



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-165

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Bedford Central School District

Appearances:

Spencer Walsh Law, PLLC, attorneys for petitioner, by Christopher Barnett, Esq.

Bond, Schoeneck & King, PLLC, attorneys for respondent, by Sara M. Richmond, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to order respondent (the district) to reimburse the costs of her son's tuition at the Eagle Hill School (Eagle Hill) for the 2017-18 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 parties' familiarity with the detailed facts and procedural history of this case and the IHO's decision is presumed and will not be recited here in detail. The CSE convened on June 26, 2017, to formulate the student's IEP for the 2017-18 school year (see generally Joint Ex. 4). The parent disagreed with the recommendations contained in the June 2017 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2017-18 school year and, as a result, notified the district of her intent to unilaterally place the student at Eagle Hill (see Joint Ex. 11).

The parent initially filed a due process complaint notice on May 13, 2019, challenging the district's recommended program for the 2018-19 school year (see May 13, 2019 Due Process Compl. Not.). In an amended due process complaint notice, dated October 1, 2019, the parent

withdrew her allegations related to the 2018-19 school year and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see Parent Ex. A).¹ The parent alleged numerous ways in which the CSE meeting process was procedurally deficient and that the resulting IEP was both procedurally and substantively inappropriate (see Parent Ex. A). As relief, the parent sought to require the district to fund the costs of the student's attendance at Eagle Hill for the 2017-18 school year.

An IHO was appointed to the matter and an impartial hearing convened on February 26, 2020 and concluded on October 1, 2020 after six days of proceedings (Tr. pp. 1-1098). In a decision dated June 25, 2021, the IHO addressed the parent's allegations and determined that the district offered the student a FAPE for the 2017-18 school year (IHO Decision at pp. 25-35, 39). Although not required to do so, the IHO further determined that Eagle Hill was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (id. at pp. 37-38).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred by finding that the student was offered a FAPE for the 2017-18 school year. Specifically, the parent argues that the IHO erred by finding that the June 2017 CSE was properly composed with the required participants, that the district conducted sufficient evaluations, and that the CSE did not impermissibly predetermine its recommendations and provided the parent with an opportunity to fully participate in the decision-making process. The parent further alleges that the IHO erred by finding that the district's recommended programming and placement in the June 2017 IEP were appropriate, that the student's annual goals were sufficient and that the student's allergy, health, and management needs were adequately addressed. The parent also contends that the IHO relied on improper retrospective testimony to find that the district would have provided the student with access to a computer to meet the student's assistive technology mandate and that the district would have taken measures to maintain a safe environment for the student. The parent requests reversal of the IHO's FAPE determination in favor of the district and as relief seeks tuition reimbursement for the cost of the student's attendance at Eagle Hill for the 2017-18 school year.

In an answer, the district responds to the parent's allegations in the request for review by generally denying the material allegations of error and asserts that the IHO's determinations should be affirmed.²

¹ The parent filed another due process complaint notice on June 9, 2020, challenging the appropriateness of the district's recommendations for the 2018-19 school year; in a decision dated July 20, 2020, the IHO declined to consolidate the proceedings for the 2017-18 and 2018-19 school years and both matters proceeded separately (IHO Order on Consolidation).

² Neither party appealed the IHO's finding that Eagle Hill was an appropriate unilateral placement and that equitable considerations favored an award of full tuition reimbursement had the IHO not found that the district offered the student a FAPE for the 2017-18 school year. As such, those determinations have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The parent needlessly filed a reply thereto, which asserts that the district did not cross-appeal any portion of the IHO's decision and does not respond to any affirmative defenses in the answer and, as such, was impermissibly filed as it meets none of the criteria in State regulations for a reply (8 NYCRR 279.6[a]).

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]).³

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).

³ 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).

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. June 2017 CSE Process

1. June 2017 CSE Composition and Parent Participation

Turning to the first of the disputed matters in this appeal, the parent argues that the IHO erred by finding that the special education teacher who participated in the June 2017 CSE meeting also participated as the regular education teacher due to her dual certification. The parent alleges that the CSE recommended an integrated co-teaching (ICT) class without the presence of a regular education teacher and as a result the parent was denied the opportunity to ask questions of a regular education teacher about the student's health needs and management needs. The parent also contends that the CSE failed to provide a description of its recommended program and refused to meaningfully consider the program proposed by the parent.

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

The IHO determined that the June 2017 CSE was properly composed due to the district's special education teacher's dual certification as a regular education teacher as well as her participation during the meeting. The IHO found that the district's special education teacher described the ICT class and the district's recommended transitional academic support program (TASP) during the meeting (IHO Decision at pp. 26-27). The IHO also found that although "no [d]istrict employee was present at the IEP in the capacity of a general education teacher," the district's special education teacher "was present during the meeting; thus I find that the IEP team was duly constituted" (id. at p. 27).

The evidence in the hearing record shows that in a notice dated June 19, 2017, the parent was invited to attend the student's "Reevaluation/Annual Review" at a CSE meeting scheduled for June 26, 2017 (Joint Ex. 2 at p. 1). The meeting notice identified the names and titles of the meeting participants, including the district's director of special education who participated as the chairperson, a special education teacher, a psychologist, an occupational therapist and a speech-language "[s]pecialist" (Tr. pp. 186, 210; Joint Ex. 2 at p. 1). The June 19, 2017 meeting notice did not include a regular education teacher and the district's director of special education testified that a regular education teacher did not attend the meeting (Tr. p. 211; Joint Ex. 2 at p. 1).

