The University of the State of New York

The State Education Department
State Review Officer
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No. 21-130

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:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Lauren A. Goldberg, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered the student appropriate special education programming and denied their request to be reimbursed for their son's tuition costs at the IVDU – Boy's High School (IVDU) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student presents with delays in his cognitive, receptive and expressive language, academic, pragmatic and social/emotional skills (see Dist. Exs. 1; 3; 5). He has received the diagnoses of an autism spectrum disorder and attention deficit hyperactivity disorder (ADHD) (Parent Ex. M ¶ 5). As a younger child, the student received services through the Early Intervention Program (EIP) and the Committee on Preschool Special Education (CPSE) (id. ¶¶ 2-3). According to the parent, for kindergarten through third grade the student was enrolled in a mainstream school where he received special education and related services provided by the

district (id. ¶ 4). For the 2012-13 through the 2017-18 school years (fourth through eighth grades), the student attended a special education parochial school (id. ¶ 6). For the 2018-19 school year (ninth grade), the parents enrolled the student at IVDU where he attended a special class with an 8:1+1 student-to-adult ratio, received speech-language therapy and counseling, and was expected to take Regents examinations (id. ¶¶ 6, 9; see Dist. Ex. 1 at p. 1).[1]

On March 13, 2019, a CSE convened to conduct the student's annual review and develop an IEP for the 2019-20 school year (tenth grade) (see Dist. Ex. 1). Having found the student remained eligible for special education as a student with autism, the CSE recommended he attend a 12-month program in a 12:1+1 special class in a specialized school with the related services of counseling once per week individually and once per week in a group of three for 40 minute sessions, two 40-minute sessions per week of individual speech-language therapy, and four 60-minute sessions per year of parent counseling and training (id. at p. 11).[2]

In a prior written notice with attached school location letter, dated May 13, 2019, the district summarized the recommendations of the March 2019 CSE and notified the parents of the particular public school site to which the district assigned the student to attend for the 2019-20 school year (Dist. Ex. 2).

In a letter dated June 20, 2019, the parents notified the district that they felt the IEP and the recommended program would not provide the student with sufficient individualized attention and instruction (Parent Ex. B at p. 1). They specifically noted their concerns that the recommended class size of 12:1+1 was too large, the recommended goals were too vague, the IEP did not fully describe the student's academic, social/emotional, language and behavioral needs, and that the CSE may not have had sufficient evaluations when creating the IEP (id.). Additionally, the parents detailed that they felt the transition activities were vague and the public school the student was assigned to attend was inappropriate because it did not have a vocational training component and, therefore, would not be able to implement the IEP and the student would not be able to meet his IEP goals (id. at pp. 1-2). Additionally, the parents opined that the assigned public school site would not be able to provide the student with an appropriate peer group and that the classrooms and related service rooms were overcrowded and cramped, which would be too distracting for the student (id. at p. 2).

In a letter dated August 21, 2019, the parents notified the district of their intention to enroll the student at IVDU and seek public funding for that placement (Parent Ex. C). On September 9, 2019, the parents signed a contract to reenroll the student at IVDU for the 2019-20 school year (Parent Ex. I).

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

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

A. Due Process Complaint Notice

In a due process complaint notice dated March 4, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A).[3] Generally, the parents alleged that the district failed to conduct and consider proper evaluations, failed to convene a CSE that was properly composed in that "upon information and belief" the district representative was not qualified, failed to meaningfully include the parents in the decision-making progress, predetermined the CSE's recommendations, and failed to provide the parents with prior written notice (id. at pp. 1-2). The parents also alleged that the March 2019 CSE did not include a sufficient description of the student's present levels of the performance; incorrectly stated the student's diagnoses; included inappropriate, vague, and unmeasurable annual goals; failed to include appropriate services and supports to address the student's needs; failed to include appropriate promotional criteria; and contained an insufficient post-secondary transition plan (id. at pp. 1-3). In addition, the parents argued that the March 2019 CSE's recommendation for a 12:1+1 special class in a district specialized school was inappropriate, as the "class size [wa]s too large" and the student would not be provided with 1:1 and small group instruction or the "small school environment" he required (id. at p. 2).

Next, the parents alleged that the assigned public school site did not have the capacity to implement the March 2019 IEP in that it was "academic-focused" and did not offer a vocational program (Parent Ex. A at p. 3). In addition, the parents asserted that the "physical environment" of the school would be inappropriate because the classroom and related services rooms were "crowded and cramped" (id.). The parents also alleged that the proposed classroom would not have a suitable peer grouping for the student (id. at pp. 2, 3).

For relief, the parents sought district funding of the costs of the student's tuition at IVDU for the 2019-20 school year (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 18, 2020 and concluded on April 14, 2021 after eight days of proceedings (see Tr. pp. 1-167). In a decision dated May 5, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year and, therefore, denied the parents' request for tuition reimbursement at IVDU (IHO Decision at p. 13). Regarding the composition of the CSE, the IHO found that, contrary to the parents' assertion, a district representative attended the meeting (id. at p. 8). The IHO further found that, given the testimony regarding the CSE's rationale for the IEP recommendations, "[t]here was no reason to suspect predetermination" (id.). As for the sufficiency of the evaluative information before the CSE, the IHO noted that the district did not offer any evidence regarding evaluations conducted other than a psychoeducational evaluation and a level 1 vocational interview, but held that those evaluations in combination with the report from IVDU and parent input provided sufficient information for the CSE to develop the student's IEP (id. at p. 10). The IHO rejected the parents' allegation that the annual goals in the March 2019 IEP were vague, noting that they included "a variety of specifics in each goal," criteria for measurement, methods of measurement, and a schedule of when

[3] The parents also alleged that the district violated section 504 of the Rehabilitation Act of 1973 (section 504), (29 U.S.C. § 794[a]) (Parent Ex. A at p. 1).

progress would be measured (id. at p. 11). In addition, the IHO noted that, even if the CSE did not discuss the goals fully at the meeting, this did not result in a failure of the IEP to meet the student's needs (id. at p. 12).

