoeducational evaluation), the June 2017 CSE had before it additional evaluative information, including the May 19, 2016 district speech evaluation report, the April 26, 2017 classroom observation, and the 2016-17 YESS general

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<sup>12</sup> According to the due process complaint notice, an August 2015 CSE recommended a 12:1+1 special class placement in a public school for the student (Dist. Ex. 1 at p. 2). The April 2016 CSE then changed the recommended program to ICT services (id.).

studies and speech therapy annual reports (Tr. pp. 81-83; Dist. Exs. 7 at p. 1; 8; 9 at p. 1; 10; 14; 17; Parent Exs. J; K).

The August 2015 psychoeducational evaluation report described the student as reserved at first, but she "quickly warmed up to the examiner" (Dist. Ex. 17 at p. 1). The student "transitioned easily" and "appeared to put forth her best effort on all tasks" (*id.*). At the time of the August 2015 psychoeducational report, the student was receiving five sessions of SETSS per week in a group (*id.*). As reflected in the June 2017 IEP, results from administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) indicated that the student's IQ was 87, which fell in the low average range (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 17 at p. 1). The student's perceptual reasoning skills fell in the average range, and her perceptual matching, attention to detail, and serial reasoning skills were "adequately developed" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 17 at p. 1).

Also reflected in the June 2017 IEP, the results of the WISC-IV verbal comprehension index from the August 2015 psychoeducational evaluation report indicated that the student's ability to formulate verbal concepts, verbal reasoning, and knowledge acquired from the environment fell in the low average range (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 17 at p. 2). The student's score was below average in verbal concept formation, but she exhibited "adequately developed" skills in learning ability, memory, concept formation and language development (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 17 at p. 2). The comprehension subtest revealed inadequately developed "common sense, social judgement, and grasp of social conventionality" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 17 at p. 2). On the working memory index the student's scores fell in the low average range, and her "short-term auditory memory and attention skills [were] not well developed" (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 17 at p. 2). The student's processing speed score was in the average range, and her perceptual discrimination, attention, concentration and cognitive flexibility skills were "well developed" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 17 at p. 2).

According to the results of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) that were included in the June 2017 IEP, the student was performing in the average range in overall reading, math and written language (compare Dist. Ex. 5 at pp. 2-3, with Dist. Ex. 17 at p. 2). Specifically, the student's basic reading composite score, which comprised reading comprehension, word reading, and pseudoword decoding, fell in the average range (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 17 at p. 2). The student's math problem solving, and numerical operations skills fell in the average range, and she exhibited stronger math skills when given equations rather than problem solving tasks (compare Dist. Ex. 5 at pp. 2-3, with Dist. Ex. 17 at p. 2). In the area of written expression, which included measurements of sentence composition and spelling, the student's scores were in the average range, although her sentences lacked proper capitalization and punctuation (compare Dist. Ex. 5 at p. 3, with Dist. Ex. 17 at p. 2).

The May 19, 2016 district speech-language evaluation was conducted due to concerns regarding the student's poor processing skills, limited vocabulary, and poor reading comprehension (Dist. Ex. 14 at p. 1).<sup>13</sup> During the May 2016 speech-language evaluation the student "presented

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<sup>13</sup> The May 2016 speech-language evaluation was conducted by a regular education teacher (Dist. Ex. 14 at p. 3).

as polite, thoughtful and responsive," stayed on task, and spoke "in complete, well-formed sentences" (*id.* at pp. 1-2). According to the evaluator, the student "seemed comfortable with pragmatic language skills such as turn-taking, eye contact and topic maintenance" but reportedly was "struggling with processing instructional material" and needed help understanding word problems and reading passages (*id.*). According to results of the May 2016 administration of the Clinical Evaluation of Language Fundamentals-5th Edition (CELF-5) reflected in the June 2017 IEP, the student exhibited receptive and expressive language abilities that were "clustered around the midpoint of typical development" (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 14 at p. 1). On subtests measuring receptive and expressive language components including sentence comprehension, word structure, formulated sentences, and recalling sentences the student exhibited average abilities (compare Dist. Ex. 5 at p. 3, with Dist. Ex. 14 at pp. 2-3). In addition, the student's speech production was judged to be typical, and she completed the Phonological Awareness Skills Test with 94 percent accuracy (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 14 at p. 1). The June 2017 IEP indicated that per the results of the May 2016 speech-language evaluation, the student exhibited speech-language development commensurate with her typically developing peers therefore, speech-language therapy was not recommended at that time (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 14 at p. 1).

