



The University of the State of New York

The State Education Department
State Review Officer
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No. 25-149

Application of a STUDENT WITH A DISABILITY, by her parent, 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 Office of Courtney L. Haas LLC, attorneys for petitioner, by Courtney Haas, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition at the International Academy of Hope (iHope) for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has reportedly received diagnoses of microcephaly, cerebellar hypoplasia, hypotonic cerebral palsy, and absent corpus callosum (Parent Exs. I at p. 1; J at ¶ 3; Dist. Exs. 1 at p. 3; 2 at p. 1; 9 at p. 2). She is non-ambulatory and non-verbal and presents with global developmental and functional delays (Parent Ex. J. ¶ 3; Dist. Exs. 2 at p.1; 11 at pp. 4, 5). For the 2023-24 school year, a Committee on Preschool Special Education (CPSE) found the student eligible for special education as a preschool student with a disability and recommended the student attend a 12:1+3 special class in an approved preschool special education program, which the student attended (Dist. Exs. 1 at pp. 1, 18, 19; 2 at p. 1). Pursuant to the CPSE IEP, the student also received two 30-minute sessions per week of individual occupational therapy (OT), three 30-

minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy during the 2023-24 school year (Dist. Exs. 1 at pp. 1, 18, 19; 2 at p. 1).

Between January and April 2024, the district conducted an evaluation of the student (see Dist. Exs. 2 at pp. 1-9; 4 at pp. 3; 6-9).¹ A CSE convened on April 5, 2024, found the student eligible for special education as a student with multiple disabilities, and developed an IEP with a projected implementation date of September 1, 2024 (Dist. Ex. 2 at pp. 1, 29).² The April 2024 CSE recommended that the student attend a 12-month school year program in a 12:1+(3:1) special class in a district specialized school and receive two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy (*id.* at pp. 23-24, 29).³ The CSE also recommended the student be provided an assistive technology device, identified as a communication board, throughout the school day (*id.* at p. 24). Additionally, the April 2024 CSE recommended that the student be provided with special transportation from the closest safe curb location to school in a vehicle with a lift and air-conditioning (*id.* at p. 28).⁴

¹ The January 23, 2024 speech-language evaluation referenced in the April 2024 IEP is not included in the hearing record (see Dist. Ex. 2 at p. 3).

² The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

³ The student-to-adult ratio of the special class recommended for the 2024-25 school year is variably referred to in the hearing record as a 12:1+(3:1), 12:1:4, and 12:1+4 special class. For purposes of this decision, the ratio will be described as "12:1+(3:1)," which reflects a maximum of 12 students with one teacher, and a "staff/student ratio [of] one staff person to three students" (8 NYCRR 200.6[h][4][iii], see "Continuum of Special Education Services for School-Age Students with Disabilities," at p. 18 [Off. of Spec. Educ. updated Nov. 2013], available at <https://www.nysesd.gov/sites/default/files/programs/special-education/continuum-of-special-education-services-for-school-age-students-with-disabilities.pdf>).

⁴ In describing the student's management needs, the CSE noted that the student required the following supports in addition to related services to enable her to benefit from instruction: a custom Danmar helmet to be worn during play to prevent injury; an adapted Stingray stroller for transport on school bus; an adapted classroom upright chair with a high cushioned seat back, harness, trunk and hip guides, foot sandals, and a lap tray for use in the classroom as a seating device; AFOs to provide proper alignment in standing; a prone stander for a daily standing program in the classroom; use of cushioned supports behind her when seated; full physical assistance with feeding, changing, and toileting; an individual daily schedule; a mini schedule to dictate two task choices to choose from; a physically accessible classroom; text in large print; accessibility of objects (i.e., addition of Velcro, development of a hand splint to hold materials, attachment of an elastic cord or string to objects so that they can be easily moved or retrieved), and enhancement of visual clarity or distinctiveness (add contrast or special lighting) (Dist. Ex. 2 at p. 8). The IEP indicated that due to the student's "severe global delays in the areas of cognition, academics, language/comprehension, and adaptive functioning," she required a specialized program with "frequent adult support to carry out the majority of daily activities" (*id.*). The April 2024 CSE recommended approximately 12 annual goals to address the student's needs in the areas of academics, fine motor skills, feeding, social/emotional skills, receptive and expressive language, gross motor skills, functional play skills, and visual motor skills (*id.* at pp. 10-22).

In a letter to the parent dated May 17, 2024, the district identified the particular public school to which it assigned the student to attend for the 2024-25 school year (Dist. Ex. 5).

On July 30, 2024, the parent entered into an enrollment contract for the student to attend iHope for the 2024-25 school year starting on September 5, 2024 and continuing through June 30, 2025 (Parent Ex. D).⁵ In a letter to the district dated August 23, 2024, the parent stated her disagreement with the recommendations contained in the April 2024 IEP, as well as with the assigned public-school site, and, as a result, notified the district of her intent to unilaterally place the student at iHope for the 2024-25 school year and seek funding for the student's tuition from the district (Parent Ex. B). The student began attending iHope on September 5, 2024 (Parent Ex. G at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated November 27, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A). In particular, the parent alleged that: the IEP was not reasonably calculated to enable the student to receive educational benefit and address her medical needs; the district failed to evaluate the student in all areas of suspected disability; the district "ignored the feedback of [the student's] teachers and providers" resulting in recommendations "contrary to the opinions of the professionals who ha[d] direct knowledge of [the student]'s needs"; the district deprived the parent of a meaningful opportunity to participate in the CSE process and predetermined the IEP program and placement recommendations by failing to discuss annual goals or the continuum of services or consider a private-placement; the IEP did not sufficiently identify all of student's present levels of performance or include appropriate corresponding goals required to address identified needs; the IEP did not adequately address the student's management needs including her sensory, time, spatial, and instructional needs; the IEP goals were vague and not appropriate for the student; the district failed to address the student's needs related to activities of daily living (ADL) skills, leisure skills, generalization, community-integration, and safety in the community; the IEP did not include sufficient assistive technology or recommend an assistive technology evaluation or consultation; the CSE failed to recommend a sufficiently "small" classroom, a full-time 1:1 paraprofessional for the student, sufficient related services, or the level of support the student required; the IEP did not include any recommendation for parent counseling and training or consultation time with the teacher and related services providers, both of which the parent alleged were necessary to ensure the student's program was implemented with fidelity across her school day, home, and community environment; and the proposed classroom would not have offered an appropriate functional grouping (*id.* at pp. 3-4).

