



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-268

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Neal Howard Rosenberg, attorneys for petitioners, by Vanessa Vazquez, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Bulban Salim, 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 denied their request to be reimbursed for their son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2022-23 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 this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student began attending ninth grade at Mary McDowell during the 2020-21 school year (Parent Ex. K at p. 4; Dist. Ex. 10). The CSE convened on May 20, 2021 and, finding the student eligible for special education as a student with a speech or language impairment, recommended integrated co-teaching (ICT) services for math, English language arts (ELA), social studies, and sciences, as well as special education teacher support services (SETSS) for one period per week and related services including counseling, occupational therapy (OT), and speech-language therapy (Parent Ex. K at pp. 1, 13-14).

The CSE next convened on May 16, 2022, to conduct the student's annual review and to develop an IEP for the student with an implementation date of May 30, 2022 (Dist. Ex. 1). Finding that the student remained eligible for special education as a student with a speech or language impairment, to support the student in a general education program, the CSE recommended several classroom supports for his management needs, annual goals, and related services including one 30-minute session of counseling per week in a group of three and one 30-minute session of speech-language therapy per week in a group of two, as well as testing accommodations (id. at pp. 1, 6, 8-14, 17).¹ In an August 23, 2022 letter, the parents disagreed with the recommendations contained in the May 2022 IEP and indicated that the district failed to notify them of the particular public school site to which it assigned the student to attend for the 2022-23 school year; as a result, the parents notified the district of their intent to unilaterally place the student at Mary McDowell (see Parent Ex. B).

In a due process complaint notice, dated January 10, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). Amongst other concerns, the parents argued that the district's recommendation for "[a] general education class" with related services was insufficient to address the student's needs, specifically referencing the student's social, emotional, and executive functioning needs (id. at pp. 1-2). The parents noted that, prior to the May 2021 CSE meeting, the student had been recommended for placement in a State-approved nonpublic school and the parents protested the subsequent decreases to the level of support recommended for the student (id. at p. 2). The parents further asserted that the district failed to notify the parents of the particular public school site to which it assigned the student to attend for the 2022-23 school year (id. at pp. 1-3). The parents additionally asserted that their unilateral placement of the student at Mary McDowell was appropriate and requested funding/reimbursement for the student's tuition and related services for the 2022-23 school year (id. at p. 3).

An impartial hearing convened on June 15, 2023 and concluded on September 5, 2023 after six days of hearings (Tr. pp. 55-231).² In a decision dated October 23, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, specifically addressing issues related to the composition of the May 2022 CSE, the evaluative information considered by the May 2022 CSE, the appropriateness of the recommended related services, the management needs and annual goals included in the May 2022 IEP, and the assigned public school site (IHO Decision at pp. 8-11). The IHO denied the parents' request for an award of tuition reimbursement at Mary McDowell and dismissed the parents' due process complaint notice (id. pp. 11-12).³

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² Status conferences were held on February 24, 2023, March 3, 2023, March 20, 2023, March 30, 2023, April 7, 2023, April 21, 2023, May 12, 2023, May 19, 2023, and May 25, 2023 (Tr. pp. 1-54).

³ The IHO's October 23, 2023 decision was not paginated. For the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-20).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO failed to appropriately analyze the evidence and testimony and erred in finding that the district offered the student a FAPE for the 2022-23 school year. More specifically, the parents contend that the IHO failed to conduct a proper, sufficient review of the hearing record in that the IHO failed to analyze issues raised by the parents.⁴ The parents raise several procedural issues they assert were overlooked by the IHO, including that the May 2022 CSE did not discuss the full continuum of programming and that the parents were denied meaningful participation in the CSE process. In addition, the parents argue that the IHO ignored evidence of the student's need for a special education program, asserting that in focusing solely on the student's strong academic performance, the IHO overlooked the interventions supporting the student, including his attendance at a full-time special education school. The parents assert that the district failed to demonstrate how the student would appropriately progress in a general education environment without the supports he received at Mary McDowell. The parents also claim that the May 2022 CSE failed to engage in a meaningful discussion about the student's ability to function in a general education environment and the IHO adopted the district's position without critically reviewing the evidence in the hearing record. Related to these assertions, the parents contend that the May 2022 CSE disregarded a private July 2021 neuropsychological evaluation addendum in favor of district evaluations and that the IHO ignore parental concerns related to the district evaluations. The parents further contend that the IHO improperly found the recommended annual goals appropriate and misapplied the least restrictive environment (LRE) standard. The parents assert that the district failed to demonstrate how its recommendations for progressively less supportive environments were appropriate for the student, particularly in light of the May 2022 CSE and the May 2021 CSE relying on mostly the same evaluative information and with the May 2022 IEP and May 2021 IEP containing "nearly identical" present levels of performance. Finally, the parents assert that the hearing record did not support finding that the assigned public school site could implement the May 2022 IEP. As relief, the parents request findings that the district denied the student a FAPE for the 2022-23 school year, Mary McDowell appropriately met the student's special education needs for the 2022-23 school year, and equitable considerations weigh in favor of tuition reimbursement.