The April 26, 2017 classroom observation report available to the June 2017 CSE was conducted at YESS, with four students and one teacher in the classroom (Tr. pp. 99-100; Dist. Ex. 8). During the observation, the student appeared to be engaged in the lesson, answered questions correctly, and behaved appropriately (Dist. Ex. 8). The June 2017 CSE also reviewed the 2016-17 YESS general studies and speech therapy annual reports and incorporated information from those reports into the IEP (Tr. pp. 100, 102; see Parent Exs. J; K; Dist. Ex. 5 at pp. 3-4).<sup>14</sup> According to the May 2017 YESS general studies annual report, the student had made "steady progress," throughout the year, was "self-motivated and quick to learn" (Parent Ex. J at p. 2). The student was doing her homework "more conscientiously" and was "interrupting her classmates" less often (*id.*). Further, the student found "abstract or open ended" concepts challenging and could become discouraged (*id.*). Also, the report indicated that the student benefitted from extra time, prompting and encouragement (*id.*).

The May 2017 YESS general studies annual report and the June 2017 IEP indicated that academically, the student had made progress with respect to her reading skills, and her summary and comprehension skills had improved (compare Parent Ex. J at pp. 3-4, with Dist. Ex. 5 at p. 3). The student was able to answer comprehension and higher-order thinking questions independently, although at times had difficulty answering comprehension questions (compare Parent Ex. J at p. 3, with Dist. Ex. 5 at p. 3). She benefitted from encouragement to look back in the text to find proof for and to be able to correctly answer questions (compare Parent Ex. J at p. 3, with Dist. Ex. 5 at p. 3). According to the May 2017 YESS speech therapy annual report and the June 2017 IEP, the student's "weak" comprehension and vocabulary impacted her reading comprehension, including her ability to answer "wh- questions" and deduce information from the linguistic cues presented (compare Parent Ex. K at p. 1, with Dist. Ex. 5 at p. 4). The student needed "extensive

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<sup>14</sup> The YESS general studies and speech therapy annual reports provided information from November 2016, February 2017, and May 2017; as such, in this decision it will be referred to as the May 2017 YESS annual reports (see Parent Exs. J; K).

prompts" when retelling stories, and retelling details about an event (compare Parent Ex. K at p. 1, with Dist. Ex. 5 at p. 4).

In the area of writing, both the May 2017 YESS general studies annual report and the June 2017 IEP indicated that the student was working on writing summaries of short stories she had read, and benefitted from the use of a graphic organizer to help identify the beginning, middle and end of the story, main and supporting characters, and the setting (compare Parent Ex. J at pp. 3-4, with Dist. Ex. 5 at p. 3). Additionally, the student was working on selecting the most important events in the story to retell it concisely and shortening run-on sentences (compare Parent Ex. J at p. 4, with Dist. Ex. 5 at pp. 3-4). The May 2017 YESS speech therapy annual report reflected in the June 2017 IEP indicated that the student had difficulty writing a personal narrative in sequence and using adequately descriptive details to aid listener understanding (compare Parent Ex. K at p. 1, with Dist. Ex. 5 at p. 4).

In math, both the May 2017 YESS general studies annual report and the June 2017 IEP indicated that the student had begun to learn the concepts of multiplication and multiplication facts (compare Parent Ex. J at p. 5, with Dist. Ex. 5 at p. 4). She demonstrated proficiency in those concepts by representing multiplication sentences in equal groups of items, arrays, repeated addition, and skip counting (compare Parent Ex. J at p. 5, with Dist. Ex. 5 at p. 4). The student used those strategies when solving simple word problems as well as multiplication facts (compare Parent Ex. J at p. 5, with Dist. Ex. 5 at p. 4). According to the YESS general studies report and the IEP, the student felt confident about her new skill, she was eager to continue learning and practicing math each day, she was proactive in her learning, and challenged herself to compute multiplication she had not yet learned (compare Parent Ex. J at p. 5, with Dist. Ex. 5 at p. 4).

Additionally, the June 2017 IEP reflected information from the May 2017 YESS speech therapy annual report that indicated the student had difficulty with auditory processing; specifically, when she was asked a question, she took a long time to answer and often asked for the information to be repeated (compare Parent Ex. K at p. 1, with Dist. Ex. 5 at p. 4). Further, the student exhibited difficulty with word retrieval, and often with carrying over information learned from one context to another (compare Parent Ex. K at p. 1, with Dist. Ex. 5 at p. 4).