The parent alleged that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief (Parent Ex. A at p. 5). The parent sought direct funding/reimbursement of the student's tuition costs, related services, and any other costs or fees due to iHope in the 2024-25 school year (*id.*).

⁵ The Commissioner of Education has not approved iHope as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

The district submitted a response to the parent's due process complaint notice on December 5, 2024 (see Due Process Response).

B. Impartial Hearing and Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). The IHO convened a prehearing conference with the parties on December 27, 2024 (Tr. pp. 1-10). An impartial hearing convened on January 31, 2025 and concluded that same day (Tr. pp. 11-83). At the hearing, the district offered 16 exhibits into evidence, including affidavit testimony from the principal of the assigned public school site and the school psychologist who attended the April 2024 CSE meeting, which the IHO admitted into evidence (Tr. pp. 15-16; see Dist. Exs. 1-16). Both witnesses presented by the district were cross-examined by the parent's attorney (Tr. pp. 22-30, 40-42). The parent offered 11 exhibits into evidence at the hearing, including affidavit testimony of the parent and iHope's director of speech therapy and student supports (speech therapy director), which the IHO admitted (Tr. p. 17; see Parent Exs. A-K).

In a decision dated January 31, 2025, the IHO found that the district offered the student a FAPE for the 2024-25 school year (IHO Decision at p. 8). In particular, the IHO found that the district offered a "cogent and responsive explanation for the IEP it created for [the s]tudent, and that this IEP afford[ed] [the s]tudent an appropriate education and opportunity [for] greater than mere trivial advancement" (id. at p. 5). The IHO found the district committed a procedural error by failing to conduct an assistive technology evaluation but, as the district "did still offer [assistive technology] to [the s]tudent and presented evidence that [the s]tudent's programming still focused on verbal and non-verbal communication," the IHO determined that the failure did not rise to the level of a substantive denial of FAPE (id. at p. 7). Relatedly, the IHO found that, while the IEP did not include an annual goal to address the student's use of assistive technology to communicate, it did include a goal related to the student's verbalization of words, which aligned with the student's needs in this area (id.). Regarding the 12:1+(3:1) special class, the IHO found that the student had made progress in preschool, thereby supporting the CSE's recommendation for a similar program for the 2024-25 school year (kindergarten), and that, given the supportive ratio in the 12:1+(3:1), the student's needs did not warrant the support of a 1:1 paraprofessional (id. at pp. 5-6). In addressing related services, the IHO found that, while the student's unilateral placement offered more hours of related services than the April 2024 IEP, "the IDEA does not require maximization of [s]tudent potential, but rather appropriate and more than 'de minimis' progress" and the district "demonstrated that [the IEP's] significantly smaller related services mandates still produced significant progress for [the s]tudent, whose cognitive profile mean[t] it will take much longer than average to make progress" (id. at pp. 7-8). The IHO determined the district offered related services sufficient to enable the student to educationally benefit and make appropriate progress (id.). With respect to the assigned public school site, the IHO found that it had the capacity to implement the April 2024 IEP in a classroom of kindergarten-aged students with similar needs and that evidence in the hearing record did not reflect that the size of the building would impact the student's ability to access a FAPE (id. at pp. 6, 7). Having found the district offered the student a FAPE, the IHO did not address the appropriateness of the unilateral placement at iHope or whether the equitable considerations favored the parent and denied the parent's requested relief (id. at pp. 8-9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding the district offered the student a FAPE for the 2024-25 school year.⁶ Specifically, the parent argues that the IHO failed to address her claim that the CSE predetermined the student's programming. The parent also challenges the IHO's determination that the district's failure to conduct an assistive technology evaluation was only a procedural error and did not rise to the level of denying the student FAPE, arguing that the IHO relied on impermissible retrospective testimony regarding what the district would have done and that student did not have the fine motor skills to use the recommended communication board. Next, the parent asserts that the IHO incorrectly found that the student made progress during preschool and that the CSE's recommendation for placement in a 12:1+(3:1) special class without paraprofessional support was appropriate. The parent contends that in so finding the IHO erred in relying on the district's testimony that the parent did not provide medical documentation to support her requests for more supportive programming. The parent also asserts that the IHO erred in finding that the related services offered in the April 2024 IEP were appropriate, arguing that the IHO misstated the parent's claim by focusing on the lack of evidence presented to support the private school's related services and that the evidence did not establish that the student made progress during preschool in the area of fine motor, gross motor, or expressive language skills. The parent also alleges that the district did not conduct a "feed[ing] therapy evaluation" or recommend services to address the student's "feeding issues."⁷ The parent requests findings that

⁶ The parent's appeal is not accompanied by a notice of request for review as required by State regulation (8 NYCRR 279.3; 279.4[a], [e]). In addition, the request for review does not number the discrete issues presented for review, opting instead to set forth under the heading "Issues on Appeal" a broad statement that the IHO incorrectly found that the district offered the student a FAPE for the 2024-25 school year and then setting forth numbered paragraphs with no particular delineation of the specific issues presented that underlay the IHO's broader finding (8 NYCRR 279.8[c][2]). Further, the parent's memorandum of law does not include a table of contents (8 NYCRR 279.8[d]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). I decline to exercise my discretion to reject the parent's request for review in this instance; however, the parent's attorney is cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a pleading (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

⁷ To the extent the parent includes other claims in her memorandum of law that are not set forth in the request for review (i.e., that the district failed to address the student's ADL skills, leisure skills, generalization, community-integration, and safety in the community; that the IEP did not identify sufficient management needs; the IEP lacked recommendations for parent counseling and training or consultation time), it is well settled that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis v. Carranza, 2021 WL 964820, at *11 [S.D.N.Y. Mar. 15, 2021]; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). As the parent did not identify these claims in the request for review, they are deemed abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

the district failed to offer the student a FAPE for the 2024-25 school year, that iHope was an appropriate unilateral placement for the student in the 2024-25 school year, and that equitable considerations weigh in favor of the parent's requested relief.