In an answer, the district denies the parents' allegations and asserts that the development of the IEP was procedurally compliant and the recommendations of the CSE were substantively appropriate. The district further argues that the parents did not meet their burden as Mary McDowell was not an appropriate placement for the student in that it did not deliver a structured program of counseling or speech-language therapy and was too restrictive. The district also

⁴ The parents assert that the IHO erred in ignoring "red flags" regarding the credibility of the testimony of the district special education teacher. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, notwithstanding that the witness at times needed to refresh her recollection regarding the May 2022 CSE meeting, neither the non-testimonial evidence nor the hearing record in its entirety warrants a finding that the district special education teacher was not credible.

contends that equitable considerations do not favor reimbursement. The district requests that the IHO's decision be upheld 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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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 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]).⁵

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).

⁵ 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., 580 U.S. at 402).

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. May 2022 CSE Process

The parents allege that their procedural rights were violated, which resulted in a denial of a FAPE. The parents specifically argue that there was no discussion of the full continuum of programming during the May 2022 CSE meeting. In addition, the parents allege they were not afforded meaningful participation in the May 2022 CSE meeting, in that the CSE was dismissive of their concerns, information from the student's July 2021 neuropsychological evaluation addendum was excluded from the May 2022 IEP and the report's recommendations were disregarded, and the parents did not receive the district's speech-language evaluation report prior to the CSE meeting. The parents further assert that the district's prior written notice failed to identify the July 2021 neuropsychological evaluation addendum as an evaluation considered at the May 2022 CSE meeting and, therefore, the IHO erred in finding that the CSE considered the July 2021 neuropsychological evaluation addendum.

1. Parental Participation

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., 2015 WL 4597545 at *8, *10; 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 & Comm'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], 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]).

Here, participants at the May 2022 CSE meeting included a special education teacher, a regular education teacher, a school psychologist who also served as the district representative, the student's mother, and a representative from Mary McDowell (Dist. Ex. 2).

According to the minutes of the May 2022 CSE meeting, the CSE reviewed a "speech eval," a "teacher report," and a "neuro addendum- no new testing" (Dist. Ex. 3 at p. 1). The minutes indicated that the parents expressed "distinct concerns about [the student's] executive functioning which affect[ed] him academically and socially" (id. at p. 2). The minutes further reflected that the parents were concerned with the student's difficulty "with anything open ended or not clearly structured" and that he was "very challenged with pragmatic communication, understanding and expressing information" (id.). The parents also noted the student's "challenges with emotional regulation and anxiety" (id.). When the "CSE asked if there [we]re any academic concerns," the parents reported that the student could "do rote work but struggle[d] to apply information when more sophisticated application [wa]s required across subject areas" (id.). The minutes reflected that the participants in the meeting from Mary McDowell reported the student's then-current functioning was at the eighth grade level in reading decoding and comprehension, late seventh-to-early eighth grade level in writing, and at the seventh grade level in encoding (id.). The minutes indicated that the Mary McDowell participants stated that the student was never reported to be at the 12th grade level as was written in the IEP; however, the CSE "rep" stated that the student's performance in reading skills on the district's April 2021 psychoeducational evaluation placed him at or above 12th grade (id.).

According to the May 2022 CSE meeting minutes, Mary McDowell reported that the student's writing without support could be "unfocused and repetitive," and he needed "multiple step instructions broken down" (Dist. Ex. 3 at p. 2). The student was able to identify main ideas in text, make independent inferences, and answered fact-based questions well, but did not read aloud in class (id.). It was further noted that the student used "the Hochman organizer," feedback for teacher editing, and digital spellcheck tools (id.). At the time of the May 2022 CSE meeting, the student was "working on a 10th grade curriculum at a slightly modified pace of instruction, everything [wa]s done digitally, and he turn[ed] in homework" (id.). Reportedly, speech-language therapy was pushed into the classroom and the focus was on the student's organization and executive challenges, as well as writing support (id.). In math, the student was functioning at the late ninth-to-early 10th grade level (id. at p. 3). According to the minutes, at times the student was "hasty" and needed to slow down to develop his conceptual thinking, correct mistakes, and ensure his understanding (id.). It was noted that the parent did not have questions about the student's levels and the "CSE discussed the very high scores for applied problem solving on the testing" (id.).