Regarding the student's social/emotional skills, the May 2017 YESS general studies annual report and the June 2017 IEP indicated that the student was eager to learn, participated enthusiastically in group discussions, and was eager to share her answers when reviewing class work (compare Parent Ex. J at p. 1, with Dist. Ex. 5 at p. 4). Also, the student exerted her best effort when learning a new skill, she followed rules and procedures, and knew what was expected of her during transitions and lessons (compare Parent Ex. J at p. 1, with Dist. Ex. 5 at p. 4). Additionally, the student made friends and got along well with peers (compare Parent Ex. J at pp. 1-3, with Dist. Ex. 5 at p. 5).

## **b. Annual Goals**

The parents alleged in the due process complaint notice that the June 2017 IEP annual goals were "insufficient to address the student's social and attentional deficits and there were no goals to address her pragmatic language deficits" (Dist. Ex. 1 at p. 3). The IHO did not address this issue

specifically in his decision, and the district asserts on appeal that the "IEP goals were measurable and appropriate" (see generally IHO Decision).

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][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The regular education teacher who attended the June 2017 CSE meeting testified that the student's annual goals were discussed and agreed upon at the meeting (Tr. pp. 75, 89-90; Dist. Ex. 6). In developing the student's annual goals, the June 2017 CSE reviewed the student's previous annual goals and recent progress reports YESS, and then determined which goals were appropriate for the IEP (Tr. p. 105).

The June 2017 IEP present levels of performance indicated that the student exhibited below average verbal concept formation, was working on identifying the "most important events" in a story and retelling the story "concisely," and needed to work on "using adjectives, adverbs and descriptive phrases" (Dist. Ex. 5 at pp. 1, 3, 4). In order to address those areas of need the June 2017 IEP included annual goals to retell a story "in sequence incorporating temporal vocabulary" and use adjectives, adverbs and other descriptive phrases to describe objects, pictures, and events (id. at pp. 9-10). The present levels of performance reflected that the student "at times" had difficulty answering reading comprehension questions, and her comprehension skills were described as "weak" (id. at pp. 3, 4). In order to address the student's needs in comprehension the IEP included annual goals for her to use context cues to determine the meaning of unfamiliar words and phrases, answer both literal and inference based questions related to text, respond appropriately to wh-questions based on an orally presented story, use context clues to determine meaning and provide definitions of unfamiliar vocabulary words in classroom textbooks, and retell a story "in sequence incorporating temporal vocabulary" (id. at pp. 6-9).

In addition, the student was working on "shortening run on sentences" in her written work (Dist. Ex. 5 at p. 4). The June 2017 IEP addressed the student's writing needs with an annual goal to compose an organized, two-paragraph opinion composition with correct capitalization, punctuation, and grammar, and with minimal teacher support (id. at p. 7). In the area of math, the IEP reflected that the student had begun learning "the concepts of multiplication and multiplication facts," was demonstrating proficiency with this concept, and was able to implement strategies she had learned in order to solve simple word problems (id. at p. 4). The student had reportedly begun learning division and was "gaining an understanding of this skill quickly" (Parent Ex. J at pp. 5-6). Accordingly, the IEP featured math goals to divide three digits by two digits and determine which operations to use in order to solve word problems (Dist. Ex. 5 at pp. 7, 8). The IEP further addressed the student's math needs with a goal to improve her ability to compare and add fractions (id.).

Finally, the parent alleged in the due process complaint notice that the June 2017 IEP lacked annual goals to address the student's social and "pragmatic language delays" (Dist. Ex. 1 at p. 3). According to the IEP, there were "no social concerns" and the student "ma[de] friends and g[ot] along with her peers" (Dist. Ex. 5 at p. 5). Additionally, the May 19, 2016 speech-language evaluation report indicated that the student "seemed comfortable" with "pragmatic language skills such as turn-taking, eye contact and topic maintenance" (Dist. Ex. 14 at pp. 1-2). Nevertheless, the IEP reflected the parents' concern about the student's need to "work on having appropriate conversations" (Dist. Ex. 5 at p. 4). Accordingly, the IEP included an annual goal for the student to "engage in appropriate topics of conversation" with peers (*id.* at p. 9). With respect to the parents' claim that the IEP failed to address the student's attention needs with an annual goal, an IEP does not need to identify annual goals for every one of a student's deficits in order to offer a FAPE (see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*14 (S.D.N.Y. Sept. 27, 2013), *aff'd*, 589 Fed. App'x 572 (2d Cir. Oct. 29, 2014)). Review of the IEP shows that it provided the student with management strategies to address her attention needs, including simplified language, information broken down and explained, presentation of information both visually and auditorily, and provision of verbal prompts and cues as well as prompts to focus (Dist. Ex. 5 at p. 5). As such, review of the annual goals in the June 2017 IEP does not provide a basis to determine that the district failed to offer the student a FAPE.