Turning to the program recommendations, the IHO concluded that, at the time of the March 2019 CSE meeting, the committee had no reason to believe that the student "required substantial 1:1 instruction" (IHO Decision at p. 8). The IHO further indicated that the IEP included strategies appropriate to address the student's needs in the classroom and counseling goals appropriate to assist the student in managing his attention and to address his lack of confidence (id. at pp. 8, 10). As to the parents' allegations that the IEP did not address the student's social/emotional, sensory processing, and behavioral/attentional needs, the IHO first indicated that the evidence did not reflect that the student had "sensory processing issues" (id. at p. 9). The IHO noted that the annual goals in the IEP, as well as the recommended individual and group counseling services, were appropriately designed to address the student's social/emotional and behavioral needs (id.). In addition, the IHO found that information from IVDU regarding the student's need for frequent positive reinforcement or praise was not before the CSE (id. at pp. 9-10). The IHO concluded that the recommended 12:1+1 special class was appropriate, reasoning that "[t]here was no reason to assume that the Student would not have received the necessary attention in the class, simply because it was somewhat larger than his 8:1:1 class at IVDU" (id. at p. 12). The IHO also concluded that the IEP included appropriate and sufficient post-secondary transition goals and transition activities and found no basis for the parents' concerns about promotional criteria (id. at pp. 11-12).

Regarding the assigned public school site, the IHO found that the school offered vocational programs and was capable of implementing the student's post-secondary transition goals (IHO Decision at pp. 12-13). Further, the IHO found no basis for concerns about overcrowding in the classroom and related services rooms and no basis to conclude that the proposed classroom would not include appropriate peers (id. at pp. 9, 13).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year and in denying the parents' request for district funding of the costs of the student's attendance at IVDU. The parents assert that the IHO erred in dismissing their claims regarding the composition of the March 2019 CSE, the CSE's failure to discuss annual goals at the meeting, and the CSE's predetermination of the IEP recommendations. The parents also contend that the IHO erred in finding that the CSE had sufficient evaluative information to develop the student's IEP. Relatedly, the parents allege that the IHO improperly shifted the burden of proof to the parents on the question of the sufficiency of the evaluative information before the CSE. As to the March 2019 IEP, the parents argue that the IHO erred in finding the IEP sufficiently addressed the student's behavioral needs and that the 12:1+1 special class recommendation was appropriate. The parents further contend that, contrary to the IHO's decision, the annual goals and transition services in the IEP were vague and inadequate. As for the assigned public school site, the parents contend that the IHO erred in dismissing their concerns about the inability of the school to provide appropriate vocational programs and travel training, the crowdedness of the classrooms and related services rooms, and the functional grouping of the students in the proposed classroom.

The parents also argue that the IHO erred in failing to find that IVDU was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parents' requested relief. The parents request that the district be required to fund the student's placement at IVDU for the 2019-20 school year.

In an answer, the district denies the parents' allegations and argues that the IHO's decision should be affirmed in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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 Endrew 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]).[4]

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

[4] 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" (Endrew F., 137 S. Ct. at 1000).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. March 2019 CSE

1. CSE Composition

The parents argue that the IHO improperly dismissed their claim that the March 2019 CSE did not include a qualified district representative based solely on the individual's signature on the attendance page. The parents allege that no evidence in the hearing record demonstrates that the district representative had the requisite knowledge of the continuum of placements in the district to serve in that role.

The IDEA and federal and State regulations require that a CSE include "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]). State regulations additionally provide that the district representative may be the same individual appointed as the special education teacher or the school psychologist provided that such individual meets the above qualifications (8 NYCRR 200.3[a][1][v]).

Review of the hearing record shows that the March 2019 CSE was composed of a special education teacher who also served as the district representative, a school psychologist, and the student's parents who attended the meeting in person, as well as two of the student's then-current teachers from IVDU who participated via telephone (Tr. p. 93; Parent Ex. M ¶ 8; Dist. Ex. 1 at p. 18). To the extent that the parents assert that the CSE failed to consider all possible programs that could provide the student with educational benefit "calling into question the qualifications of the district representative," the district school psychologist testified that "given [the student's] classification, given his cognitive performance, which was low average, given his really delayed academic skills . . . we felt that a [specialized school] program would really . . . address his needs the most appropriately" (Tr. pp. 66, 98). Moreover, as discussed below, the IEP itself reflected that the CSE considered but rejected other options on the continuum, including a 6:1+1 and an 8:1+1 special class in a specialized school (Dist. Ex. 1 at p. 16). Even if the IEP had not included such notations, the CSE's discussion of other special class ratios or lack thereof would not necessarily reflect the district representative's knowledge about the availability of resources of the district.