The student's social/emotional challenges were described as primarily related to executive functioning (Dist. Ex. 3 at p. 3). The student reportedly had a difficult time understanding how "to figure out how to achieve goals" (id.). The student needed to organize thoughts and understand how to break material down and solicit help from others (id.). The student also struggled with frustration tolerance (id.). According to the CSE participant from Mary McDowell, the student received counseling "as needed" and the student could struggle with social interactions and his social cues could "be less in tune with the group - he c[ould] have an inappropriate tone or rush through conversations" (id.). Mary McDowell also provided check-ins with the student's advisor as a point of contact (id.). Reportedly, "[o]rganization and executive functioning come through

cross curricular" and the student needed frequent redirection and check-ins (*id.*). Mary McDowell reported that the small class sizes supported him in reaching more complex material (*id.*). In physical development, the May 2022 CSE meeting minutes indicated that "OT [wa]s a holdover" (*id.* at p. 4).

According to the May 2022 CSE meeting minutes, the student's mother reported that she had never received the speech-language therapy evaluation from the evaluator (Dist. Ex. 3 at p. 4). According to the minutes, the evaluation was sent to the parent during the meeting, and it was stated that the student did not have any below average skills (*id.*).⁶ The minutes further reflected that the student had all average scores on the April 2021 psychoeducational evaluation and the speech-language evaluation, and the CSE questioned the student's eligibility as a student with a speech or language impairment, as "all scores [we]re in [the] average range or higher" (*id.*). The minutes also stated that the CSE "said there [wa]s nothing to justify an IEP," that the May 2022 IEP "[wa]s a transitional IEP" and that declassification should be discussed next year (*id.* at pp. 4, 5). The CSE minutes further noted that the district "provide[d] services for students performing below grade level" and that the student did not "qualify for services based on our metrics" (*id.* at p. 4). The parent stated that there was a difference "between performance on standardized testing and how he [wa]s in school" and that "[t]here [wa]s a dissonance" between what the CSE was seeing in testing and what the parent saw (*id.*).

The Upper School CSE coordinator and Head Art Teacher of Mary McDowell (Mary McDowell CSE coordinator) provided an affidavit in lieu of direct testimony (Parent Ex. L at ¶¶ 1, 3). The Mary McDowell CSE coordinator testified that she attended the May 2022 CSE meeting and "discussed [the student's] need for a small, full-time special education setting," detailed the student's continued special education needs, and "in particular the extent of his social pragmatic, executive functioning and attentional challenges and how they impact[ed] his ability to function in the classroom" (*id.* at ¶ 49). She further testified that, at the May 2022 CSE meeting, the CSE recommended "a general education program with only counseling and speech," in response to which she "expressed [her] concerns about a mainstream setting due to the size of the class, which would be overwhelming for [the student]" (*id.* at ¶ 50). The Mary McDowell CSE coordinator also testified that she "expressed concerns with the curriculum, as at the time [the student] was in a very highly supportive program with modified instruction and pacing" and she further stated that the student needed a very small and structured setting due to his social pragmatic challenges, poor attention, and poor executive functioning (*id.*). According to her affidavit testimony, during the May 2022 CSE meeting, the CSE "explained that it was making [its] recommendation because [the student] achieved high scores on academic testing done as part of an evaluation conducted in April 2021," to which she and the student's mother responded "that scores [we]re only one part of [the student]'s profile" and that "[t]here was and continue[d] to be a disparity in how he perform[ed] in a 1:1 setting and even how he perform[ed] in his small classes" (*id.* at ¶ 51). She further testified that the student's teachers and providers at Mary McDowell saw "a difference depending on the size of the class," and that the student required more support in his larger classes even in the self-

⁶ Among the procedural requirements in State and federal regulations is the requirement that parents must be afforded "an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a [FAPE] to the student" (8 NYCRR 200.5[d][6]; see 34 CFR 300.501; 300.613[a]).

contained program at Mary McDowell and opined that the "disparity would be even greater in a much larger general education class" (id.).

The Mary McDowell CSE coordinator testified that "during the meeting, the [CSE] tried to rely on the high scores in their evaluation but in doing so they ignored the concerns raised in the evaluation" (Parent Ex. L at ¶ 52). She stated that it was important to note that "the evaluation was conducted in a very structured 1:1 setting where [the student's] executive functioning challenges were less likely to be evident" and that "the same evaluation detail[ed] [the student]'s many executive challenges, including difficulty sustaining working memory, shifting set, initiating problem solving or activity, inhibiting the impulse to respond, maintaining emotional control, self-monitoring and tracking performance, processing information, organization and planning problem solving approaches and organizing materials" (id.). She further testified that "[s]ome of the things listed in the report, such as difficulty thinking flexibly or accepting differing perspectives, understanding the consequences of his behavior, having emotional reactivity and difficulty maintaining control without structure" were seen in the classroom at Mary McDowell, even with their "small and structured full time special education school" (id.). She then stated that "this aspect of the evaluation was ignored during the [CSE] meeting" (id.).