The procedural determination for when a regular education teacher of the student is a required member of a CSE meetings is particularly murky in some circumstances. The parent

points to Application of the Bd. of Educ., Appeal No. 05-074, but that proceeding involves the provision of SETSS services, not the services involved in this case and thus is of less usefulness. The case does point out an important point that with respect to teachers (either regular or special education) "of the child," flexibility is often required because either a current teacher of the child or a future teacher of the child may satisfy the procedural requirement and "board[s] of education cannot always be expected to know who the student's regular education teacher will be prior to the CSE meeting" (Application of the Bd. of Educ., Appeal No. 05-074). The Official Analysis of Comments to the federal regulations indicate that "[d]ecisions as to which particular teacher(s) or special education provider(s) are members of the IEP Team and whether IEP Team meetings are held at the end of the school year or some other time, are best left to State and local officials to determine, based on the needs of the child. (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]). Under Education Law § 4402 [1][b][1] [a]-[b], certain members of the CSE may permissibly serve in multiple roles under certain circumstances, such as the regular education teacher also serving as the district representative. State law and regulations do not explicitly indicate whether one teacher who is dually certified in regular education and special education can permissibly serve in both roles and instead the statute merely indicates that "[t]he regular education teacher of the student shall participate in the development, review and revision of the individualized education program for the student, to the extent required under federal law (Educ. Law § 4402[1][b][1][b]). Older federal guidance merely states the following: "Note that an IEP team member may fill more than one of the team positions if properly qualified and designated. . . . The extent to which it would be appropriate for the regular education teacher member of the IEP team to participate in IEP meetings must be decided on a case-by-case basis" (see "A Guide to the Individualized Education Program," OSERS U.S. Department of Education, [July 2000] available at <https://www2.ed.gov/parents/needs/sepced/iepguide/iepguide.pdf>). Although the purpose of an ICT setting is to coteach disabled students alongside their nondisabled peers in the same classroom, some courts have held that a regular education teacher is not required on the IEP team at all when an ICT setting is being considered, and thus is not a procedural violation (Y.A. v. New York City Dep't of Educ., 2016 WL 5811843, at *18 [S.D.N.Y. Sept. 21, 2016]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *9 [S.D.N.Y. Nov. 9, 2011]). The debate on who can permissibly serve in the role of a regular education teacher during CSE meeting in which a blended, co-taught class is considered—a class which often has special education teachers who commonly have a general education certification as well—is increasingly an endless circle, and it is less than certain that a regular education teacher is required at all. Candidly, I am hard pressed to find that a classroom with nondisabled students and students with IEPs blended together and co-taught is a special class setting rather than a general education setting. But that does not resolve who can serve in the role of a regular education teacher if one is required.

Fortunately, assuming for the sake of argument that the lack of a regular education teacher was a violation, the record is sufficiently developed to make a determination as to whether the absence of a regular education teacher at the June 2017 CSE meeting 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 (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The parent contends that the lack of a regular education teacher at the June 2017 CSE meeting prevented her from discussing the student's learning in a regular education environment

or the appropriateness of the recommended program for the student. Upon review, the evidence in the hearing record does not support this contention.

The district's director of special education who participated in the June 2017 CSE meeting as the CSE chairperson indicated that the district's special education teacher in attendance participated as the teacher knowledgeable of the district's ICT core content areas (Tr. p. 212). The director of special education testified that the special education teacher provided special education services to the students in the district's ICT classrooms and worked with the regular education teacher for science, social studies, math, and English (*id.*).

The district's special education teacher testified that she was certified to teach nursery school through age 21 for special education and kindergarten through sixth grade for regular education (Tr. pp. 367, 369, 410, 412). The district's special education teacher also testified that she did not participate in the June 2017 CSE meeting as the regular education teacher (Tr. p. 430).

Based on the above, although the June 2017 CSE did not include a regular education teacher, under the circumstances of this matter and as determined by the IHO, if it was a procedural violation, it did not rise to the level of a denial of a FAPE (see DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *17-*18 [S.D.N.Y. Jan. 2, 2013] [concluding that when parents were allowed to meaningfully participate in the review process, ask questions of and receive answers from CSE members, and express opinions about the appropriateness of the recommended program for the student, the "preponderance of the evidence" did not show that the "failure to include a ninth grade regular education on the CSE was legally inadequate"]).

Additionally, the hearing record included recordings of the June 26, 2017 CSE meeting totaling one hour and 50 minutes (Parent Exs. B1; B2). A review of the recordings demonstrated that the parent participated throughout the entire meeting, engaged with the evaluators and the chairperson and asked many questions (*id.*). The parent asked questions about how the change from the student's class size at Eagle Hill to a 12:1+1 and ICT classroom would be addressed (*id.*). Each of the parent's questions was answered and the parent was able to speak freely about the student's learning style and experience at Eagle Hill during the prior school year (*id.*). The CSE chairperson described the full continuum of services and each participant spoke individually and recommended the TASP program (*id.*). Notably, the parent did not have any unanswered questions about the program recommendations and the meeting concluded with the parent thanking the CSE members (*id.*).

Although the parent disagreed with the CSE's recommendation for TASP, which consisted of ICT services and a 12:1+1 special class, as discussed above, the parent had the opportunity to present her concerns to the CSE and participate in the development of the student's program during the June 2017 CSE meeting. 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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "[a] professional disagreement is not an IDEA violation"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; 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"; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"].⁴

Assuming that there was a procedural violation, the IHO nevertheless correctly determined that any procedural violations that occurred during the CSE meeting did not rise to the level of a denial of a FAPE.