Even assuming that the district representative was incapable of adequately fulfilling the criteria to serve on the CSE, the parents' argument is technical in nature and they do not otherwise allege with any particularity under these facts how such a deficit significantly impeded their ability to participate in the development of the student's educational program or deprived the student 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]). Absent some argument for how this purported deficiency in the composition of the CSE harmed the student or the parents' ability to participate in the March 2019 CSE meeting, the hearing record does not support a finding of a denial of a FAPE on this basis (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

2. Parent Participation and Predetermination

The parents assert that the IHO erred in concluding that there was no reason to suspect predetermination and in noting that no information regarding predetermination was elicited in testimony. The parents point to the testimony of the student's mother that the CSE did not discuss any option other than a 12:1+1 special class. The parents also allege that the CSE did not explain its reasoning for the recommendation to the parents and did not offer a rationale related to the student's needs at the impartial hearing. Further, the parents argue that the IHO erred in excusing the CSE's failure to discuss the annual goals to be included in the IEP at the March 2019 meeting.

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] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). 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). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

As to predetermination, 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 (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The 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 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

With regard to predetermination, although the parents allege that the CSE considered nothing but a 12:1+1 special class placement for the student, the May 2019 IEP and the May 2019 prior written notice reflect that the March 2019 CSE considered a 6:1+1 and an 8:1+1 special class in a specialized school but determined that the student did "not need such intensive specialized instruction to address his educational needs" (Dist. Exs. 1 at p. 16; 2 at p. 2). Moreover, the hearing record reflects that the parents actively and meaningfully participated in the CSE meeting, which undermines their claim of predetermination.

Specifically, the May 2019 IEP reflects that, during the CSE meeting, the parents expressed their concerns that the student needed to improve his overall academic performance so he could graduate with a high school diploma and that he lacked safety awareness when on the street (Dist. Ex. 1 at p. 2). Additionally, the IEP indicated that the parents agreed to terminate OT because of the student's resistance and that they were advised that a request for an evaluation to restart services could be completed at any time (id. at p. 3). According to the school psychologist, who attended the March 2019 CSE meeting, the student's teachers from IVDU provided verbal input during the meeting which was included in the IEP's present levels of performance (Tr. pp. 94-95; Dist. Ex. 1 at pp. 1-3).

The student's mother indicated in her direct testimony via affidavit that, during the March 2019 CSE meeting, the CSE discussed testing accommodations for when the student sat for Regents exams, that the student was "not behaviorally appropriate" and had a behavior plan at IVDU, and the student's needs related to transition planning (Parent Ex. M ¶ 9). Additionally, the student's mother indicated that the CSE confirmed the student's eligibility for Medicaid waiver services and suggested looking into a residence home for after graduation (id.). She further explained that she responded to the CSE's suggestion, stating that the parents were able to meet the student's needs at home (id.). Furthermore, according to the mother's affidavit testimony, she expressed concern at the CSE meeting regarding the 12:1+1 class size and staffing ratio but no other options were presented or discussed (id. ¶ 11). During the hearing, the student's mother elaborated that at the CSE meeting she expressed concerns that a 12:1+1 class would be too large and would prevent the student from functioning well, and that she stated a 6:1+1 would be more beneficial (Tr. pp. 131-33). She further testified that the CSE's response was that they heard her concerns and would "make a note of it" (Tr. p. 133).

Overall, while the parents did not agree with the CSE's ultimate recommendations, as noted above, disagreement with a proposed IEP does not amount to a denial of meaningful participation.

Regarding the parents' contention that annual goals were not discussed at the March 2019 CSE meeting, the hearing record contains scant evidence relevant to this argument. The student's mother indicated in her affidavit testimony that the CSE did not discuss annual goals for the upcoming 2019-20 school year (Parent Ex. M ¶ 10). The school psychologist testified that annual goals were based on what was discussed during the CSE meeting (Tr. p. 95). She explained that "[w]hen we discuss a student's strengths and weaknesses, and when we develop the program, we determine what skills or goals he should have for the following school year" (id.). There is no evidence that the parents attempted to raise or discuss specific concerns related to the student's annual IEP goals during the CSE meeting and were rebuffed by other members of the CSE. Here, while the evidence in the hearing record suggests that the annual goals ultimately included in the March 2019 IEP may not have been discussed during the March 2019 CSE meeting, the weight of the evidence in the hearing record indicates that because the parents attended the March 2019 CSE meeting and participated in the meeting and the annual goals were appropriate to meet the student's needs—any failure to discuss the particular annual goals included in the March 2019 IEP at the CSE meeting did not significantly impede the parents' opportunity to participate in the development of the student's IEP (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that annual goals be drafted at the CSE meeting]).

3. Sufficiency of Evaluative Information

The parents allege that the IHO erred in finding that the information before the March 2019 CSE was sufficient. The parents argue that the district failed to conduct any updated assessments of the student and solely based its recommendations on the IVDU progress report, which was "not a suitable replacement for comprehensive evaluations" (Parent Mem. of Law at p. 11). The parents take particular issue with the district's failure to conduct or consider a classroom observation given the IHO's conclusion that the CSE could not be expected to know the student's classroom needs and functioning at IVDU if the information was not shared with it (see IHO Decision at p. 6).

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 need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and 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][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). 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, among other things 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]).

According to the hearing record, the March 2019 CSE had before it and considered a March 2017 psychoeducational evaluation report, a March 2019 Level I vocational interview, a fall 2018 IVDU goals progress report, and information provided by the student's special education teacher and related service providers during the March 2019 CSE meeting (Dist. Exs. 1; 2 at p. 2; 3; 4; 5).[5] The school psychologist, who participated in the March 2019 CSE meeting, testified that the CSE used the "most recent assessments available" including the progress reports provided by IVDU and "verbal reporting during the meeting by the teachers and by the parent" (Tr. pp. 94-95).