The Mary McDowell CSE coordinator testified that she provided the May 2022 CSE with the student's needs and in her "professional opinion, despite his intelligence and academic abilities, [the student] continue[d] to require a small full-time special education program with differentiated instruction to address all of his challenges" (Parent Ex. L at ¶¶ 53, 54). She further testified that, without the support of "small class sizes, multisensory instruction and scaffolded supports," the student would not be able to access academic material and "would quickly become overwhelmed by the academic demands of the high school curriculum and run the risk of shutting down" (id. at ¶ 54).

The student's mother testified that she attended the May 2022 CSE meeting and that "there was a lot that was discussed" (Tr. p. 182). The parent recalled a focus on the student being an intelligent student and a lot of discussion of the student's scores as reported in the district's April 2021 psychoeducational evaluation report (Tr. pp. 182-83). The parent further testified that the Mary McDowell CSE coordinator described the student in detail during the May 2022 CSE meeting and "talked a lot about his pragmatic language challenges and his executive functioning challenges, in how they c[ould] really influence his experience academically as well as socially" (Tr. p. 183). The parent testified that she agreed with the Mary McDowell CSE coordinator as to the issues she discussed regarding the student at the CSE meeting (Tr. pp. 183-84). The parent also testified that she stated her own concerns during the May 2022 CSE meeting, "because there was a really significant focus on his scores" on the district's April 2021 psychoeducational evaluation and that focus "detracted from recognizing that [the student] as a person still ha[d] some really significant challenges that affect[ed] him in -- in his academic life" (Tr. p. 185). She further testified that she explained to the May 2022 CSE that the student continued to need a lot of support, at that time, and would not be able to do classwork without that support (id.). The parent testified that the student could easily become overwhelmed in a classroom setting and needed a smaller setting (id.). The parent also testified that the district's psychoeducational evaluation was administered in "a one to one setting" and that the student "tend[ed] to do much better in those settings because he doesn't have to deal with the potential distractions and frustrations of being in a -- in a larger setting" (Tr. pp. 185-86). The parent also testified that the district's April 2021

psychoeducational evaluation report had described the student's "other challenges," but those challenges were not discussed, "the focus was on the scores in that evaluation" (Tr. p. 186). Next, the parent testified that the May 2022 CSE also discussed a speech-language evaluation that was not shared with her until the meeting (id.). The parent further testified that she was confused during the May 2022 CSE meeting because the CSE said that the student "shouldn't qualify for speech[-language therapy]," but they were recommending services anyway, and when she later reviewed the speech-language evaluation, the student had been recommended to receive speech-language therapy (id.). The parent next testified that the May 2022 CSE had a copy of the July 2021 neuropsychological addendum at the time of the meeting but did not discuss it (Tr. p. 187). The parent testified that she disagreed with the recommended program during the May 2022 CSE meeting and that she explained to the CSE why she disagreed (Tr. pp. 188-90).

The hearing record reflects that the district provided the student's mother the opportunity to participate in the May 2022 CSE meeting. As described above in detail, both the parent and the Mary McDowell CSE coordinator participated in the CSE meeting, shared information about the student, and shared their concerns about the CSE's programming recommendations. Although the hearing record reflects parental disagreement with the school district's proposed IEP and programming recommendation, such a disagreement does not amount to a denial of the parents' meaningful participation in the development of the student's educational program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K., 569 F. Supp. 2d at 383; Sch. for Language & Comm'n Dev., 2006 WL 2792754 at *7).⁷ Further, with respect to the parents' allegation about not receiving a copy of the January 2022 speech-language report in advance of the meeting, there is no indication that, after having time to review the January 2022 speech-language evaluation report, the parents had any questions or concerns regarding the contents of the evaluation. Accordingly, to the extent a delay in providing the parent with a copy of the evaluation report was a procedural violation, it does not rise to the level of a denial of a FAPE (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; see also N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013]; Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

2. Sufficiency and Consideration of Evaluative Information

With regard to the July 2021 neuropsychological evaluation addendum, although the parent testified that the May 2022 CSE did not discuss it, the hearing record, as a whole, indicates that it was considered by the May 2022 CSE. The parents are correct that the July 2021 neuropsychological evaluation addendum was omitted from the prior written notice (Dist. Ex. 4 at p. 1).⁸ However, in this instance, the May 2022 CSE's failure to specifically reference the report

⁷ Relatedly, the parents also allege that the district did not consider the full continuum of placement options. As discussed further below in the discussion of the CSE's recommendations, the hearing record does not support the parents' contention.

⁸ State and federal regulations require that a district provide parents of a student with a disability with prior written

in the prior written notice or to incorporate the July 2021 neuropsychological evaluation addendum into the May 2022 IEP is not necessarily a violation of the parents' rights under the IDEA.