2. Sufficiency of Evaluative Material

On appeal the parent argues that the IHO erred in finding that the June 2017 CSE obtained sufficient evaluative information having failed to conduct an assistive technology evaluation, a

⁴ Related to the parent's assertions regarding participation at the June 2017 CSE, the parent also alleged that the IHO erred by failing to find that the June 2017 CSE predetermined the student's placement because the CSE members entered the meeting with closed minds and had determined the student's program six days before the meeting. The parent further asserts that the district refused to consider a more restrictive program. For similar reasons as discussed above, the parent's predetermination claim is not supported by the hearing record. 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. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; 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] [alteration 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]). The hearing record demonstrates that elements of the June 2017 CSE were developed during the meeting, the parent requested assurances about qualifications for instructional aides and participated in the development of annual goals (Parent Exs. B1; B2). Next, the parent's claim that an email between district staff prior to the student's CSE meeting demonstrated that the student's program was predetermined to be ICT services is belied by the hearing record. The student was not recommended to solely receive ICT services in seventh grade, and further the district's secondary coordinator of special education testified exhaustively that the email exchange was related to preparing for intake procedures if the student reenrolled in public school and was a placeholder subject to the CSE's upcoming recommendation (Tr. pp. 328-329, 331-332, 343, 349; see Dist. Ex. 2). Contrary to the parent's contention, once a CSE determines that an appropriate class placement for the student is available within the district, the district is not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). The parent's preference for the student to remain at Eagle Hill is understandable, however the district was not required to consider placement of the student in a nonpublic school once it determined that a less restrictive placement was appropriate to address the student's needs.

physical therapy (PT) evaluation, and a vocational assessment. The parent further alleges that the district failed to assess the student in all areas of suspected disability.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

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]).

In deciding whether the June 2017 CSE had sufficient evaluative information, the inquiry logically focuses on identifying what documents the CSE relied on to develop the IEP. The district noted in their July 10, 2017 prior written notice that "after careful consideration and review" of all evaluative materials and school reports, the CSE recommended that the student continue to be classified as a student with a disability and receive special education services as indicated on the IEP; and that the reports and evaluations that were considered were listed under the evaluation/report section of the June 2017 IEP (Dist. Ex. 3 at p. 1). According to the June 2017 IEP, the CSE considered and reviewed a "Report Card (06/07/2016)," a March 31, 2017 psychological evaluation, a social history, and a speech-language evaluation, as well as a May 1, 2017 occupational therapy (OT) evaluation (Joint Ex. 4 at p. 3; see also Joint Exs. 5; 6; 7; 8).⁵ The student's scores on intelligence testing, conducted as part of the March 2017 psychological

⁵ Although not noted in the "Evaluation/Report" list on the June 2017 IEP, test results from an April 2017 Educational Evaluation were included under "Test Results" on the June 2017 IEP (compare Joint Ex. 4 at p. 3, with Joint Ex. 10 at p. 4).

evaluation, were reflected in the June 2017 IEP (compare Joint Ex. 4 at p. 5, with Joint Ex. 6 at p. 4). In addition, evaluator impressions from the March 2017 speech-language evaluation report were noted in the June 2017 IEP (compare Joint Ex. 4 at pp.4-5, with Joint Ex. 8 at pp. 3, 10-11). With respect to the student's reading and writing skills, the June 2017 IEP included standardized test results and narrative descriptions from the April 2017 district educational evaluation as well as from the June 2017 Eagle Hill "Advisor Report" (compare Joint Ex. 4 at p. 5, with Joint Exs. 9 at pp. 1-2, 4; 10 at pp. 1, 4-5).⁶ A description of the student's mathematics skills was included in the June 2017 IEP and reflected the results of the district educational evaluation as well as information from the student's 2017 Eagle Hill report card (compare Joint Ex. 4 at p. 5, with Joint Exs. 9 at pp.6-9; 10 at pp. 4-5). The IEP also reflected information regarding the student's social development gleaned from the 2017 Eagle Hill report card (compare Joint Ex. 4 at p. 6, with Joint Ex. 9 at p. 21). In addition, with respect to physical development, the June 2017 IEP included test results and information from the April 2017 OT reevaluation report (compare Joint Ex. 4 at pp. 6-7, with Joint Ex. 5 at pp. 1-5).

The parent argues that the IHO erred in finding that the June 2017 CSE obtained sufficient evaluative information having failed to conduct an assistive technology evaluation, a PT evaluation, and a vocational assessment. Although the June 2017 CSE did not recommend that an AT evaluation be conducted, it did note that the student required a particular device or service to address his communication needs (Joint Ex. 4 at p. 8). In addition, the CSE recommended that the student have access to a portable word processor for lengthy assignments throughout the school day in all relevant classes; and that the student receive an assistive technology consultation to ensure that he was able to access his curriculum and to train staff on the technology (id. at p. 11). The district's director of special education testified that although the CSE did not recommend an assistive technology evaluation for the student, the CSE recommended an assistive technology consultation and a portable word processor (Tr. pp.186, 273-75; Joint Ex. 3 at p. 1).

Turning to the need for a PT evaluation, the occupational therapist who evaluated the student and attended the June 2017 CSE meeting testified that any member of the CSE team could have recommended a PT evaluation for the student (Tr. p. 479; see also Joint Exs. 3 at p. 1; 5 at pp. 1-5). She agreed that the student laying down while writing was indicative of low tone control and low core muscle development and could be further evaluated during a PT evaluation; but stated that a PT evaluation was not indicated based on the information that she had of the student (Tr. pp. 479-80, 490).