The March 2017 psychoeducational evaluation report, which had been conducted only approximately two years prior to the CSE meeting, included standardized test results in the areas of cognitive, intellectual and academic skills, as well as behavioral observations (see Dist. Ex. 3). The results indicated that the student obtained cognitive assessment scores solidly in the low average range for his overall intellectual IQ as well as in verbal and nonverbal ability (id. at p. 2). Additionally, the student's reading skills were found to be at a beginning sixth grade range and math skills at a beginning fourth grade range (id.). In social/emotional functioning, the evaluator described the student as "friendly, cooperative, compliant and hard-working," opined that the student was a "generally well related pleasant adolescent with typical, age appropriate interests and concerns at this time" and noted that the student had a high frustration tolerance (id.). There is no evidence in the hearing record to support the parent's contention that the CSE should not have relied on this evaluation.

The March 2019 Level 1 vocational interview reflected the parents' interests and expectations regarding the student's vocational interests (see Dist. Ex. 4). For example, the parent indicated that after graduation with a high school diploma, the student would continue with vocational school and training to work with animals (id. at p. 1). According to the parent, the student needed to develop social skills with peers and skills needed to persevere with difficult tasks (id.). The parent also informed that the student would either "be at home or possibly supportive living" and noted that the family received supports for community habilitation and an agency list for organizations that provided assistance for people with autism (id. at p. 2).

The fall 2018 IVDU goals and progress report reflected the student's strengths and needs as well as progress towards his goals in academics, classroom behavior, work habits and participation, counseling, and speech therapy (Dist. Ex. 5).[6]

[5] The May 2019 prior written notice incorrectly refers to the dates of the student's psychological evaluation and the vocational assessment as having been conducted in May 2017 (compare Dist. Ex. 2 at p. 2, with Dist. Exs. 3 at p. 1; 4 at p. 1). Also, the fall IVDU goals progress report is undated; however, the May 2019 prior written notice indicated that it was from December 2018 (Dist. Exs. 2 at p. 2; 5). Furthermore, the report is referenced as the "IVDU progress report Fall 2018" in the March 2019 IEP (Dist. Ex. 1 at p. 1, 3).

[6] Related to the sufficiency of the evaluative information before the CSE is the parents' argument that the IHO improperly shifted the burden of proof to the parents when, after the close of evidence, the IHO requested that parents' counsel confirm what documents from IVDU were provided to the district before the March 2019 CSE

Review of the March 2019 IEP shows that it included information from the evaluative reports available to the CSE: the March 2017 psychoeducational evaluation report, the March 2019 Level I vocational interview, and the fall 2018 IVDU goals progress report, as well as information provided by the student's teachers and the parents (compare Dist. Ex. 1 at pp. 1-3, with Dist. Exs. 3; 4; 5).[7] As such, the evidence in the hearing record does not support the parents' assertion that the CSE solely based its recommendations on the IVDU progress report.

Regarding the parents' allegation that the district failed to conduct a classroom observation or otherwise have sufficient information about the student's classroom performance, State regulation requires that when conducting an initial evaluation to determine a student's eligibility for special education services, an observation shall take place "in the student's learning environment" for the purpose of "document[ing] the student's academic performance and behavior in the areas of difficulty" (8 NYCRR 200.4[b][1][iv]).[8] This was not an initial evaluation of the student and the March 2019 CSE otherwise had such information available to it. For example, the IEP itself indicated that the student received instruction in an 8:1+1 class and "[s]peech and [c]ounseling" at IVDU (Dist. Ex. 1 at p. 1). Although mandated to receive OT, the IEP indicated that the student did not attend sessions (id.). Pertaining to the student's learning style, the March 2019 IEP indicated that he was "a multi-modal learner" who benefitted "from visual cues and [a] [S]martboard in the classroom" (id.). According to the IEP, the student's "expected rate of progress in acquiring skill and information [was] slower than that of typically developing peers due to his diagnosis and delayed academic skills" (id.).

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meeting (see IHO Ex. II). The parents argue that, in requesting this information after the close of evidence, the IHO failed to base her decision upon the record of the proceeding. It is an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5 [j][3][vii]). Here, while the parents' counsel stated her position that the hearing record sufficiently addressed the question of the information available to the CSE (see id. at p. 3), there is no indication that either party requested that the hearing reconvene for the purposes of further exploring the question posed by the IHO. Further, while the parent argues that the IHO relied upon the responses to the IHO's question to find that IVDU provided insufficient information to the CSE, the IHO appeared, instead, to be articulating the premise that she could not rely on retrospective evidence about the student to evaluative the appropriateness of the March 2019 IEP (IHO Decision at p. 6; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). Ultimately, there is no indication that the responses to the IHO's question provided by the parties' representatives were determinative to the IHO's findings of fact (see generally IHO Decision at pp. 9-10). Accordingly, the IHO's inquiry to the parties regarding this evidence does not offer a sufficient basis to modify the IHO's decision that the evaluative information before the CSE was sufficient.

[7] On appeal the parents do not assert that the present levels of performance on the March 2019 IEP were inaccurate (see Req. for Rev.).

[8] A CSE has greater flexibility when conducting a reevaluation of a student with a disability to determine what additional data is needed when conducting a reevaluation (8 NYCRR 200.4[b][5][ii]). There is no evidence that the parents specifically requested that the CSE conduct a new classroom observation (see 8 NYCRR 200.4[b][5][iv]).