A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakistic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

The June 2022 prior written notice indicated that the May 2022 CSE considered the district's April 2021 psychoeducational evaluation along with the district's January 2022 speech-language evaluation (Dist. Exs. 1 at pp. 1-3; 4 at p. 1; see Dist. Exs. 6; 7). The January 2022 speech-language evaluation included language that was taken from the parents' July 2021 neuropsychological addendum stating that "[b]ased on the most recent neuropsychological assessment performed September 2019, consistent with [district] testing performed April 2021, . . . as well as a discussion with the staff at . . . Mary McDowell . . . , [the student] remains a complex teen with persistent features of a Pragmatic Communication Disorder and concomitant specific executive function and anxiety regulatory challenges" (compare Dist. Ex. 7 at p. 1, with Parent Ex. C at p. 1). The minutes of the May 2022 CSE also accurately reported that the July 2021 neuropsychological addendum did not include any updated assessment information (compare Dist. Ex. 3 at p. 1, with Parent Ex. C). Review of the parents' July 2021 neuropsychological addendum confirms that it did not include any evaluative data and that the report was based on the student's prior testing in September 2019 and April 2021, as well as discussions with staff at Mary McDowell (see Dist. Ex. 8).

Thus, in this instance, the failure to identify the July 2021 neuropsychological addendum on the June 2022 prior written notice did not rise to the level of a denial of a FAPE, and the hearing

notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a [FAPE] to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1]). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

record demonstrates that the May 2022 CSE adequately considered the July 2021 neuropsychological addendum.

With respect to the other evaluative information considered by the May 2022 CSE, the April 2021 psychoeducational evaluation report (psychoeducational report) indicated that the student functioned within the very high range of intelligence (Dist. Exs. 1 at p. 1; 6 at p. 4). The psychoeducational report noted, and the May 2022 IEP included, that the student's verbal comprehension, fluid reasoning, and working memory composite scores, fell within the very high range while his processing speed composite score fell within the average range (Dist. Exs. 1 at p. 1; 6 at p. 4). With respect to executive functioning, testing suggested concerns regarding the student's ability to sustain working memory, to easily shift set, to initiate problem solving or activity, to inhibit the impulse to respond, to demonstrate emotional control, to self-monitor and track performance, to demonstrate informational processing with respect to organizational and planning problem solving, and to organize materials (Dist. Ex. 6 at pp. 5-6). The evaluator opined as to how these executive functioning concerns might impact the student, but did not state that they did, in fact, impact the student (*id.* at p. 6). In particular, the report noted that executive functioning relates to higher level cognitive skills, which "may be instrumental in assisting one in interacting successfully within their environment" (*id.* at p. 5). Accordingly, the evaluator opined the student may have difficulty organizing and finding his belongings, retaining complex or multistep instructions and completing tasks with multiple steps, keeping up with classroom routines, and working independently, as well as difficulty with monitoring his behaviors and the impact they have on others (*id.* at p. 6). The evaluator opined that the student may have difficult functioning efficiently in school (*id.*).

The May 2022 IEP stated that many of the student's challenges centered around the executive functioning component, that he had "a difficult time understanding how to get there," and even if he was motivated, he struggled to figure out how to achieve goals (Dist. Ex. 1 at p. 5). The IEP noted that the student needed to organize thoughts, understand how to break material down, and solicit help from others, and stated that the student's challenges were in understanding nuanced information if it was not clear and explicit (*id.*).

The district evaluated the student's speech and language skills in January 2022 and the results were included in the May 2022 IEP (Dist. Exs. 1 at pp. 2-3; 7 at pp. 1-7). The testing revealed that the student presented with average receptive language, expressive language, and auditory comprehension skills, and with strengths in his reading comprehension skills (Dist. Exs. 1 at p. 3; 7 at p. 2). Based on the results of the assessment, although the student achieved average scores in regard to his pragmatic language skills, he presented with some pragmatic language weaknesses including inconsistent accuracy in his ability to exhibit various skills when communicating to an audience, using topic introduction, breakdown and repair skills, and understanding symbolic or abstract messages (Dist. Exs. 1 at p. 3; 7 at p. 3). Informal pragmatic language observations revealed that the student demonstrated overall flat affect, inconsistent fleeting eye contact, inability to engage in reciprocal conversation, and difficulties understanding humor and sarcasm (Dist. Exs. 1 at p. 3; 7 at p. 3).