With respect to the vocational evaluation, the chairperson agreed that the district did not conduct an assessment that included a review of parent and teacher interviews for the purpose of determining the student's vocational skills, aptitudes or interests prior to the June 2017 IEP meeting, but stated that the CSE reviewed information the district received from Eagle Hill (Tr. 274-75; see Dist. Ex. 9).⁷ While the district should have conducted a vocational assessment for

⁶ The June 2017 IEP refers to a "private school report card," which appears to refer to the June 2017 Eagle Hill Advisor Report (compare Joint Ex. 4 at pp. 5-6, with Joint Ex. 9 at p. 1). The joint exhibits list refers to Joint exhibit 9 as "Eagle Hill School Advisor Report/Report Cards"; and for purposes of this decision, it will be referred to as 2017 Eagle Hill report card.

⁷ 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]).

the student, the parent has not presented a sufficient argument to depart from the IHO's determination that the district's failure to conduct a vocational assessment "at the first opportunity" did not result in a denial of FAPE. Rather, the only reason advanced by the parent was that "a vocational assessment was necessary to develop [the student's] annual goals and services related to post-secondary transition"; however, a plan for postsecondary transition activities was not necessary until the student was older. 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]).

Based on the above, the evidence in the hearing record supports the IHO's determination that the CSE obtained and considered sufficient evaluative information, which included a review of the student's progress at Eagle Hill as well as input from the student's parent, and the district's evaluators about the student and his individual needs to develop an IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-30 [S.D.N.Y. 2013]).

B. June 26, 2017 IEP

1. The Student's Needs and Management Needs

Although not entirely in dispute on appeal, a description of the student's overall needs is necessary to evaluate the appropriateness of the June 2017 IEP and to determine whether the student's management needs were addressed. Review of the present levels of performance in the June 2017 IEP shows that they reflected information contained in the 2017 Eagle Hill report card as well as information obtained from the district's evaluations (Joint Ex. 4 at pp. 3-7).

According to the June 2017 IEP, the student's scores on standardized measures of reading fluency were within the average range (Joint Ex. 4 at p. 5). The student's performance on measures of reading comprehension and word reading (decoding single words in isolation) fell within the low average range (id.). The IEP referenced the 2017 Eagle Hill report card, which indicated that the student was able to decode words with closed syllables, silent "e" syllables, open syllables, "vowel-r syllables and consonant-le syllables" (id.). The student was reportedly receiving support on decoding words with vowel combination syllables, phonetically regular two-syllable words and decoding multisyllabic words (id.). The June 2017 IEP further noted that with respect to comprehension the Eagle Hill report card stated that the student was able to complete oral sentences using instructed terms (id.). In addition, the student was able to define vocabulary terms and incorporate them into written exercises with support (id.). The student was able to form appropriate visual images from reading material, as well as make reasonable emotional responses to reading (id.). As reflected in the IEP, the 2017 Eagle Hill report card also indicated that with support, the student was able to recall facts and details, sequence events, make predictions and develop opinions about reading (id.).

The June 2017 IEP stated that math fluency was a relative strength for the student, with standardized scores placing the student within the average range (Joint Ex. 4 at p. 5). The student's score for numerical operations was within the average range and his score for math problem solving was within the low average range (id.). The 2017 Eagle Hill report card, as referenced in

the June 2017 IEP, indicated that with support, the student was able to add, subtract, multiply, and divide fractions, mixed numbers, and numbers containing decimals (id.). The student was also able to order integers on a number line (id.). With support in the area of math reasoning, the student was reportedly able to demonstrate an understanding of math vocabulary and was able to solve one and two-step word problems (id.).

With respect to writing, the June 2017 IEP indicated that the student's scores on standardized testing in the area of written expression were in the very low range (Joint Ex. 4 at p. 5). The IEP stated that the student "had difficulty combining multiple sentences into a well-structured single sentence with the same meaning" (id.). Additionally, the student tended to combine sentences by using the word "and," which was noted, "was not usually the most effective way to combine them" (id.). The student wrote a 31-word response to the essay prompt but his writing lacked punctuation, as well as an introduction and conclusion (id.). According to the June 2017 IEP, the student was independently capitalizing and adding ending punctuation to his sentences (id.). With support, the student was able to write complete sentences, and proofread for mechanical and contextual errors (id.). The student required direct instruction to write paragraphs (id.).

Cognitively, the June 2017 IEP indicated that the student's full-scale IQ was within the very low range with a great deal of scatter across the different domains (Joint Ex. 4 at p. 5). The student's index scores placed him within the average range in verbal comprehension, the extremely low range in visual spatial skills, the very low range in fluid reasoning, the average range in working memory and the very low range in processing speed (id.). The IEP indicated that the student performed best on tasks measuring his verbal reasoning and memory skills (id.).

With regard to the student's speech and language development, the June 2017 IEP indicated that the student had a difficult time on a formulating sentences subtest as he struggled with word retrieval and appropriate sentence structure (Joint Ex. 4 at p. 4). The IEP reflected information from the March 2017 speech and language reevaluation report in which the evaluator indicated that the student did not ask for help or repetition of items throughout the assessment (id.). The student's performance yielded spoken language skills below age-level expectations and his performance on various subtests revealed splintered skills within age-level expectations (id.). The June 2017 IEP also indicated that the speech and language testing revealed specific strengths the student had during isolated tasks (id.). Reportedly, the student "experience[d] difficulty when engaged in conversation when these skills occur[ed] in conjunction with his language vulnerabilities" (id.). According to the IEP, the student demonstrated consistent weaknesses with syntax and with his use and understanding of grammatical structures (id.). The IEP noted that the student's "overall vocabulary skills were revealed to be splintered between below age-level and within age-level expectations as his expressive vocabulary was stronger than his receptive vocabulary skills" (id.). The June 2017 IEP stated that the student experienced difficulty with inferencing during various social situations and contexts (id. at p. 5). However, he was able to derive meaning from context when target words were unknown (id.). According to the June 2017 IEP, results of testing showed "a profile with specific vulnerabilities with language, particularly syntactic structure and understanding" (id.). The student's articulation was assessed to be below age-level expectations "as his speech was characterized by the use of several phonological processes that should have been extinguished by his chronological age" (id.).