### **c. ICT Services**

The IHO determined that the district failed to meet its burden to show that the student was offered a FAPE for the 2017-18 school year because the district did not present testimony by the special education teachers who would have provided the student's ICT services to explain "what they did in the class and how specifically they would have implemented" the June 2017 IEP (see IHO Decision at pp. 7-8). The district asserts on appeal that the IHO erred by finding that the district was required to present testimony from the providers of the ICT services, and also argues that, in any event, the ICT services recommended by the CSE were appropriate to meet the student's needs.

As an initial matter, with respect to the recommendation for ICT services, the due process complaint notice only alleges that a recommendation for 20 hours per week of ICT services "d[id] not provide [the student] with the individual academic support she need[ed] in order to receive a FAPE" (Dist. Ex. 1 at pp. 2-3).<sup>15</sup> Essentially, the parents are questioning the June 2017 CSE's decision to recommend ICT services and that decision must be addressed based on the information available to the June 2017 CSE (see R.E., 694 F.3d at 186-88 [the sufficiency of the district's offered program must be determined on the basis of the IEP itself]). In assessing the parents' allegation, the analysis will be based on whether the June 2017 CSE's recommendation was reasonable based on the information available to the CSE; as discussed below, the district presented a witness who was present for the CSE meeting and who could explain the CSE's rationale. Accordingly, the IHO's finding that the district was required to present testimony from the teachers who would have implemented the student's ICT services was not proper.

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<sup>15</sup> The only allegation regarding the implementation of the June 2017 IEP is that the school was too large and the setting inappropriate for the student and that allegation is addressed below (see Dist. Ex. 1 at p. 3).

As a starting point for the analysis, State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

Review of the IEP shows that the June 2017 CSE considered options for the student including SETSS, 12:1 and 12:1+1 special class placements in a community school, and a State approved nonpublic school placement (Dist. Ex. 5 at p. 16). The June 2017 CSE recommended that the student receive 5 periods per week of ICT services in a general education setting in a community school for each of four subject areas: English language arts (ELA), math, science, and social studies (id. at p. 11). According to the regular education teacher who attended the June 2017 CSE meeting, an ICT "program" was a "general education classroom that ha[d] a special education teacher in the room to support the students that ha[d] IEPs, and there [was] a general education teacher in the room so they both work[ed] together to help create lesson plans . . . the special education teacher w[ould] help the general education teacher" and ensure that students with IEPs could access the curriculum (Tr. pp. 91-92; Dist. Ex. 6). She further testified that the special education teacher would address the student's annual goals and "could help with any prompts or any accommodations or modifications that need[ed] to be made" (see Tr. p. 92). The regular education teacher testified that ICT services were appropriate to address the needs of a student who was "only one grade level behind in those two subjects," opined that the student would have made academic progress, and that the recommended program was the student's LRE (Tr. pp. 104, 115-16; see Dist. Ex. 5 at p. 15).

Further, in addition to the ICT services, to specifically address the student's comprehension needs the June 2017 IEP provided the student with management strategies including simplified language, information broken down and explained, visual and auditory presentation, verbal prompts and cues, and graphic organizers (Dist. Ex. 5 at p. 5; see Tr. pp. 192-94).<sup>16</sup> The June 2017 CSE identified her need for verbal prompts to recognize important information in text (Tr. p. 193; Dist. Ex. 5 at p. 5). The student's need for graphic organizers was identified in order to help her organize her thoughts, and her need for focusing prompts to address attention difficulties was identified as well (Tr. pp. 193-94; Dist. Ex. 5 at p. 5). The student struggled with auditory processing skills, and often took an extended time to answer a question or needed information repeated (Dist. Ex. 5 at p. 4). To further address her difficulties with focusing and comprehension, the June 2017 CSE recommended that the student receive testing accommodations of extended time, separate location in a small group, test directions and questions read and reread aloud, and visual and verbal prompts (id. at p. 12).