In an answer, the district responds to the parent's allegations and 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 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]).⁸

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

⁸ 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).

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

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

VI. Discussion - FAPE

A. Parent Participation/Predetermination

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 E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding 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"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["[a] professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development 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"]).

As to the parent's claim that the district predetermined the recommended programming for the student, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [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 Dep't 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]).

Attendees at the April 2024 CSE meeting included the parent, a district representative, a social worker, a school psychologist, and the student's preschool special education teacher (Dist. Ex. 2 at p. 32).

The parent argues that the district only considered a 12:1+(3:1) special class for the student, which constituted predetermination. However, consistent with statements in the IEP and the prior written notice, the district school psychologist testified that the CSE considered 6:1+1 and 8:1+1 special classes within a specialized school but rejected these options "based on the student's current functioning across areas including cognition, language development, social-emotional development, and academic and adaptive functioning," further noting that the student needed "more intensive services to support her learning," such as those available in a 12:1+(3:1) special class (Dist. Exs. 2 at pp. 31-32; 4 at p. 4; 16 ¶ 12). The IEP and prior written notice additionally reflect that the CSE considered a State-approved nonpublic school for the student but found such a placement "too restrictive" for the student at that time (Dist. Exs. 2 at p. 32; 4 at p. 4).⁹

In her affidavit, the parent described that, at the CSE meeting, she explained how the student needed "a lot of help," "always needed someone to help her physically," and "needed lots of reminders" and a consistent schedule (Parent Ex. J ¶ 5). The parent further testified that she shared her concerns with CSE about the student's lack of progress (Tr. pp. 67-68). The parent stated in her written testimony that she had attended the April 2024 CSE meeting "in good faith but was not given a meaningful opportunity to contribute to the decision-making process" and that the recommendations did not reflect the student's "extensive needs or the feedback provided by her preschool educators and therapists" (Parent Ex. J ¶ 7). The parent further indicated that the CSE did not recommend "paraprofessional support" despite her "repeated concerns about [the student's] safety and inability to function independently" (id. ¶ 6).

The parent's statements in this regard do not rebut the district's evidence that it considered other options for the student. While the parent claims that she was denied a meaningful opportunity to participate in the process, she does not point to an example where she was prevented from contributing to the CSE meeting. Instead, the parent's testimony reflects that she had the opportunity to and did share information and concerns during the April 2024 CSE meeting. Further, while the parent may not agree with the recommendations included in the IEP, as noted above, this alone does not lead to a finding that the parent was significantly impeded from participation or support the claim that the district predetermined the student's programming.

⁹ To the extent the parent claims district school psychologist testified that the 12:1+(3:1) special class was the "only program available," a review of the school psychologist's affidavit does not reflect this statement (Parent Mem. of Law at p. 10 [emphasis in the original]; Dist. Ex. 16 ¶ 14). As part of her allegation pertaining to predetermination, the parent also alleges that the procedural violation cumulatively denied the student a FAPE and lists other procedural violations that have not been raised in this matter or are based on alleged factual circumstances that are not present in this matter (i.e., the allegation that the district had not evaluated the student "in almost ten years") (Parent Mem. of Law at p. 11). Upon review of the hearing record, I do not find that the district predetermined the student's programming or committed procedural violations that cumulatively denied the student a FAPE.

B. Student's Needs

A review of the student's needs and functioning at the time of the April 2024 CSE meeting will provide the background necessary to evaluate the appropriateness of the April 2024 IEP.

The April 2024 prior written notice reflected that the CSE considered a February 2024 social history update, an April 2024 psychological evaluation, and an April 2024 classroom observation (Dist. Ex. 4 at p. 3; see Dist. Exs. 7-9).¹⁰

As noted above, the student is non-ambulatory, nonverbal, and presents with global developmental and functional delays (Parent Ex. J ¶ 3; Dist. Ex. 8 at p. 7).

The April 2024 IEP reflected the results of an April 2022 administration of the Stanford Binet Intelligence Scales, Fifth Edition (SB-5) that indicated the student demonstrated "limited ability to comply with formal testing," that the testing results were based on parent report and clinical opinion, and that the student obtained a full-scale IQ of 52, which fell within the deficient range (Dist. Ex. 2 at p. 4). The April 2024 IEP also included information from the district's April 2024 psychoeducational evaluation of the student (id. at p. 2). In particular, the IEP reflected that administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), parent caregiver form, yielded an adaptive behavior composite score in the low range (<1 percentile) (id. at pp. 1-2).