The March 2019 IEP reflected teacher reports provided at the CSE meeting indicated the student did not like to read aloud in class, he was able to read for 10 minutes without becoming distracted, and that he read without expression (Dist. Ex. 1 at p. 1). The student also liked to look up words he did not know, understood elements in the story, and asked appropriate questions about the text (id.). The teacher also reported that the student's writing skills were approximately at a third-grade level, he resisted writing, and saw "no reason to write beyond the test" (id.). The student wrote three to five sentences independently but did not use commas in sentences (id.). Regarding math, the IEP reflected teacher reports that the student was able to use a calculator and complete arithmetic sequences, and also that his math skills were "scattered" (id.). Additionally, the teacher reported that at times the student gave up and left the classroom and lacked confidence that he could complete tasks (id.). Socially, the teacher reported at the CSE meeting that the student only talked to teachers in school, and he did not interact with peers in that he responded to peers when they initiated contact, but he did not reciprocate (id. at p. 3).

Although the district did not conduct a new classroom observation of the student prior to the March 2019 CSE meeting, the evidence in the hearing record shows that the CSE had sufficient information about the student's school performance from the fall 2018 IVDU progress report and the reports provided by the student's teachers at the CSE meeting in order to develop his IEP (Dist. Exs. 1 at pp. 1, 3; 5).

In sum, the evidence does not show that a lack of sufficient evaluations "deprived [the parents] of evaluative material so critical and insufficiently substituted at the CSE meeting that [they were] significantly hindered in [their] ability to advocate" for the student (A.A. v. New York City Dep't of Educ., 2015 WL 10793404, at *11 [S.D.N.Y. Aug. 24, 2015]). Under the facts described above, it is more difficult to accept the parents' argument that they were at a disadvantage in their participation when the student was already attending a private school that they selected without the input of the CSE. While the parents contend now that the district did not conduct all required evaluations, the evidence shows that evaluative information available to the CSE provided sufficient information regarding the student (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *16-*17 [S.D.N.Y. Feb. 14, 2017]; S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 567 [S.D.N.Y. 2016] [holding that procedural violations, including untimely evaluations and the failure to obtain required evaluations, did not rise to the level of a denial of a FAPE where the CSE had adequate information about the student's needs]; K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *7-*8 [S.D.N.Y. Mar. 31, 2016] [holding that where evaluative materials provided detailed information regarding the student's needs, the procedural violation of not conducting required evaluations did not rise to the level of a denial of a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7-*8 [S.D.N.Y. Mar. 30, 2016]; M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 116 [S.D.N.Y. 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *5 [S.D.N.Y. Feb. 24, 2016]).

B. March 2019 IEP

1. Supports for Social/Emotional and Behavioral Needs

Turning to the CSE's recommendations, the parents allege that the IHO erred in finding that IVDU did not provide the CSE with sufficient information to demonstrate the student's need for behavioral supports and that the counseling goals included in the IEP could address the

student's behavioral needs. The parents note that the IEP inaccurately stated that, at the time of the March 2019 CSE meeting, that the student did not have a behavioral intervention plan (BIP). The parents further point to information that IVDU informed the CSE that the student was "not behaviorally appropriate" and, at times, would give up and leave the classroom (Parent Mem. of Law at p. 17). The parents argue that counseling alone was insufficient to address the student's lack of self-confidence. According to the parents, the CSE should have recommended positive behavioral interventions, supports, and other strategies to address his behaviors that impeded his learning.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Schenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *8 [S.D.N.Y. July 3, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

The March 2019 IEP present level of social development indicated that the student only talked to teachers in school and did not interact well with peers, and noted that he would respond to peers when they initiate but would not reciprocate (Dist. Ex. 1 at p. 3). Additionally, the March 2019 IEP reported from the IVDU progress report fall 2018 that the student continued to struggle getting to class on time and that a staff member often had to go get him (compare Dist. Ex. 1 at p. 3 with Dist. Ex. 5 at p. 3). Additionally, the student needed time to get acclimated to the class and get started, and noted that he had a hard time taking notes for class (compare Dist. Ex. 1 at p. 3 with Dist. Ex. 5 at p. 3). The IEP further reported that the student had been making progress in transitioning more smoothly between subjects and had become more comfortable in school and counseling; he had become more expressive and honest and had become more respectful towards staff and students in class (compare Dist. Ex. 1 at p. 3 with Dist. Ex. 5 at pp. 3-4). Finally, the March 2019 IEP reported that the student had improved his social interactions with peers and staff, specifically noting that he was "a kind young man with a lot to offer" (compare Dist. Ex. 1 at p. 3 with Dist. Ex. 5 at p. 4).

Further review of the March 2019 IEP indicated that the CSE recommended the following supports for the student's social/emotional and behavioral needs: counseling once per week individually and once per week in a group of three for 40 minutes; three counseling goals designed to improve the student's ability to remain on task, participate, share, follow directions, and take turns during unstructured play with one to two peers, and to recognize more appropriate ways to express himself; speech-language therapy twice per week individually for 40 minutes; three speech-language goals designed to improve the student's comprehension of figurative language, use of meaningful language and ability to clarify miscommunication, ability to exhibit active participation in a group or class discussion, and to initiate and participate effectively in collaborative discussions with diverse partners building on others' ideas and expressing ideas clearly (Dist. Ex. 1 at pp. 3, 6-7, 11). Additionally, the March 2019 IEP contained a coordinated set of transition activities that were designed to improve, among other things, the student's

conversational skills with peers and adults in authority in order to facilitate development of employment and other post-secondary adult living objectives (id. at p. 13).