In the area of physical development, the IEP noted that the student had medical diagnoses of Wolff-Parkinson-White syndrome and oral apraxia (Joint Ex. 4 at p. 6). The June 2017 IEP further noted that the student had "a serious allergy to tree nuts, legumes, peanuts and raw eggs" (id.). The student carried an EpiPen and wore glasses (id.).

With respect to the student's motor abilities and needs, the June 2017 IEP indicated that the student demonstrated fluctuating seated posture throughout testing with functional range of motion in his bilateral upper extremities (Joint Ex. 4 at p. 6). The IEP reflected the results of the April 2017 OT evaluation report which indicated that the student demonstrated decreased midline crossing when performing pencil and paper tasks on his left side, resulting in shifting of his body to the left (id. at pp. 6-7). The IEP noted that during writing, the student was observed to lay his head on his bent left arm (id. at p. 7). According to the June 2017 IEP, the student presented with below average fine motor control and coordination skills, difficulties coordinating his eyes and hands to smoothly, accurately, and quickly perform tasks, and demonstrated very low visual motor, perceptual, and motor coordination skills (id.). The student was able to copy basic shapes from a visual model, however he was unable to copy combined lines and shapes with appropriate size and spatial organization (id.). On a test of visual perception, the student was able to accurately match shapes and designs that were correctly sized, oriented, and complete when given three-to-four choices and when there were fewer and larger visuals presented on the page (id.). On a test of motor coordination, the student's errors were reportedly related "to decreased control within the boundaries and remembering rules to connect all dots" (id.). The June 2017 IEP noted that the student used a five-finger thumb wrap grasp pattern which the evaluator noted was "not optimal for smooth pencil control" (id.). The student was observed to inconsistently stabilize the testing booklet with his left hand (id.). Based on the OT reevaluation report, the IEP stated that the student's handwriting was observed to include letters that were poorly sized and aligned with inconsistent spacing between words on the writing line; however, all words were reported to be legible (id.). The student was described as having "decreased spatial organization" due to beginning his first sentence indented, then continuously shifting his writing further towards the middle of the page on subsequent lines (id.). The IEP summary of the OT reevaluation report indicated that the student used a computer throughout the school day, especially for composing longer writing assignments and stated that this was his preferred method of written communication (id.). The IEP indicated that the student participated in a two-minute typing test for the evaluator to observe his keyboarding mechanics and ability to locate and strike keys accurately (id.). The student was observed to demonstrate "appropriate body mechanics; stable and upright seated posture, use of both hands with wrists resting on the keyboard, elbows resting on the table, and fingers slightly bent" (id.). The student was able to locate and place his fingers accurately on the home row keys and with regard to technique, the student "smoothly shifted his vision between the keys and the screen to ensure accurate letter striking" (id.). The student reportedly typed at a rate of approximately 11 words per minute (id.).

The June 2017 IEP indicated that the student was friendly and enjoyed interacting with others including adults and peers (Joint Ex. 4 at p. 6). According to the 2017 Eagle Hill report card referenced on the June 2017 IEP, the student had become more comfortable with peers since the beginning of the school year and had shown greater ability to initiate and join in conversations (id.). The student was described as having difficulty reading a social situation, "which c[ould] lead him to mak[e] comments such as repeating teacher's directions or commenting on what has

been done. While he is often eager to please, these behaviors can unintentionally frustrate others" (id.).

As detailed above, a review of the present levels of performance shows that the June 2017 CSE identified the student's educational needs (Joint Ex. 4 at pp. 3-7). With respect to speech-language skills, the IEP indicated that the student needed to improve his vocabulary skills, grammar skills, and reduce the use of phonological processes (id. at p. 6). Regarding reading skills, the IEP indicated that the student needed to answer inferential questions regarding an independent level text, read multisyllable words, and identify the main idea of a given selection (id.). In writing, the IEP indicated that the student needed to write two paragraphs on a given topic with details and write grammatically correct sentences (id.).

With respect to the student's management needs the June 2017 IEP indicated that the student "require[d] the additional support of special education services to be successful in the regular education classroom" (Joint Ex. 4 at p. 7).

The parent asserts that the IHO erred by finding that the lack of specified supports listed in the June 2017 IEP's management needs section was not a denial of a FAPE to the student. The IHO determined that the June 2017 IEP provided the student with numerous supports and accommodations to address the student's deficits and needs although they were not written in the management needs section of the IEP (IHO Decision at p. 31). In her request for review, the parent asserts that the district was unable to provide a reasonable explanation for why the student's deficits and needs were omitted from the management needs section of the June 2017 IEP and that the district weakly asserted that management needs were built into the student's program.

Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

The district's director of special education testified that use of special education services in the management needs section of the June 2017 IEP referred to the comprehensive services that the district provided as part of the recommended program, services, modifications, and accommodations (Tr. p. 297). When asked what management needs were built into special education services, the district's director of special education further testified that "it's laid out in the IEP" and that the level of support the student would have received on a regular basis included being supported by a special education teacher, program aide, and the provision of related services, which addressed each of the student's areas of need in the present levels of performance (Tr. pp. 297-298).