The June 2024 IEP noted that, according to the student's teacher, her functional self-help skills were estimated to be "within the six-month age range" (Dist. Ex. 2 at p. 2). The student was unable to feed herself, drank fluids from a bottle, and ate pureed or soft foods (id.). In addition, the student was not yet toilet trained and was unable to communicate the need to use the bathroom (id.). The student was able to doff her socks and hat but unable to assist with taking off her jacket (id.). As noted in the IEP, the student's teacher reported that the student engaged in self-stimulatory behavior, which impacted her progress (id.). Further, the teacher indicated the student required hand-over-hand assistance to engage in most activities as well as prompting and redirection throughout the school day (id.). She noted the student demonstrated "good eye contact," and "underst[ood] object permanence and cause and effect" (id.). According to the IEP, the student's teacher reported that the student was able to attend to books with assistance, could make choices when presented with two toys, and "respond to her name" (id.). Her attention span had improved with preferred activities and her imitation skills, while improved, were inconsistent (id.). Based on the teacher's report, the June 2024 IEP noted that the student had made progress in identifying some pictures and understood the "the function of some objects" (id.). The student was unable to sort objects or colors, place objects "under, next to or behind," match pictures or identify colors and shapes, or identify big/little or number concepts (id.).

With regard to the student's speech-language development, the IEP included information from the student's teacher that indicated that the student communicated "using eye gaze" and could reach for a familiar adult to seek attention (Dist. Ex. 2 at p. 3). She did not consistently babble or

¹⁰ In her affidavit, the parent testified that the April 2024 CSE "relied solely on prior reports from [the student's] preschool, without conducting updated evaluations" (Parent Ex. J ¶ 5); however, given the information before the CSE, the hearing record does not support this statement.

imitate sounds or words nor did she use sign language (*id.*). According to the IEP, with respect to receptive language, the student could follow a one-step familiar direction such as "give me five" but she was unable to listen to stories or touch her body parts to identify them (*id.*). A January 2024 speech-language evaluation report incorporated into the April 2024 IEP indicated the student continued to present as a nonverbal student who had made "modest progress" (*id.*). Based on the evaluation report, the IEP noted that the student understood certain one-step directions including 'come,' 'want up,' and 'wait' and she was able to engage in structured play activities for "at least 20 minutes" during sessions (*id.*). The student was unable to respond to 'No' "most of the time," maintain attention to a speaker, attend to pictures, or wave (*id.*). According to the IEP, the speech-language therapist noted that the student struggled to "touch named objects, shapes, or pictures in a book even with assistance," and she was unable to demonstrate "common object functions, imitate sounds/words with degrees of prompting, show understanding of cooperative or dramatic play, gesture to request desired items, sustain [attention] in nursery games such as "peek a boo," or respond to "give me" requests" (*id.*). In terms of expressive language, the IEP indicated the student demonstrated emerging skills of saying "mama" meaningfully and frequently vocalizing with intent (*id.*). However, the student did not imitate the names of familiar objects or spontaneously say words (*id.* at pp. 3-4). Additionally, the IEP reflected the speech-language therapist's report that the student struggled to tolerate "orofacial muscle massages and attempt[ed] to bite any 'perceived "invaders'" (*id.* at p. 3). When her face was wiped clean, she attempted to rip the wipe (*id.*). As reflected in the IEP, the speech-language therapist reported that the student continued to demonstrate communication skills at the six- to nine-month-old level as measured by the Rossetti Infant Toddler Language Scale (*id.*).

Turning to the student's social development, the April 2024 IEP described the student as friendly and noted that she preferred to interact with "familiar adults" rather than peers (Dist. Ex. 2 at p. 5). According to the IEP the student transitioned well in the classroom or when going to therapy (*id.*). The IEP noted that the student did not engage in cooperative play with peers but "sometimes" would participate in parallel play (*id.*). The IEP indicated that the student "often smile[d] when she [was] in a 1:1 interaction with a familiar adult" and she was able to reach out and touch adults when she wanted attention (*id.*). In addition, the student was becoming more open to allowing peers to sit next to her and would reach out to touch them (*id.* at p. 6).

With regard to the student's physical development, the IEP indicated that the student was able to sit up independently, but was unable to crawl or pull to stand (Dist. Ex. 2 at pp. 2, 7). The student moved around by scooting (*id.* at pp. 3, 7). According to the IEP, the student traveled back and forth to school in a travel chair and used an adapted chair in the classroom with a harness since she often threw her head back (*id.* at p. 6). As reflected in the IEP, the student had poor body and safety awareness (*id.*). The IEP indicated that the student wore bilateral ankle-foot orthoses (AFOs) and used a stander in the classroom (*id.*). It noted that the student was non-ambulatory and dependent for all ADLs and position changes (*id.*). In addition, it noted that the student presented with an "increased range of motion, joint hypermobility, and ligamentous laxity throughout all four extremities" (*id.*). The student exhibited low muscle tone and her spinal mobility was limited in rotation and flexion (*id.*). The IEP indicated that the student was unable to move out of sitting with graded control or good safety awareness and that she frequently threw herself backward and noted she wore a custom helmet during free play on the floor and during playroom to prevent injury (*id.*). As reflected in the IEP, the student could occasionally cross

midline with either hand to reach for an object and though she sometimes "strongly resist[ed] to standing," she tolerated being positioned in a prone stander in her classroom for 45- minute periods (*id.*). Based on a report from the student's occupational therapist, the IEP noted the student presented with decreased trunk rotation as well as generalized decreased muscle strength and postural stability (*id.* at p. 7). As reflected in the IEP, the student demonstrated a "gross grasp and a whole arm release" when introduced to a toy or when one was placed in her hand (*id.*). She was beginning to cross midline to reach for a toy but did not engage with toys for a prolonged period of time (*id.*). The IEP indicated the student demonstrated limited forearm and wrist movement which impacted her finger dexterity and thumb opposition (*id.*). The IEP noted the student demonstrated "profound delays" related to her "overall reach, grasp, release and fin[g]er isolation skills" (*id.*). It indicated that the student's immature grasp pattern hindered her ability to manipulate writing utensils or a toy for an extended amount of time and that she presented with "poor joint attention due to a lack of engagement" (*id.*). The IEP noted that the student's visual scanning was delayed due to decreased visual attention (*id.*). In addition, it noted the student had an oculomotor dysfunction in which she lacked fluidity and exhibited delays when moving her eyes from one stationary target to another (saccades) or following a moving target (pursuits) (*id.*).