The parents asserted in the due process complaint that the June 2017 CSE failed to recommend counseling for the student (Dist. Ex. 1 at p. 3). However, the parents' allegation that

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<sup>16</sup> The school psychologist's testimony is specifically related to the April 2016 IEP; however, her testimony is relevant as she also attended the June 2017 CSE meeting and the student's management needs remained the same as reflected in both the April 2016 and June 2017 IEPs (Dist. Ex. 6; compare Dist. Ex. 5 at p. 5; with Dist. Ex. 10 at p. 4).



the June 2017 IEP was inappropriate because it did not provide counseling services is not supported by the evidence in the hearing record. Results of the August 2015 psychoeducational evaluation reflected in the June 2017 IEP indicated that given the student's low average performance on the verbal comprehension index, the student exhibited inadequately developed "common sense, social judgement, and grasp of social conventionality" (Dist. Ex. 5 at p. 1). However, the June 2017 IEP also reflected that according to the more recent November 2016 YESS annual progress report, the student was eager to learn, participated enthusiastically in group discussions, and was eager to share her answers when reviewing classwork and exerted her best effort when learning new skills (Dist. Ex. 5 at p. 4; see Parent Ex. J at p. 1). Additionally, the IEP reflected the YESS report which indicated the student followed rules and procedures well and knew what was expected of her during transitions and classroom lessons (Dist. Ex. 5 at p. 4; Parent Ex. J at p. 1). Further, the hearing record shows that the YESS report from May 2017 indicated that the student got "along well socially" and "enjoy[ed] interacting" with the other students and that she had an "upbeat personality" (Tr. pp. 88-89; Parent Ex. J at p. 2). Notably, the June 2017 IEP specifically indicated that the CSE determined that there were "no concerns" regarding the student's social development (Dist. Ex. 5 at p. 5; see Tr. pp. 88-89). Therefore, as the June 2017 CSE did not have evidence of the student's needs in the area of her social/emotional development, there was no reason for the CSE to recommend counseling or social/emotional annual goals in the student's June 2017 IEP (see Dist. Ex. 5).

Therefore, as discussed above, the evidence in the hearing record supports a finding that the recommended ICT services in conjunction with management strategies and test accommodations would have provided the student—who exhibited academic skills in the average range—a level of support that would have enabled her to receive educational benefits and would have also satisfied the IDEA's LRE mandate.

### **3. Assigned School**

Further, on appeal, the district correctly argues that the IHO erred in determining that the student was denied a FAPE for the 2017-18 school year based upon the district's failure to establish at the impartial hearing "how specifically" the assigned school "would have implemented" the June 2017 IEP. Initially, the parents' claims related to the ability of the assigned public school to implement the June 2017 IEP are limited to the parents' allegation that "[t]he parents found the school to be very large and the setting to not be appropriate for their daughter" (Dist. Ex. 1 at p. 3).

Initially, permissible prospective challenges to a district's ability to implement an IEP must be "'tethered' to actual mandates in the student's IEP" (Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 5, at \*2 [2d Cir. Aug. 24, 2016]); the parents "must allege that the school is 'factually incapable' of implementing the IEP" to be considered "more than speculation" (see, e.g., M.E. v. New York City Dep't of Educ., 2018 WL 582601, at \*12 [S.D.N.Y. Jan. 26, 2018]); and such challenges "must be based on something more than the parents' speculative 'personal belief' that the assigned public school site was not appropriate" (see, e.g., K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]). Based on the above, the parents' general allegations that the school was "very large" and "not appropriate," without something further, do not fall within the permissible prospective challenges to a district's capacity to

implement the June 2017 IEP, as these issues do not rise to "more than speculation" nor are they tethered to actual mandates in the IEP.

Additionally, the principal of the assigned school testified that she had reviewed the student's IEP, and that a seat was available for the student in the fifth grade ICT "classroom" at the start of the 2017-18 school year (Tr. pp. 120, 124-25). The principal also asserted that the assigned school would have been able to implement the student's 2017-18 IEP (Tr. p. 127). The parents do not present evidence that contradicts the assigned school principal's testimony regarding the ability to implement the student's IEP.<sup>17</sup> Accordingly, the IHO's conclusion on this issue must be reversed.

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the parents' allegations regarding the April 2016 IEP are barred by the statute of limitations, the student's June 2017 IEP addressed her needs, and does not support the IHO's determination that the district failed to meet its burden in proving that the student was offered a FAPE for the 2017-18 school year, the necessary inquiry is at an end.

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

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated August 4, 2020 is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and which ordered the district to directly pay YESS the tuition and related services costs for the student's attendance during those school years.

**Dated: Albany, New York  
November 19, 2020**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**

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<sup>17</sup> The school location letters for both the 2016-17 and 2017-18 school years reflect that the student was assigned to attend the same public school (compare Dist. Ex. 9 at p. 4, with Dist. Ex. 13 at p. 4). The parent testified he could not recall which school year he visited the assigned school, but that he had been "there on several occasions" (Tr. p. 324). The parent's testimony regarding his visit to the assigned school relates to the claims in the due process complaint notice regarding the 2016-17 school year (compare Tr. pp. 332-34, with Dist. Ex. 1 at p. 2).