According to the March 2017 psychoeducational evaluation report, overall, the student presented as friendly, cooperative, compliant and hardworking (Dist. Ex. 3 at p. 1). Additionally, the evaluator opined that the student worked in a "good natured motivated manner and displayed good frustration tolerance" (id.). The evaluator further explained that interviewing, behavioral observations and limited projective measures indicated that the student was "a generally well related pleasant adolescent with typical, age appropriate interests and concerns at this time" (id. at p. 2).

The mother's affidavit testimony detailed that the March 2019 CSE discussed that the student was "not behaviorally appropriate" and that he had a behavior plan in place at IVDU (Parent Ex. M ¶ 9). However, the March 2019 CSE discussed and documented the student's difficulty engaging in appropriate interactions with peers, getting class on time without adult support, and giving up and leaving the classroom (Dist. Ex. 1 at pp. 1-3). Even if the IHO made a minor misstep and during the 2018-19 school year at IVDU the student did have a BIP, the information available to the March 2019 CSE indicated that the student had demonstrated improvements in these areas, such that the annual goals and related services the CSE offered were appropriate to meet his needs (Dist. Exs. 3 at pp. 1, 2, 5 at pp. 3, 4). Accordingly, based on the information detailed above, I find that there is insufficient evidence in the hearing record to overturn the IHO's conclusions related to the student's behavior.

2. 12:1+1 Special Class

The parents argue that the IHO's decision that the 12:1+1 special class was appropriate to meet the student's needs was based on incorrect assumptions, rather than the evidence in the hearing record. The parents note that the recommended 12:1+1 special class was less supportive than the class the student attended at IVDU. The parents cite State regulations that define special classes for public programs with a maximum of 12 students differently than those meant for public programs having a maximum of 8 students. The parents also point to testimony from the parents' witnesses that the student required a "smaller, more supportive program" particularly to address his need for "a tremendous amount of external validation, as well as his language processing delays" (Parent Mem. of Law at pp. 13-14).

State regulation provides that "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]). By way of comparison, State regulation also indicates that "[t]he maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][b]).

As described in detail above, the March 2017 CSE relied on multiple sources of information to determine the student's needs (Dist. Exs. 1 at pp. 1-3; 3-5). Based on the information before it, the CSE determined that the student exhibited deficits in the areas of cognition, academics, expressive, receptive, and pragmatic language skills, and social/emotional skills (Dist. Ex. 1 at pp. 1-4). In addition to the supports provided in a 12:1+1 special class, to address the student's receptive, expressive and pragmatic language needs, the March 2019 CSE recommended that the student receive two 40-minute sessions per week of individual speech-language (Dist. Ex. 1 at p. 11). To address the student's social/emotional needs, the CSE recommended the student receive counseling service once per week individually and once per week in a small group for 40-minute sessions (id.). In addition, the March 2019 CSE developed approximately 27 annual goals related to English language arts (ELA), mathematics, writing, receptive, expressive, and pragmatic language, attention, social/emotional, and transition (Dist. Ex. 1 at pp. 6-10). The March 2019 IEP further provided the student with testing accommodations of separate location or room in a group of no more than 12, extended time (1.5) and revised test directions on all tests longer than 40 minutes (id. at p. 12). Additionally, as supports to address the student's management needs, the CSE recommended the use of graphic organizers and a calculator, preview of new material, redirection, task analysis, and that he be assessed for travel training services by his school site (id. at p. 4).

The March 2019 IEP reflects that the CSE considered both a 6:1+1 and an 8:1+1 special class placement in a specialized school, but rejected those options because it determined that the student did not need such intensive specialized instruction to address his educational needs (Dist. Ex. 1 at p. 16). Consistent with the student's needs and State regulations, the March 2019 CSE recommended a 12-month 12:1+1 special class in a specialized school (Dist. Ex. 1 at pp. 11-12). That is, while the student demonstrated management needs that could be characterized as interfering with the instructional process, the evidence in the hearing record does not support the parents' position that the student's needs were intensive, requiring a significant degree of individualized attention and intervention (compare 8 NYCRR 200.6[h][4][i], with 8 NYCRR 200.6[h][4][ii][b]). Accordingly, I am not convinced that the district was required under these facts or under State regulations to offer a special class setting with a ratio smaller than 12 students. While the parent may have preferred the particular class ratio privately offered at IVDU, districts are not merely required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]).[9]

[9] The March 2019 IEP reflected that at IVDU, the student received instruction in an 8:1+1 class and the CSE recommended a 12:1+1 special class placement (Dist. Ex. 1 at pp. 1, 11), illustrating a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parent's decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

Accordingly, based on the information detailed above, there is insufficient evidence in the hearing record to overturn the IHO's finding that the March 2019 CSE's recommendation of a 12:1+1 special class in a specialized school was reasonably calculated to provide the student with educational benefits.