The IEP included information gleaned from the April 2024 classroom observation of the student (Dist. Ex. 2 at p. 4). Notably, when given a choice of two pictures, one of herself and the other of a classmate, after several verbal prompts the student was able to independently tap the picture of herself (*id.*). In addition, when given a red card and a green card the student could identify the red card given several verbal prompts (*id.*). As recorded in the IEP, the classroom observation indicated that the student's eye-gaze was inconsistent, at times she could turn the pages of a book independently but at other times required hand-over-hand assistance, and the student required visual and verbal prompting to imitate clapping as a part of a song (*id.*). The IEP also reflected the parent's desire that the student be able to communicate her needs, engage in cooperative play with peers, and develop more independent physical abilities such as crawling and standing (*id.* at pp. 5, 6, 7).

C. April 2024 IEP

1. Special Factors—Assistive Technology

The district does not interpose a cross-appeal to challenge the IHO's determination that its failure to conduct an assistive technology evaluation of the student constituted a procedural violation.¹¹ Accordingly, the issue on review is limited to whether this violation impeded the

¹¹ While not at issue on appeal, I note that, when warranted by the student's needs, the district must assess the student's "functional capabilities" and whether they may be "increase[d], maintain[ed], or improve[d]" through the use of assistive technology devices or services (34 CFR 300.5; 8 NYCRR 200.1[e]; see 34 CFR 300.6; 8 NYCRR 200.1[f]). "The evaluation should provide sufficient information to permit the [CSE] to determine whether the student requires assistive technology devices or services in order to receive FAPE" (Letter to Fisher, 23 IDELR 656 [OSEP 1995]). However, recent guidance from the United States Department of Education describes the view that an assistive technology "evaluation must be conducted prior to providing an [assistive technology] device and service to a child with a disability" as a "myth" and indicates that "specific [assistive technology] devices and services needed by a child with a disability are determined appropriate by the IEP Team

student's right to a FAPE, hindered the parent's opportunity to participate in the decision-making process, or otherwise deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The IHO resolved this question by finding that the April 2024 CSE's recommendation for assistive technology was appropriate to meet the student's needs (see IHO Decision at p. 7). The parent alleges that the IHO erred in this regard and that there is nothing in the record that explains the CSE's recommendation for a communication board.¹²

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). The failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

As relevant to the student's communication needs, which would inform a recommendation of assistive technology for this student, the parent's responses on the Vineland-3 yielded a standard score of 27 (<1 percentile) and the evaluator described the student's communication skills as a "significant weakness" (Dist. Ex. 8 at p. 3).¹³ According to a January 2024 speech-language

based on the child's needs" and that "[m]any [assistive technology] devices and services can be provided without an [assistive technology] evaluation" ("Myths and Facts Surrounding Assistive Technology Devices and Services," 124 LRP 1843 [OSERS Jan. 2024], available at: <https://sites.ed.gov/idea/files/Myths-and-Facts-Surrounding-Assistive-Technology-Devices-01-22-2024.pdf>).

¹² In her appeal, the parent also recites the IHO's finding that the CSE's failure to recommend assistive technology for use in the student's home was an oversight that could have been updated in an IEP amendment; however, the parent does not allege that the IHO erred or set forth any basis for disagreeing with the IHO's finding in this regard (Req. for Rev. ¶ 15, citing IHO Decision at p. 7). Accordingly, this aspect of the IHO's decision will not be further discussed.

¹³ The parent argues that the IHO incorrectly limited the discussion of assistive technology to whether the student needed a communication device (see Req. for Rev. ¶ 16). In her memorandum of law, the parent cites examples of assistive technology that the student required other than a communication device, including an adapted chair and stroller, a harness, and a stander (Parent Mem. of Law. at p. 4). However, review of the April 2024 IEP reflects that the CSE recommended equipment to assist the student's functional capabilities, such as a Danmar helmet, an adapted Stingray stroller for transport on the bus, an adapted classroom upright chair, ankle-foot orthoses and a prone stander, and other supports to ensure accessibility of objects (such as use of "Velcro," a "hand splint to hold materials," use of "an elastic cord or string" attached to objects so they can be moved or retrieved) (Dist. Ex. 2 at p. 8). Accordingly, the parent's allegation in this regard is without merit.

evaluation incorporated in the April 2024 psychoeducational evaluation report, the student continued to present as a nonverbal student who had made "modest progress" (*id.* at p. 5). The student's therapist noted the student's "areas of difficulty revolve[d] around her ability to touch named objects, shapes, or pictures in a book even with assistance" (*id.*). The student was not yet able to "demonstrate common object functions, imitate sounds/words with degrees of prompting, show understanding of cooperative or dramatic play, gesture to request desired items, sustain in nursery games such as 'peek a boo,' or respond to 'give me' requests" (*id.*). Further, the therapist indicated that the student was unable to "give objects upon verbal requests; attend to new words; perform a routine activity upon verbal request; understand simple questions; gesture/verbalize/vocalize in response to verbal requests" but followed simple commands "occasionally" (*id.*). The student was described as communicating using eye gaze or reaching for a familiar adult to seek attention (*id.*).

In the section of the April 2024 IEP devoted to identifying the student's needs relating to "special factors," the CSE did not specify whether the student needed assistive technology (Dist. Ex. 2 at p. 9). However, the CSE did recommend a communication board for the student for use throughout the school day (*id.* at p. 24).¹⁴ The school psychologist indicated that the CSE recommended a communication board as a form of augmentative and alternative communication (AAC) for the student (Tr. p. 32). In her testimony the psychologist opined that the communication board was sufficient for the student based on her cognitive and adaptive levels and that the communication board "would have been more accessible for the student to access and comprehend" to be successful (Dist. Ex. 16 ¶ 23). Further, she stated that the communication board was "a low-tech device" and the CSE felt that it was appropriate based on the student's cognitive functioning at the time (Tr. p. 32).