The parent does not allege that the June 2017 IEP omitted the student's deficits and needs, rather she asserts that because they were not listed in the management needs section, the parent was confused and as a result denied meaningful participation in the development of the IEP. This claim is without merit. The CSE recommended supplementary aids and services and modifications and accommodations to address the student's management needs as highlighted in the narrative description of his academic achievement and learning, social emotional development and physical development. These included refocusing and redirection (engaging the student with visuals to

assist in refocusing), special seating arrangements (near teacher or source of instruction), check for understanding (teacher to check in consistently and pair instruction with visual cues, teacher to provide frequent visual modeling and opportunities for review and repetition), modified curriculum (and homework that prioritizes content instruction, materials and differentiation of instruction in language arts, math, science and social studies), reteaching of materials (new concepts, when needed), use of a graphic organizer (for writing and math problems), a program aide for five periods a day to support academic skill and instruction). (Joint Ex. 4 at pp. 8-9).

While it may have been more preferable to put information in a different spot on an IEP, such defects do not amount to a denial of a FAPE. The IDEA explicitly states that it is unnecessary "to include information under [one] component of a child's IEP that is already contained under another component of such IEP" (20 U.S.C. § 1414[d][1][A][ii][II]; 34 CFR 300.320[d][2]; see Klein Indep. Sch. Dist. v. Hovem, 745 F. Supp. 2d 700, 727-28 [S.D. Tex. 2010] rev'd on other grounds, 690 F.3d 390 [5th Cir. 2012]; see also D.S. v. Parsippany Troy Hills Bd. of Educ., 2018 WL 6617959, at *16 [D.N.J. Dec. 18, 2018]). As detailed above, the parent actively participated in the development of the June 2017 IEP and a review of the IEP indicates that the student's needs were identified, and the environmental modifications and human material resources required to enable the student to benefit from instruction were adequate and specific, and determined in accordance with the factors identified in the IEP present levels of performance.

2. Annual Goals

The parent contends that the IHO erred by finding that the annual goals included in the June 2017 IEP were measurable and specifically designed to meet the student's needs.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

In this matter, the June 2017 IEP included 13 annual goals to address the student's needs (Joint Ex. 4 at pp. 8-9). The hearing record indicates that the annual goals were derived from the CSE meeting discussion about the student's needs and current levels of performance, which included the parent, as well as from information contained in the 2017 Eagle Hill report card (id. at pp. 1-2).

Regarding the measurability of the annual goals, review of the June 2017 IEP shows that each annual goal included evaluative criteria (e.g., 80 percent success over one month, 80 percent success with intensive assistance over two weeks), evaluation procedures (e.g., teacher devised tests or worksheets, structured observations of targeted skill), and the schedule to be used to measure progress (e.g., monthly, every two months) (Joint Ex. 4 at pp. 8-9). The CSE chairperson testified that the June 2017 CSE meeting was a very collaborative meeting with a very long dialogue about the evaluations, data, and the development of appropriate goals (Tr. p. 198).

To address the student's reading needs, the June 2017 IEP included three annual goals requiring the student to determine the main idea of a text at his independent reading level, to read 15 multisyllable words containing open and closed syllables, and to state the main idea when presented with independent level literature text and/or specific informational text (Joint Ex. 4 at p. 8). The mathematics annual goal addressed the student's need to correctly solve a multistep word problem using addition, subtraction, multiplication, and division (id.). The two writing annual goals addressed the student's needs to write in grammatically correct sentences and to write two paragraphs with a clear topic and details (id.).

With respect to the related services annual goals, the June 2017 IEP included three speech-language annual goals, one social/emotional/behavioral goal, and three motor skills goals (Joint Ex. 4 at pp. 8-9). In speech-language, the three annual goals required the student to improve his sentence structure using appropriate noun/verb agreement in sentences of more than four words, improve his understanding of words with double meaning in orally and written paragraphs, and improve his production of "r" in the initial position of words (id.). The student's social/emotional/behavioral goals required the student to interact in a positive manner with peers including engaging in appropriate turn-taking, listening without speaking, and refraining from making irrelevant comments (id. at p. 9). The student's three motor skills annual goals required the student to demonstrate improved visual motor/visual spatial skills to copy visually presented materials with no more than two cues for detail; demonstrate improved eye/hand coordination skills in order to increase success within his educational environment when given a fine/visual motor coordination task; and complete specified left-right sided activities by consistently crossing the midline with no more than two prompts during classroom activities across a variety of educational settings (id.).

Review of the hearing record supports the IHO's determination that the June 2017 CSE developed goals that "addressed the student's skill deficits as articulated in the student's evaluations and Eagle Hill report" (IHO Decision at p. 32). The annual goals set forth on the June 2017 IEP aligned with the student's needs as presented without dispute in the IEP, and provided sufficient measurability by which to assess progress (compare Joint Ex. 4 at pp. 3-7, with Joint Ex. 4 at pp. 8-9). I do not find evidence in the hearing record sufficient to overturn the IHO's reasoning that the IEP goals adequately addressed the student's needs.