3. Postsecondary Goals and Transition Services

Next, the parents allege that the IHO erred in finding that the post-secondary transition goals in the March 2019 IEP were sufficiently specific and in finding that transition goals and services would be implemented after graduation.[10] As an example, the parents note that, although the IHO cited to a post-secondary transition goal that referenced travel safety awareness, the IEP lacked a recommendation for travel training beyond a statement that the assigned public school would determine if such services were appropriate. Therefore, the parents argue that the IEP lacked a means for implementation of the goal related to travel safety awareness.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).[11] An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ.,

[10] The parents also allege generally that the IHO erred in finding that the annual goals in the May 2019 IEP were sufficient but do not elaborate on their claim beyond alleging that the IHO erred in finding the IEP appropriate without travel training as a service to implement the transition goal relating to travel safety awareness (see Parent Mem. of Law at p. 15). In any event, review of the March 2019 IEP shows that the annual goals were designed to meet the student's needs as described in the present levels of performance and included evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goals (Dist. Ex. 1 at pp. 6-10; see 8 NYCRR 200.4[d][2][iii]; see also 20 U.S.C. § 1414[d][1][A][i][II]-[III]; 34 CFR 300.320[a][2]-[3]). Accordingly, the evidence in the hearing record supports the IHO's finding that the annual goals in the IEP were sufficient and appropriate.

[11] In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

Review of the March 2019 IEP shows that the CSE developed measurable post-secondary goals, which indicated that upon graduating the student would participate in a vocational or job training program; that he would be employed in a field related to animal care; and that he would live at home, take part in community activities that interest him, continue to develop his activities of daily living (ADL) skills, and manage his personal finances with assistance; and that he would consider supportive living situations in the future (Dist. Ex. 1 at p. 5). In addition, with respect to transition needs, the CSE indicated that beyond the requirements for a New York State academic diploma, the student would benefit from: developing his "meet and greet" skills during class time and his vocational training; developing personal, work, and educational goals for himself, with assistance; increasing conversational skills with peers and those in authority positions; learning travel safety awareness skills; registering to vote in order to take part in local, state, and national elections; taking part in an interest inventory in order to identify general work areas of interest; increasing focusing time to tasks; and that he would be recommended and assessed for travel training services if deemed appropriate by his assigned public school site (id.).

With respect to a coordinated set of transition activities, the March 2019 IEP outlined the services or activities needed to facilitate the student's movement from school to post-school activities including: taking part in Regents preparation classes and tutoring sessions as needed to support his daily academics, and taking part in vocational training opportunities; taking part in speech therapy to improve receptive and expressive language skills, and counseling to assist with social/emotional issues; taking part in community events and activities that were of interest to him and registering to vote; developing appropriate conversational skills with peers and adults in authority, setting personal educational and work goals with assistance, increasing his focus time to work tasks and taking part in an interest inventory; being assessed at his school site to see if he was an appropriate candidate for travel training; and he that would be assessed monthly at his work site (Dist. Ex. 1 at p. 13).

The March 2019 CSE developed approximately eight annual goals to support the student's participation in these transition activities which included: to develop his "meet and greet" skills during class time and vocational training; with assistance, to be able to state one personal, one educational and one work goal he would like to accomplish in an effort to plan for future living and work opportunities; to demonstrate an ability to take part in an appropriate work related conversation with his peers for two exchanges while at his vocational training site and during class time; to be able to focus on a work task for 15 minutes before needing redirection; to take initiative at his work site by clarifying tasks that need to be done and attend to a work task until completion with prompts as needed; to develop travel safety awareness regarding street signs, cars, bikes, other pedestrians as well as utilizing electronics safely while traveling in the community; to register to vote in order to take part in local, state and national elections; and to take part in an interest

inventory in order to identify general work areas of interest that he may be interested in post high school (Dist. Ex. 1 at pp. 9-10).

While the IHO misapprehended the timing of transition services and incorrectly stated that transition "services could not be included as IEP goals, because the occur after graduation" (see IHO Decision at p. 11), review of the IEP nevertheless supports the IHO's conclusion that the postsecondary goals and transition services developed by the IEP were appropriate and does not require reversal of the IHO's decision. Moreover, to the extent that the parents argue that the March 2019 IEP lacked a means for implementation of the goal related to travel safety awareness, the lack of an explicit mandate for travel training on the IEP does not, in this case, support a finding that the district denied the student a FAPE in this instance. State regulation provides that travel training is an available "special education service" that "provid[es] instruction, as appropriate, to students with significant cognitive disabilities, and any other students with disabilities who require this instruction, to enable them to develop an awareness of the environment in which they live; and learn the skills to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community)" (8 NYCRR 200.1[ggg]; see 34 CFR 300.39[a][2][ii], [b][4]). Here, the IEP created by the CSE defers the particular modality of working on the transition services goal to the staff who would be working directly to the student. Thus, the IEP did not specifically recommend travel training as a service for the student but, instead, set forth that the student would be "recommended / assessed for travel training services if deemed appropriate for him by his school site" (Dist. Ex. 1 at pp. 4, 5). The school psychologist testified that travel awareness could be "fairly incorporated" into the program but that, generally, students were assessed by the school as they "approach[ed] aging out" to determine if they were appropriate for travel training (Tr. p. 102). The school psychologist opined that the March 2019 CSE felt the student could fully participate in a travel training program which was why assessment for the travel training program was included in the management needs section of the IEP (Tr. pp. 102-03).

Here, while the CSE did not recommend travel training as a service, the IEP contemplated the student's need to learn travel safety awareness and overall sufficiently addressed the student's needs related to preparing for post-secondary life. The district witnesses used the term "assess" in conjunction with travel training, which can lead to confusion, but it does not lead to a denial of a FAPE because the assessment referenced in these particular circumstances is little more than the type of assessment that teachers regularly use whenever selecting the teaching methods used to implement an IEP goal. There is no indication that the IEP is calling for a reevaluation of the student's transition needs outside of the CSE process. Accordingly, there is insufficient basis in the hearing record to modify the IHO's conclusion that the postsecondary goals and transition services included on the student's IEP were appropriate.