With respect to academic functioning, the psychoeducational report indicated and the May 2022 IEP reflected that, "when compared with grade related peers," the student's academic skills and his ability to apply those skills were both average (Dist. Exs. 1 at pp. 1-2; 6 at p. 7). Academic

testing revealed that the student functioned in the average range in reading, mathematical computation, and written language skills and in the high average range in mathematical reasoning skills (Dist. Exs. 1 at pp. 1-2; 6 at pp. 6-8). According to the May 2022 IEP, the main challenge that the student faced across his courses was his ability to stay focused and avoid distractions for the duration of a class period, and additionally, his English teacher reported that writing organization posed a challenge for the student (Dist. Ex. 1 at p. 3). The IEP indicated that the student's independent writing could be unfocused and repetitive and he needed multi-step instructions broken down (id. at p. 4). The IEP noted that the student's global studies teacher reported that the student had a negative attitude toward learning certain material (id. at p. 3). With respect to mathematics, the IEP noted that executive functioning was challenging for the student and stated that the student could be hasty and moved quickly, he could be very literal and concrete, and he needed to slow down to ensure that he "really" understood "the learning" (id. at p. 4).

The May 2022 IEP stated that with respect to the student, there were "distinct concerns about his executive functioning which affect[ed] him academically and socially. He ha[d] difficulty with anything open ended or not clearly structured," and he had some challenges with emotional regulation and anxiety (Dist. Ex. 1 at p. 5). With respect to academic concerns, the IEP reported that the student could do rote work but struggled to apply information when more sophisticated application was required across subject areas (id.).

With respect to the student's social and behavioral development, the April 2021 psychoeducational report stated that the parent completed a protocol measuring various aspects of behavior and personality to inform the evaluation, diagnosis, and treatment planning (Dist. Ex. 6 at p. 8). Based on information provided by the parent, regarding behavior, the student's "scores fell within the at-risk range" with respect to "Atypicality, Social Skills, Leadership, Functional Communication, Developmental Social Disorder and Resiliency" (id.). The parent reported that the student "sometimes engage[d] in behaviors that [we]re considered strange or odd and he seem[ed] disconnected from his surroundings at times," he had "difficulty complimenting others and making suggestions for improvement in a factual and socially acceptable manner," and he "sometimes ha[d] difficulty making decisions, and or ha[d] trouble getting others to work together effectively" (id.). In addition, according to the report, the parent noted that the student had problems with social skills and communication and difficulty overcoming stress and adversity, noting further that the parent reported that the student demonstrated poor expressive and receptive communication skills (id.). On the other hand, the January 2022 speech-language evaluation, as well as the May 2022 IEP, indicated that the student presented with average receptive and expressive language skills (Dist. Exs. 1 at p. 2; 7 at p. 2). The student completed the "APS-SF Adolescent Questionnaire," which was described as examining "domains of psychopathology and psychosocial problems that may suggest the need for direct and expeditious interventions" (Dist. Ex. 6 at p. 8). According to the report, "[b]ased on the responses provided on the APS-SF, none of the APS-SF scales were endorsed in a clinical or subclinical symptom range" (id. at p. 9). The May 2022 IEP stated that the student did not understand how what he said was received negatively and that applied both academically and socially, adding that the student did not have a sense of how he was being perceived (Dist. Ex. 1 at p. 5). Another component noted in the May 2022 IEP was the student's frustration tolerance, that the student became frustrated but did not have a great sense of managing it and could become "incapacitated by frustration" where he could not move forward (id.). The IEP indicated that the student struggled with social interactions, that his social

cues could be less in tune with the group, and that he could have an inappropriate tone or rush through conversations (*id.*).

The parents' primary objection to the evaluations before the CSE, as stated in their request for review, relates to the district evaluation not being conducted in a classroom setting, the district evaluator prompting the student, and the lack of new information before the May 2022 CSE compared to the May 2022 CSE other than the January 2022 speech-language evaluation and updated Mary McDowell reports.⁹ As summarized above, however, review of the evaluative information available to the May 2022 CSE shows that the CSE had sufficient evaluative information to identify all of the student's special education and related services' needs. While it is understandable that the parents disagreed with the district's evaluation, in that, in their view, it did not adequately represent the student's performance in the classroom and focused more on the student's scores on cognitive and academic testing, the information within the IEP adequately described the student's performance within the classroom, as detailed above. Accordingly, based on the above, the evidence in the hearing record supports the IHO's determination that the May 2022 CSE obtained and considered sufficient evaluative information, which included input from the student's parent and the Mary McDowell CSE coordinator, 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]).

Based on all of the foregoing, review of the hearing record in this matter shows that none of the procedural violations alleged by the parents, either individually or cumulatively, rose to the level of a denial of a FAPE.

B. May 16, 2022 IEP

Turning to the recommendations of the May 2022 CSE, the parents assert that the IHO ignored evidence of the student's need for a special education program and that the district failed to demonstrate how the student would appropriately progress in a general education environment. The parents also allege that the IHO improperly found the recommended appropriate annual goals and misapplied the LRE standard. The hearing record does not support the parents claims.

Having determined that the student remained eligible for special education and related services as a student with a speech or language impairment, to address the student's needs in the general education environment, the May 2022 CSE recommended management needs, annual goals, and related services that included one 30-minute session of counseling per week in a group of three and one 30-minute session of speech-language therapy per week in a group of two (Dist. Ex. 1 at pp. 6, 8-13). In particular, as supports to address the student's management needs, the May 2022 CSE recommended structure and routine, frequent teacher check-ins, prompts and cues to complete academic tasks appropriately, redirection and refocusing as needed, positive encouragement, extended time for assignments and assessments, and breaks as needed and

⁹ The parents' assertion that the evaluator "was prompting [the student]" (Parent Ex. K at p. 5), without evidence of how the particular evaluation was supposed to be conducted, does not establish that any of the testing was invalid. In fact, as noted above, the private neuropsychological addendum indicated that the district testing performed in April 2021 was consistent with the student's performance on testing conducted by the private evaluator as part of a September 2019 neuropsychological evaluation (Dist. Ex. 8 at p. 1).

appropriate (*id.* at p. 6). The CSE developed annual goals related to the student's needs including contributing appropriately to group conversations even about non-preferred topics, self-monitoring for focus and attention, listing initial or follow-up questions he could ask related to a topic of a conversation, articulating other's perspectives, as well as self-monitoring for stamina and work pace, and requesting breaks and support when appropriate (*id.* at pp. 8-11).¹⁰ Additionally, the May 2022 CSE recommended testing accommodations for the student including extended time (time and a half), breaks (two-minute break after 40 minutes of testing), and on-task focusing prompts (verbal and gestural prompts to remain on task) (*id.* at p. 14).

As indicated above, the student's needs were primarily in the areas of social skills and executive functioning, he did not exhibit cognitive performance concerns, and few academic concerns were indicated by testing, school performance, and Mary McDowell teacher reports (*see* Dist. Exs. 1 at pp. 1-6; 10 at p. 1). According to the student's final grades for the 2020-21 school year, he received three "A"s and three "A-"s in his academic courses, and "P" for passing in three non-academic courses (Dist. Ex. 10 at p. 1).

The district special education teacher who attended the May 2022 CSE meeting testified that, after reviewing the student's 2021 psychoeducational evaluation, the speech-language evaluation, and a teacher report, as well as hearing verbal feedback from the family and school at the meeting, the CSE determined that the student had a very strong cognitive profile, noting that all of the student's scores were at least average, if not above average, and that academically, the student's skills were all at least average (Tr. p. 75). The teacher testified that the student "was a very strong student in terms of his academic and cognitive profile" (*id.*). The teacher went on to testify that the May 2022 CSE considered the student's LRE and recommended related services only because there were no academic deficits to address but the student demonstrated a "number of social-emotional concerns that [the CSE] felt could be addressed with related services supports" (Tr. pp. 75-76). She described the student's challenges in the social/emotional realm as attention, anxiety, and pragmatic skills, in addition to "difficulties around executive functioning" (Tr. p. 76). The teacher testified that the CSE "recommended the related service support so that [the student] could work with a counselor and a speech provider . . . to improve his socialization skills, his ability to manage his anxiety, his executive functioning to plan and organize . . . his work and improve study skills" (Tr. pp. 76-77). She testified that the counseling services addressed the student's pragmatic skills as well as his anxiety, self-monitoring, inattention, and executive functioning needs and that the speech-language therapy primarily addressed the student's socialization and pragmatic skills (Tr. p. 77).

Other options considered by the CSE to address the student's needs included a general education placement without the addition of related services, which was rejected as it did not provide enough support in the student's areas of weakness, as well as SETSS, which were rejected for being "too restrictive" given all of the student's areas of academic strength (Dist. Ex. 1 at pp.

¹⁰ On appeal, the parents argue that the annual goals were inappropriate, specifically alleging that the IEP did not include an annual goal to address the student's writing deficits. However, courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (*see J.B. v. New York City Dept of Educ.*, 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). Here, a review of the IEP shows that it included annual goals specifically tied to the student's main areas of need and, accordingly, there is no basis for a finding that the IEP was inappropriate on this basis.