The parent testified that, at the time of the April 2024 CSE meeting, the student "couldn't really use" the communication board that she had been provided during preschool but that there was no discussion about this at the CSE meeting (Tr. pp. 67, 70).

The iHope speech therapy director testified that, during the intake process at iHope, the student was presented with "a variety of assistive technology" and that, when presented with a communications board, the student did not "quite have the fine motor ability" to use it (Tr. p. 51). A February 28, 2024 iHope "Prospective Student Intake Evaluation 2024-2025 SY" report included observations regarding the student's interactions with a "VOCA (big mac)," a switch, as well as a "Talkpad with Proloquo2Go" (Parent Ex. I at p. 4). According to the intake evaluation, the student "[i]nteract[ed] and reach[ed] for VOCA" and "seemed interested in exploring switch" (*id.*). The student was reportedly "receptive to modeling but did not reach or activate ipad on her own" (*id.*). In addition, the intake evaluation referenced, based on parent report, the student's trial of a high tech speech generating device during the "last school year," which reportedly took place

¹⁴ The parent argues that the IHO relied on retrospective testimony of the assigned school assistant principal that the school's speech team would determine an appropriate AAC device (*see* Tr. p. 43). While the IHO cited this testimony in her general finding that the assigned school had the capacity to implement the IEP, she did not cite it in her discussion of the IEP recommendations (*see* IHO Decision at pp. 6, 7). Moreover, the principal's testimony broadly referred to the process pursuant to which students attending the assigned school were recommended for assistive technology and did not state that the school would provide the student with assistive technology not included in the IEP (Tr. p. 43; *see* R.E., 694 F.3d at 185).

after a referral from a doctor (see *id.* at pp. 4-5). According to the iHope intake evaluation, the parent shared that, based on the trial with the high tech speech generating device, the student's speech-language pathologist from her preschool "did 'not feel [the student] was ready for the device" and it was returned (*id.* at pp. 4-5).

While the parent points to the testimony of the iHope speech therapy director to support her position that the April 2024 CSE's recommendation for a communication board was inappropriate, the iHope director did not attend the April 2024 CSE meeting and there is no evidence that the parent shared with the April 2024 CSE the iHope intake evaluation or the results of the student's prior assistive technology trial (see Parent Ex. I). As this information, which was within the parent's control, was not provided to the April 2024 CSE, it cannot be relied on to assess the appropriateness of the April 2024 CSE's assistive technology recommendations (see *C.L.K. v. Arlington Sch. Dist.*, 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE"], citing *R.E.*, 694 F.3d at 186-88).

However, even if the intake evaluation was before the CSE or the district had conducted its own assistive technology evaluation of the student with similar results, the content of the evaluation does not undermine the CSE's recommendation of a communication board. The student's abilities, summarized in more detail above, support the parent's view that the student may have struggled to operate the communication board independently due to her fine motor abilities (see Dist. Ex. 2 at p. 2); however, the IEP provided for the student to receive assistance for such skills. For example, with respect to her annual goal in the area of matching and imitating, the April 2024 IEP provided that, when given a "two picture matching board," the student would match pictures with "moderate assistance" (*id.* at p. 10). In addition, when given an object to match to a picture of the object, two colors, or pictures of shapes, the objectives included in the IEP stated that the student would touch the appropriate choice with moderate assistance (*id.*). Further, the IEP included goals and related services for the student to work on fine motor and communication skills including verbal communication. With respect to the latter, the IHO noted that the student's skills were emerging and that, therefore, it was "at least equally-appropriate" for the student's programming to focus more on verbal communication skills (IHO Decision at p. 7).

Accordingly, review of the evidence in the hearing record indicates that, although the district did not evaluate the student's assistive technology needs, the April 2024 IEP recommended a low-technology assistive technology device consistent with the student's needs as identified by the April 2024 CSE, as well as other supports and services to address the student's communication needs. Therefore, there is insufficient basis to disturb the IHO's finding that the lack of an assistive technology evaluation did not result in a denial of a FAPE to the student.

2. Programming Recommendations

a. Progress under the June 2023 IEP

In finding that the April 2024 IEP was appropriate, the IHO determined that the IEP reflected the student's progress in a similar program, namely a 12:1+3 special class with related services of the same type, frequency, and duration (IHO Decision at p. 6). It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining

whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at <https://www.nysesd.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir. 2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

Here, the parent testified that "physically, [the student] was still at the same place [as] when she started preschool" and "there was no growth" (Tr. p. 69). The parent stated that the student "still couldn't do certain things" and "[e]ducationally, she still didn't know. . . simple colors [or] simple numbers" (id.).

The hearing record does not include annual goal progress reports or teacher or service provider reports outside of what is set forth in the April 2024 IEP itself. Moreover, several descriptions of the student's needs set forth in the June 2023 IEP were carried over to the April 2024 IEP, making it difficult to ascertain areas where the student's skills remained static and where there was improvement. Nevertheless, review of the evaluations considered by the April 2024 CSE and statements in the IEP reflect that, while the student did not progress in all areas, the student made modest progress in discrete skills areas during the 2023-24 school year.

For example, the April 2024 IEP included new information that the student was drinking more from an open cup and made progress in recognizing the letter "A," identifying pictures, and matching some objects to pictures (Dist. Ex. 2 at pp. 2, 5). In the social/emotional realm, the April 2024 IEP included new information that the student sometimes engaged in parallel play and was more open to children sitting next to her (id. at pp. 5-6). The IEP also identified specific one-step directions.