C. Assigned Public School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the

'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct 29, 2014]).[12] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [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, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held 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 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

At the outset, the district school psychologist who attended the March 2019 CSE meeting testified that the CSE did not make the recommendation for a particular site or school, rather, the CSE only "ma[de] a program recommendation. We don't have any control over the school sites" (Tr. pp. 97-98). I have little quarrel with the school psychologist's statement as the district is required to carry out the written terms of the IEP as developed by the CSE. As noted above, in a letter dated May 13, 2019, the district notified the parents of the particular public school site to

[12] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

which the district assigned the student to attend for the 2019-20 school year for purposes of implementing the student's IEP (Dist. Ex. 2 at p. 5). According to the affidavit testimony of the student's mother, she scheduled a time to tour the assigned public school site shortly after receiving the notice (see Parent Ex. M ¶ 13).

The parents argue that the assigned public school site did not have the capacity to implement appropriate vocational or travel training. As noted above, the March 2019 IEP contemplated that the student would take part in vocational training opportunities (Dist. Ex. 1 at p. 13). In her affidavit testimony, the student's mother indicated that, during her visit to the assigned public school, she learned the school was an "academic-focused program," which did not offer any vocational training until the student "had enough academic 'credits' to graduate" (Parent Ex. M ¶ 13). She opined that the student needed a program "where he [wa]s exposed to both an academic curriculum (with the opportunity to take Regents courses) and vocational training" (id.). However, the special education coordinator from the assigned public school site testified that part time and full time on-site vocational training programs within the community were available to students (Tr. p. 77). She further explained that students who attended a work site full time received academic instruction at the site, and that the positions available to the students depended on their interests (Tr. p. 78). She clarified that the assigned public school site did not have vocational programs working with animals at that time (Tr. p. 82). The coordinator also explained that students attending the vocational programs participated in standardized or alternate assessments depending on what the student and their family wanted (Tr. p. 81).

Therefore, the evidence in the hearing record does not support the parents' argument that the school could not provide vocational training. Further, while the student showed an interest in working with animals, the IEP did not provide that the vocational training opportunities should be in a specified area. Moreover, as discussed above, the IEP did not explicitly mandate travel training. As the IEP did not mandate these particular services, the parents' argument that the assigned public school did not have the capacity to implement them must fail (see Y.F., 659 Fed. App'x at 5).

Next, the parents allege that the IHO erred in dismissing their concerns about the physical environment at the assigned public school site. The student's mother testified that when she visited the assigned public school, the physical environment was too large, and opined that the student "would be extremely overwhelmed and not able to function in a best way possible" (Tr. p. 134). She further described that the classroom was "very cluttered" and that "too [many] things were happening" so she did not feel it would be beneficial for the student (id.). In her affidavit testimony, the mother opined that the physical environment of the school building was inappropriate citing as examples, overcrowding and cramped classrooms and related service rooms "which would be much too distracting for [the student] who has considerable attentional delays and a diagnosis of ADHD" (Parent Ex. M ¶ 14).

However, the IEP did not specify that the student needed particular accommodations regarding the physical environment of the classroom or related services rooms (see generally Dist. Ex. 1), and parental concerns regarding school or class size, when not contrary to a requirement in the student's IEP, have been deemed not to constitute permissible challenges to the ability of an assigned school to implement the student's IEP (M.O., 793 Fed. App'x at 245; Y.F., 659 Fed. App'x at 5).

Finally, the parents argue that the district failed to present evidence to demonstrate that the student would be functionally grouped with other students in the proposed classroom at the assigned public school site. Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[13] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

In her affidavit testimony, the mother described that after viewing three classrooms at the assigned public school site, she felt the program could not provide the student with an appropriate peer group "as they did not need to work on the same skills as [the student]" (Parent Ex. M ¶ 14). The parent argues that the student would benefit from being grouped with peers that were higher functioning.

Here, the parents' alleged observation does not overcome the speculative nature of grouping claims when a student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K., 12 F. Supp. 3d at 371; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Even assuming that the parents' observations were accurate, there is no basis in the hearing record to find that the range of skills among the students in the observed classroom violated State regulations, which require students to be grouped by similarity of needs, or that such a violation would impede the student's ability to receive a FAPE (8 NYCRR 200.6[a][3][h][2]). Furthermore, even if the students would not have been

[13] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

appropriately grouped in the specific 12:1+1 classroom at the time that the parent observed the class, no evidence was presented that this was the classroom in which the student would have been placed had he attended the assigned school and, in any event, any claim based on this observation would necessarily be speculative in that classroom groupings may change over time (see, e.g., M.S., 2 F. Supp. 3d at 332 n.10).[14]

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the availability of vocational programs, the school environment, or the functional grouping of the proposed classroom would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 793 Fed. App'x at 245; R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 187 & n.3).

VII. Conclusion

Having found that the district offered the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether IVDU was an appropriate unilateral placement for the student or equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 2, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[14] The parents also argue that the IHO erred in mischaracterizing the parents' argument about functional grouping and assert, instead, that the claim "was specifically related to the general recommendation of a Special Class 12:1+1 setting, and not to the proposed public school program" (Parent Mem. of Law at p. 14). However, regardless of the specific class ratio recommended by the CSE, the district would be required to implement the student's IEP in a manner consistent with State regulations set forth above regarding the grouping of students with similar needs (see 8 NYCRR 200.6[a][3][h][2]). Accordingly, the parents' argument in this regard is without merit.