18-19; Dist. Ex. 4 at p. 2). As discussed above, review of the hearing record reflects that the parent and the Mary McDowell CSE coordinator participated in the May 2022 CSE meeting and expressed their belief that the student required the support of a small special education class. Accordingly, it appears that the May 2022 CSE considered the parent's position that the student required a small, structured classroom in a full time special education school, but disagreed with the parent's position. In particular, the May 2022 IEP noted that the parents' concerns that there was a dissonance between the student's performance on standardized testing and how the student performed in school (Dist. Exs. 1 at p. 5; 3 at p. 4). In the district's view, the CSE questioned whether the student required an IEP and indicated that declassification should be discussed the following year, while in the view of the parents' and Mary McDowell staff, the student required a small class considering the program the student was then-currently attending (Dist. Ex. 1 at pp. 4, 5, 6).¹¹

Taking into account the differing viewpoints, the May 2022 CSE was nonetheless not required to adopt the recommendations of the July 2021 neuropsychological addendum or the Mary McDowell staff and the lack of further discussion of more restrictive placements did not violate the parents' right to participate in the development of the May 2022 IEP and did not result in an inappropriate program recommendation. On that point, while the July 2021 neuropsychological evaluation addendum included recommendations for a "small supportive special education program" (Dist. Ex. 8 at p. 3), for which the parents and Mary McDowell staff also advocated, the private neuropsychologist was not obligated to consider the student's LRE in recommending a possible placement for the student. The May 2022 CSE, on the other hand, was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student.¹²

The CSE appropriately weighed the information about the student's needs and the testimony of the district special education teacher provides a cogent explanation for the CSE's recommendations. The parents argue that the district did not present evidence that the student could progress without "a special education program," however, there is no requirement that a CSE "have a certain modicum of evidence regarding how a child will perform in a mainstream classroom before recommending an IEP," instead, the "IEP must be 'reasonably calculated to enable [the student] to make progress appropriate in light of [his] circumstances.'" (Y.N. v. Bd. of

¹¹ The May 2022 IEP noted that the student attended small classes, in standard ratios of 7:1, at Mary McDowell and received "modifications with curricula content chunking of information and a modified pace of instruction" (Dist. Ex. 1 at p. 4).

¹² Indeed, once the CSE determined that general education with related services was an appropriate placement in the LRE in which the student could have been educated, the CSE was not required to thereafter consider other more restrictive placements along the continuum (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016] [finding that the CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]). Further, the CSE was not required to duplicate the identical setting used in the private school in order to offer a FAPE to the student (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]).

Educ. of Harrison Cent. Sch. Dist., 2018 WL 4609117, at *25 [S.D.N.Y. Sept. 25, 2018], quoting Endrew F., 580 U.S. at 403).

In view of the foregoing evidence regarding reasonable (albeit differing) viewpoints regarding the severity of the student's needs, and in review of the objective evidence from multiple sources relied on by the May 2022 CSE, the district demonstrated that the May 2022 IEP was appropriate to address the student's needs and reasonably calculated to enable the student to make progress in light of his circumstances. Again, as discussed in detail above, the May 2022 CSE considered evaluative information showing the student's difficulties and identified them within the May 2022 IEP, particularly with respect to the areas of the greatest concern, executive functioning, attention, and pragmatic language, and social skills. Although the May 2022 CSE did not agree with the parent that the student required small classes in order to address his needs, the May 2022 CSE understood the student's then-current placement and recommended management needs and annual goals directed at the student's need areas and related service supports in the form of counseling and speech-language therapy to address them (see Dist. Ex. 1 at pp. 6-13). Accordingly, although the parents believe the IHO's reasoning insufficiently addressed the evidence that was before the May 2022 CSE at the time it made its decision, the IHO did not err in determining that the district offered the student a FAPE in the LRE for the 2022-23 school year.

C. Assigned School

Lastly, the parents allege that the student was not offered an assigned public school for the 2022-23 school year, contending that the school location letter they received after the May 2022 CSE meeting only applied to the end of the 2021-22 school year. Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school

selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

By letter dated June 5, 2022, the district notified the parent of the school location to which the student had been assigned and wherein the services recommended in the May 2022 IEP would be provided (Dist. Ex. 5 at p. 1). In an email sent to the parent, the district indicated that the school location letter offered a placement "for the 2021-2022" school year (Parent Ex. J at p. 1). The hearing record includes additional email correspondence between the student's mother and the parent coordinator and the principal of the assigned school site between June 21, 2022 and August 12, 2022 (Dist. Ex. 9). By email dated July 1, 2022, the principal of the assigned school site advised the parent that a seat was available for the student for the 2022-23 school year and that the May 2022 IEP could be implemented at the assigned school site (id. at p. 1).¹³ Review of this correspondence demonstrates that the parents knew that the assigned school site named in the June 5, 2022 school location letter was to continue through the 2022-23 school year. Therefore, there is no basis for departing from the IHO's determination that the district offered the student an assigned public school to implement the student's IEP during the 2022-23 school year (see IHO Decision at p. 11).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Mary McDowell was an appropriate unilateral placement for the student or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
January 22, 2024**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**

¹³ The principal wrote that a seat was available for the student for eleventh grade, provided that, after review of his transcript from Mary McDowell, the student was eligible to attend eleventh grade (Dist. Ex. 9 at p. 1). The student's eligibility for eleventh grade had no bearing on the assigned school site's capacity to implement the May 2022 IEP.