The April 2024 classroom observation described the student's response to prompts (e.g., touching her own picture after multiple cues, eventually touching a named color after frequent verbal prompts), which demonstrated limited but present matching and identification skills with

high adult support, corresponding to short-term objectives set forth in the June 2023 IEP (compare Dist. Ex. 7, with Dist. Ex. 1 at p. 8). The observation also included that, reportedly, the student had said her first word the day prior to the observation (Dist. Ex. 7 at p. 2). The April 2024 psychoeducational evaluation included reports from the student's teacher that the student made some gains, such as improved joint attention and attention to non-preferred activities, , ability to attend to books with support, and ability to make choices between toys, —skills that aligned partially with some basic IEP objectives included in the June 2023 IEP (compare Dist. Ex. 8 at pp. 4, 5, 7, with Dist. Ex. 1 at pp. 8, 12-13). However, the psychoeducational evaluation report indicated that the student could not yet identify colors or shapes, sort/match objects, demonstrate object function, or follow most basic academic routines without extensive prompting (Dist. Ex. 8 at pp. 1, 4).

With respect to the student's gross and fine motor and visual integration skills, the April 2024 IEP carried over or updated in minor ways the statements from the student's June 2023 IEP (compare Dist. Ex. 2 at pp. 1-7, with Dist. Ex. 1 at pp. 1-7). According to the April 2024 IEP, a January 2024 speech-language evaluation of the student reflected that the student continued to present as a nonverbal student who had made modest progress (Dist. Ex. 2 at p. 3). The April 2024 IEP reported that the student demonstrated had two emerging "9-12 months" level skills: "to say 'mama' meaningfully and vocalizing with intent frequently" (id.). The April 2024 IEP further stated that the student would "squeal[] versions of the vowel 'a' when truly excited by an interaction or a toy," but was unable to "imitate the names of familiar objects, say one-two words spontaneously[,] vocalize a desire for change in activities or use a word to call a person" (id.).

b. 12:1+(3:1) Special Class

Having reviewed evidence relating to the student's progress with the support of a 12:1+3 special class and related services during the 2023-24 school year and the student's needs as known to the April 2024 CSE, I turn to the CSE's program recommendations.

State regulation indicates that "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6 [h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel and/or related service providers (id.).

The school psychologist provided testimony explaining the CSE's recommendation that the student attend a 12:1+(3:1) special class in a district specialized school. She stated her view that the April 2024 CSE's 12+1+(3:1) special class placement recommendation would have enabled the student to make progress in the least restrictive environment (Dist. Ex. 16 ¶¶ 11, 15-31). She noted that the 12:1+(3:1) special class was a small enough class size to meet the student's needs, not overwhelm her, and also provide her with enough adult support to assist her with daily activities and participation in class instruction (id. ¶ 11). As noted above, the psychologist indicated that the CSE had considered but rejected 6:1+1 and 8:1+1 special classes within a specialized school, given the student's then-current functioning across areas including cognition, language development, social/emotional development, and academic and adaptive functioning (id. ¶ 12). The psychologist noted that the student required "more intensive services to support her

learning" (*id.*). During the impartial hearing, the school psychologist was asked how a 12:1+(3:1) special class handled students with high levels of need specifically regarding, toileting and feeding, to which she replied that the "teachers and paraprofessionals [were] trained and equipped to carry out those tasks with the students throughout the day" (Tr. p. 34). She explained that, in the 12:1+(3:1) special class setting, it was typically three students per adult, and during feeding, an adult was "sitting together with those three students and work[] with each child with their feeding" (*id.*). For toileting, she indicated that the adults "essentially . . . take turns with each of the students" in their group (*id.*).

Consistent with the psychologist's testimony, the Second Circuit has recently observed that "[i]n the continuum of classroom options, the [12:1+(3:1) special class recommendation] is the most supportive classroom available" (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *3 [2d Cir. May 1, 2023]; but see Cruz v. Banks, 2025 WL 1108101 at *1, *4-*8 [2d Cir. Apr. 15, 2025] [certifying a question of State law to the New York Court of Appeals to determine whether or not the district may choose one class size over another when a student meets the regulatory requirements of two class size regulations, or must the district satisfy both regulations]).¹⁵

The parent argues that the 12:1+(3:1) special class ratio was insufficiently supportive to meet the student's need without a recommendation for 1:1 paraprofessional services.¹⁶ While not set forth among the special factors in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct

¹⁵ The New York Court of Appeals has accepted the certified question but has yet to issue a determination on the matter (Cruz v. Banks, 43 NY3d 983 [Ct App May 20, 2025]).

¹⁶ The term "paraprofessional" is used throughout the hearing record. For purposes of this decision, in addition to the term "paraprofessional," the terms "supplementary school personnel" and "aide" are used, as they are the terms set forth in State regulation (see 8 NYCRR 80-5.6, 200.1[hh]; 200.4[d][3][vii]).

instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <https://www.nysesd.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disabilitys-need-for-a-one-to-one-aide.pdf>).

In her direct testimony by affidavit, the school psychologist indicated that the April 2024 CSE did not recommend a 1:1 paraprofessional for the following reasons: no medical documentation was provided to the team suggesting the need for a 1:1 health paraprofessional, as the student did not present with the need for nursing services; the student's needs in the realm of toileting/feeding would have been "properly supported by the classroom staff, as they had done so in preschool" and, in fact, the class ratio of 12:1+(3:1) was an increase in the number of adults in the classroom compared to the 12:1+3 special class the student attended for preschool and thus was "a higher level of support, and would have been sufficient to meet the child's needs" (Dist. Ex. 16 ¶ 14). The psychologist testified that the district typically recommended "either a behavioral paraprofessional for students that have severe behavior challenges, a toileting paraprofessional, [or] a health paraprofessional" if needed (Tr. p. 26).¹⁷

When asked during the impartial hearing if the CSE required a medical recommendation for a 1:1 paraprofessional before including the service on a student's IEP, the psychologist explained that the CSE would require documentation or information of medical need for a 1:1 health paraprofessional to be considered; she further replied that, while the CSE had medical documentation that listed the student's medical conditions, there was no "medical documentation to support . . . the request for a health paraprofessional" (Tr. p. 28; see Dist. Ex. 2 at pp. 28, 31). The psychologist indicated that the CSE "didn't have anything to specifically say that [the student] needed a paraprofessional in school," including but not limited to a 1:1 health paraprofessional (*id.*). In the social history the parent was of the opinion that the student required a paraprofessional to address toileting needs (Dist. Ex. 9 at p. 2); however, review of the evaluative information available to the April 2024 CSE, including but not limited to the March 2024 psychoeducational evaluation report, did not indicate that the student required 1:1 paraprofessional to address her needs (see Dist. Ex. 8). Nor did the observation conducted by the district in the student's 12-student preschool special class indicate that the student was struggling in the absence of a 1:1 paraprofessional (Dist. Ex. 7).