3. Allergy and Health Needs

The parent alleges that the IHO erroneously concluded that the lack of specific supports or plans in the June 2017 IEP relating to the student's life-threatening allergies and heart condition did not deny the student a FAPE and further argues that the district failed to address the student's medical issues, in any way, on the June 2017 IEP. The IHO found that the lack of specific supports or plans on the IEP was not a denial of FAPE, stating that the student's allergies, medical diagnoses, and need for an EpiPen were included on the June 2017 IEP. Additionally, the IHO found that the June 2017 IEP included an alert to the school nurse to develop an individualized health plan (IHP) had the student enrolled in a district school (IHO Decision at pp. 31-32). In finding that the district would have developed an IHP, the parent alleges that the IHO relied on impermissible retrospective testimony.

State guidance provides that "nursing treatment and/or medication orders [should be] documented on an IHP, which is a nursing care plan developed by an RN [and] maintained in the

student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4). In another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at <http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf>).

Review of the recorded June 2017 CSE meeting indicates that the parent participated in discussion of the student's allergy and medical needs (Parent Exs. B1 at 3:11-3:27; B2 at 45:11-48:00). The parent requested special transportation due to the student's sensitivity and shared stories of the student's allergic reactions to contact with a desk and to unforeseen allergens on a larger bus (Parent Ex. B2 at 45:11-48:13). The parent also requested "eyes on" the student during lunch periods because the student would on occasion shove food in his mouth (Parent Ex. B2 at 46:31). This information was included on the June 2017 IEP summary information and the student was recommended to receive special transportation (Joint Ex. 4 at pp. 1, 2, 6, 13).

The summary page of the student's June 2017 IEP includes special alerts that the student had a severe allergy to nuts, especially legumes, and a parent report that the student sometimes stuffed food in his mouth while eating and required slight monitoring (Joint Ex. 4 at p. 1). The meeting information section reflects that the student has "severe nut allergies" as well as "severe allergies to legumes, trees, nuts and shellfish" (*id.* at p. 2). The meeting information further stated that the student carried an EpiPen and had been diagnosed as having a heart condition and was followed by a pediatric electrophysiologist (*id.*).⁸ The physical development section of the student's present levels of educational performance reflected that the student had been diagnosed as having Wolff-Parkinson-White syndrome, which "can lead to a condition of pre-excitation" and that medication had been discontinued (*id.* at p. 6). The physical development section also indicated that the student had a history of ear infections as well as a successful corrective surgery (*id.*). A medical diagnosis of oral apraxia was also noted (*id.*). The physical development section again reiterated that the student had a serious allergy to tree nuts, legumes, peanuts, and raw eggs; and that the student carried an EpiPen (*id.*).

I note that there is no claim that the student is medically fragile requiring health services or nursing services as a related service in order to receive a FAPE. If that were the case, such related services would be required to be listed on the student's IEP rather than an IHP (see *E.I.H. v. Fair Lawn Bd. of Educ.*, 747 Fed. Appx. 68, 73 [3d Cir. 2018] [district's failure to include nursing services for transportation on student's IEP rather than on an IHP resulted in a denial of FAPE]). Under the circumstances presented, there is no indication that the district omitted any necessary services from the June 2017 IEP regarding the student's medical concerns. Additionally, as described above, the parent's assertion that the district failed to address the student's medical issues in any way on the June 2017 IEP is unsupported by the hearing record. The student's allergy and health needs were described in more than one section of the June 2017 IEP and the summary page

⁸ The June 2017 IEP meeting information states that the student was followed by an "electrocardiologist", however this information was corrected by the parent in the recording of the CSE meeting (compare Joint Ex. 4 at p. 2, with Parent B1 at 3:27).

included an additional special alert describing the student's allergies and slight need to be monitored while eating.

The remainder of the parent's substantive argument relates to the IHO's reliance on information produced at the impartial hearing regarding how the student's allergies and heart condition would have been addressed in the district. The parent asserts that the IHO should not have relied on information that the district would have had an IHP in place for the student and should have instead focused on the lack of a safety plan to address the student's allergies within the IEP itself. While a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The prohibition against retrospective testimony is intended to reflect the fact that "[a]t the time the parents . . . choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on" (R.E., 694 F.3d at 186). Therefore, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision" (id. at 187).

The district's director of special education testified that medical needs that were to be prioritized for a student were listed in the special alerts section and that a safety plan would be developed when a student transitioned to the school as part of the intake process (Tr. pp. 237, 238). The district's director further explained that when a health plan is noted as part of the intake process, the school nurse would participate in the intake to develop an appropriate health plan for the student (Tr. p. 238). On cross-examination, the district's director of special education testified that the nurse would work with the team to develop the student's health plan for the building (Tr. p. 294).

As noted above, there is no requirement that the details of an IHP be included on a student's IEP. Accordingly, the testimony of the district's director of special education was not an impermissible attempt to rehabilitate a deficient IEP and, instead, permissibly explained the alerts that were included in the IEP. Based on the above, the parent's arguments that the district did not sufficiently address the student's medical conditions in the student's IEP is rejected as lacking in merit.

4. TASP: ICT services and 12:1+1 special class

The parent contends that the IHO erroneously found that the district's recommended class and related services were appropriate and met the student's needs. The parent alleges that the district ignored the student's need for a small student-to-teacher ratio and failed to consider the 2017 Eagle Hill report card. The IHO found that the student was appropriately recommended for ICT services for specific content classes and a 12:1+1 special class for daily English instruction,

alternate days of reading skills class, and a support and skills class three times per week (IHO Decision at p. 34).

ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

A 12:1+1 special class is defined as the 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, cannot 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]). ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

The student was recommended to receive daily ICT services in social studies, science and math for 43 minutes per day (Joint Ex. 4 at pp. 1, 9-10).⁹ The June 2017 CSE also recommended that the student attend a 12:1+1 special class for daily English instruction, support and skills class three times per week for 43-minute periods, and a reading skills class on alternate days for 43-minute periods (*id.* at pp. 1, 10). The June 2017 CSE also recommended related services of individual OT once per week for 30 minutes, small group OT once per week for 30 minutes, individual speech-language therapy once per week for 30 minutes, small group speech-language therapy two times per week for 30 minutes each session and small group counseling once per week for 30 minutes (*id.* at pp. 1, 10). As supplementary aids and services, program modifications and accommodations, the June 2017 CSE recommended refocusing and redirection, special seating arrangements, checks for understanding, modified curriculum, reteaching of materials, use of a graphic organizer, and a program aide (*id.* at pp. 10-11). For assistive technology devices and services, the June 2017 CSE recommended access to a portable word processor for lengthy assignments as needed on a daily basis throughout the school day (*id.* at p. 11).¹⁰ As supports for

⁹ On cross-examination, the district's director of special education testified that the first two pages of Joint exhibit 4 were a summary of services and not part of the student's IEP (Tr. p. 258). The district's director of special education further testified that the first two pages were attached to the IEP and provided to the parent (Tr. pp. 299).

¹⁰ The parent also alleged that the IHO improperly relied on retrospective testimony that the district "would have" provided the student with access to a computer to meet his assistive technology mandate. This claim is wholly without merit. At the outset, the parent has not asserted any claim that the district is factually incapable of implementing the student's June 2017 IEP, which specifically provides for quarterly assistive technology consults and access to a portable word processor (Joint Ex. 4 at p. 11). 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]). In addition, the recording of the June 2017 CSE meeting reflects that all students in the TASP program use

school personnel on behalf of the student, the June 2017 CSE recommended quarterly consultations in assistive technology and OT (id.). For testing accommodations, the student was recommended to receive on-task focusing prompts, tests administered in a separate location or room, modified district and class assessments, answers recorded in test booklet, directions explained, extended time and use of break periods (id. at p. 12). The June 2017 CSE also recommended special transportation of a small bus or vehicle and special monitoring (id. at p. 13).

The district's secondary coordinator of special education (coordinator) testified that the district's TASP program served as a transition for students whose abilities were stronger than those who required an alternate assessment of curriculum but needed the additional support of a special education teacher and a program aide to be successful in the regular education environment (Tr. p. 316).¹¹ The coordinator also testified that a program aide supported students under the supervision of the special education teacher with executive functioning needs such as organization, writing down homework, putting papers in the correct folders; answering questions; and assisting the teacher by offering general supervision and data collection (Tr. p. 317). According to the coordinator, TASP was designed for students with language-based learning difficulties who were unable to process and use language effectively for academic success and for whom the program was designed with flexibility, program support staff and a self-contained English class (Tr. pp. 317-318).

The district's director of special education also testified that the self-contained English class was "blocked up against" the support and skills class which provided opportunities for intensive remediation in the areas of reading and writing, and speaking and learning, which would address the student's need for intensive support in English Language Arts (ELA) (Tr. p. 220). The district's director of special education also noted that TASP included the regular support of a speech therapist (Tr. p. 221). The district's director of special education further described the ICT services in content areas which were relative strengths for the student allowed the flexibility for the student to begin a unit of study in the regular education classroom, while still providing if needed, opportunities for small group and individual instruction as well as the support of a program aide (Tr. p. 221). The district's director of special education further testified at length as to how the student's needs would be met by TASP (Tr. pp. 222-226, 228-232, 233).

The IHO found that the June 2017 CSE's recommendation for the student's class placement met the student's deficits and needs, as they were likely to produce progress not regression and provided for more than a trivial advancement. In addition, the IHO found that the specifics of the TASP program indicated in the IEP provided the student a FAPE; and that the mere fact that the acronym TASP, or its full name "transitional academic support program" did not appear in the IEP did not rise to the level of a denial of a FAPE.¹² In addition, the IHO found that the 12:1+1 special class for English, support skills and reading skills further addressed the student's reading deficits; and that the size of the classes along with additional supports contained in the classes addressed

a 1:1 device and are provided individualized software tailored to their specific needs (Parent Exs. B1 at 53:54-54:01; B2 at 35:06-37:04). The parent attended and participated in this meeting.

¹¹ The district referred to its special education teachers as learning specialists (Tr. p. 316).

¹² TASP is included in the meeting information section of the June 2017 IEP (Joint Ex. 4 at p. 2).

the student's need for reinforcement and repetition. The hearing record supports the IHO's findings.¹³

Based on the above evidence, the hearing record provides no reason to depart from the IHO's finding that the recommended program, including ICT services, 12:1+1 special classes for specific content areas, and related services, in conjunction with the numerous accommodations, modifications and supports included in the June 2017 IEP, were sufficient to meet the student's needs and provide him with educational benefit for the 2017-18 school year.

VII. Conclusion

As discussed above, the IHO correctly determined that the lack of a regular education teacher did not rise to the level of a denial of a FAPE and having reviewed each of the parent's remaining challenges in her appeal, I find the district offered the student a FAPE for the 2017-18 school year. Accordingly, the parent is not entitled to relief and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 24, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹³ The IHO used language that continues to be employed by the Second Circuit, albeit not often argued by practitioners in New York, that an IEP passes muster if it meaningfully addresses the student's deficits and needs, is "likely to produce progress, not regression" or allows for an opportunity that is "greater than mere 'trivial advancement'" Doe v. E. Lyme Bd. of Educ., 962 F.3d 649, 663 [2d Cir. 2020]). The IHO was correct that the IEP in this case passed those thresholds.