As noted, the parent indicated that she shared with the CSE her concern about the student's safety and inability to function independently (Parent Ex. J ¶ 6). While the parent's concerns for her daughter are understandable, the IEP specified a highly supportive program with extensive services and equipment to assist the student and keep her safe. Although the parent may have preferred that the student also receive an individual 1:1 paraprofessional in addition to the adult support in the 12:1+(3:1) special class setting, for the 2024-25 school year, the hearing record supports the IHO's finding that a full-time individual paraprofessional in addition to the other paraprofessionals and adults in the classroom was not required to provide the student with a FAPE.

¹⁷ Neither the IDEA nor federal or State regulations establish subspecialties for paraprofessionals (see 8 NYCRR 80-5.6, 200.1[hh]).

Rather, the evidence supports the IHO's determination that the CSE recommended sufficient adult support to meet her needs in the 12:1+(3:1) special class.¹⁸

c. Related Services

The parent also challenges the frequency and duration of related services recommended by the April 2024 CSE. "Related services" are defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]). An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]).

Initially, to the extent iHope provided the student with related services at a greater duration or intensity when the student attended during the 2024-25 school year, a mere comparison of the public and private programming to determine which is better is not the test for assessing the appropriateness of the April 2024 CSE's recommendations as there was no information before the CSE about iHope's recommendations in this regard (see R.E., 694 F.3d at 186-88; C.L.K., 2013 WL 6818376, at *13).¹⁹ Indeed, the parent acknowledged that, at the CSE meeting, there was not a discussion about increasing the student's related service mandates (Tr. p. 70).

As noted above, the April 2024 CSE recommended related services of three 30-minute sessions of individual speech-language therapy per week and two 30-minute sessions each of individual OT and individual PT per week (Dist. Ex. 2 at pp. 23-24). The district school psychologist testified that the April 2024 CSE determined the student's recommended related service frequencies after reviewing the student's progress reports from her preschool providers and that the CSE "kept it in line with what she [had been] receiving" (Tr. p. 33). The student had received the same related services at the same frequencies and durations for the 2023-24 school year (Dist. Exs. 1 at p. 19; 2 at p. 1).

The parent argues that the evidence does not reflect the student's progress with related services during the 2023-24 school year when the student was in preschool, noting that the hearing record does not include related service progress reports for that time period. However, the programming included in the IEP as a whole, including the special class, related services, and supports for the student's management needs was designed to meet the student's fine and gross motor and receptive and expressive language skills during the 2024-25 school year.

¹⁸ The parent argues that the IHO placed the burden on the parent to show that the student required additional 1:1 support. However, the district met its burden to demonstrate the appropriateness of the April 2024 CSE's recommendations and to the extent the IHO noted that the parent did not present evidence to the contrary, this was not a shifting of the burden. Moreover, in her appeal, the parent points to the 1:1 paraprofessional that was assigned to the student at iHope during the 2024-25 school year as evidence that the student required this support; however, this information was not before the April 2024 CSE.

¹⁹ It follows then that the IHO's discussion of the issue, which considered whether the evidence supported the frequency and duration of related services that iHope provided to the student, was not a legally sound analysis (see IHO Decision at p. 7).

With respect to the parent's allegation that the district did not evaluate or offer services to address the student's feeding needs, review of the April 2024 IEP reflects that the CSE described the student's needs in this area, noting that the student could not feed herself; ate pureed food and soft foods like avocado and bananas; and drank fluids from a bottle but did not hold the bottle and resisted drinking from an adapted cup (Dist. Ex. 2 at pp. 2, 4-5). The IEP also noted that, during the meeting, it was reported that the student was "drinking more from an open cup," which was "something she would not accept prior" (*id.* at p. 5). The April 2024 IEP management needs include a recommendation for "full physical assistance with feeding" (*id.* at p. 8). Short-term instructional objectives for her ADL annual goal were that the student would "scoop her food with moderate assistance" and would "drink from a cup with moderate assistance" (*id.* at p. 12).

The evidence in the hearing record shows that the April 2024 CSE recommended an educational program for the student for the 2024-25 school year that was designed to confer educational benefit and enable the student to make progress. In developing the student's IEP, the CSE considered information from the student's teachers and related services providers, as well as the results of district testing, and identified the student's areas of weakness. The CSE developed annual goals that targeted the student's deficit areas and recommended an educational program that was designed to provide her extensive special education support throughout the day. The recommended programming was similar to the student's program the previous year. Although the evidence of the student's progress during the 2023-24 school year does not reflect robust progress, the evidence nevertheless leads to the conclusion that the student was receiving meaningful educational benefits during the 2023-24 school year and that continuing similar programming as recommended by the April 2024 CSE was appropriate. While this may not have contemplated everything desirable by the parent for her daughter that she obtained in the iHope programming, the district was not required to mimic all of the private programming in order to offer the student programming that was reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

VII. Conclusion

Having found that the IHO did not err in concluding that the district offered the student a FAPE for the school years at issue, I need not reach the issue of whether iHope was an appropriate placement for the student or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 23, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER