The University of the State of New York

The State Education Department
State Review Officer
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No. 22-163

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

Appearances:
Law Offices of Anne Leahey, LLC, attorneys for respondent, by Anne C. Leahey, 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 dismissed the parent's due process complaint notice and granted the district's motion to dismiss. 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 in this case has been the subject of 15 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; 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). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—

as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

The student was administered the New York State Alternate Assessment (NYSAA) in the areas of English Language Arts (ELA), math, and science on May 28, 2021 (Dist. Ex. 1a at p. 7).[1, 2]

On June 9, 2021, a CSE convened to conduct the student's annual review and to develop the student's IEP for the 2021-22 school year (see Dist. Ex. 1b).[3] Finding that the student remained eligible for special education as a student with an intellectual disability, the June 2021 CSE recommended a 12:1+1 special class in an out-of-district school placement with related services of occupational therapy, physical therapy, speech-language therapy, along with special instruction (delivered in the home and community), parent counseling and training, 1:1 aide services for transitions, assistive technology, additional supplementary aids and services, program modifications, and accommodations, and supports for school personnel on behalf of the student (id. at pp. 1, 15-18, 22). As a student eligible for 12-month services, the student's 2021-22 school year was scheduled to commence on July 5, 2021 (id. at pp. 1, 17-18). The June 2021 IEP was the subject of a prior State-level administrative appeal, which upheld an IHO's determination finding that the district offered the student a free appropriate public education (FAPE) for the 2021-22 school year (see Application of a Student with a Disability, Appeal No. 22-010).

In emails dated between January and February 2022, the student's mother corresponded with a representative from the New York State Education Department (NYSED) (Parent Ex. D at pp. 1-8).[4] In a January 21, 2022 email, the student's mother stated that the district was "refusing to consider" the student's past NYSAA "learning profiles" and "only want[ed] to utilize his most recent from May 2021" (id. at p. 8). She further indicated that the district claimed they had not been given the results from the May 2021 test "as of yet" (id.). In a February 11, 2022 email, the representative from NYSED advised the student's mother that school districts received access to student score reports and learning profiles via the "Educator Portal" on July 27, 2021 (id. at p. 1).

[1] District Exhibit 1a combines the April 7, 2022 prior written notice and the April 7, 2022 IEP; however, the exhibit as a whole is not consecutively paginated. As submitted with the hearing record on appeal, the prior written notice is included as pages 1 through 3 of District Exhibit 1a and the April 2022 IEP is included as pages 4 through 23 of District Exhibit 1a and will be cited as such.

[2] The May 28, 2021 NYSAA was the sole New York State alternate assessment given to the student while he was in high school and the timing of the assessment was based on the student's date of birth (Dist. Ex. 1f).

[3] In her affidavit in support of the district's motion to dismiss, the district's director of pupil personnel services (district's director) averred that the CSE met on June 9 and June 17, 2021 as part of the student's annual review in order to develop the student's IEP for the 2021-22 school year (Dist. Ex. 1 at ¶ 6). Consistent with this, the June 2021 IEP reflects that evaluative data and reports from June 9, 2021 and June 17, 2021 were considered in the development of the June 2021 IEP (Dist. Ex. 1b at p. 1).

[4] The student's mother sent separate emails dated December 16, 2021 and January 21, 2022 to a different individual at a NYSED email address; it does not appear a response was received but the mother's reference to that individual in a later correspondence spelled that person's name differently, so it is unclear if the mother's earlier messages were delivered (see Parent Ex. D at pp. 8-9).

In a February 14, 2022 email to the district, the student's mother indicated that, although NYSAA results had, according to NYSED, been available to the district since July 2021 and although she had been requesting access to the same since July 2021, the district's director of pupil personnel services, who served as the CSE chairperson (hereinafter "CSE chairperson") had denied the requests of the mother and refused to share the information with the CSE (Parent Ex. C at pp. 1-2).

At the parent's request, the CSE met on April 7, 2022, to review the student's NYSAA results (Dist. Exs. 1a at pp. 1-2; 1e at pp. 3, 5-6). The April 2022 did not amend the programming recommendations for the student for the 2021-22 school year (compare Dist. Ex. 1a pp. 17-20, 23, with Dist. Ex. 1b at pp. 15-18, 22).

A. Due Process Complaint Notice

In a due process complaint notice, dated April 8, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 school year (see Parent Ex. A). The parent argued that the NYSAA that the student took in May 2021 was facilitated by a district staff member who was not certified as a NYSAA facilitator (id. at pp. 2-3). The parent further alleged that the student's NYSAA testing was administered following a six-month period in which the student had not received educational instruction and was therefore "inherently suspect" (id. at p. 3). The parent alleged that the June 2021 CSE did not use the NYSAA results when it developed the present levels of educational performance or the annual goals contained in the student's IEP for the 2021-22 school year (id.). Because the CSE did not consider the NYSAA results, the parent argued that the IEP's present levels of educational performance and annual goals were "inherently suspect" (id. at pp. 3-4). Regarding the present levels of educational performance, the parent alleged that the district "failed to derive" the student's present levels of educational performance "from any other form of appropriate assessment methodology that utilized measurable criteria" (id. at p. 4). The parent further reasoned that, if the student's present levels of educational performance were improper, then the annual goals contained in the student's IEP were inappropriate as well and alleged that the goals were not created using "any measurable criteria" (id. at pp. 4-5).

The parent argued that the district failed to modify and provide the student with access to a general education curriculum and, therefore, denied the student "an appropriately ambitious FAPE" (Parent Ex. A at pp. 4-5). The parent described the April 2022 CSE meeting and claimed that the parents were denied an opportunity to meaningfully participate in the creation of the student's IEP (id. at p. 5). The parent alleged that the student "suffered significant educational regression" for the 2021-22 school year and requested an order directing the district to remedy their alleged violations and for compensatory education for the 2021-22 school year (id. at p. 6).

The district responded to the parent's due process complaint notice in a combined answer and motion to dismiss (Dist. Ex. 4). As grounds for its request that the matter be dismissed, the district alleged that the due process complaint notice was insufficient and failed to state a cause for proceeding, that the parent had previously challenged the student's placement for the 2021-22 school year in a separate proceeding and could not relitigate the matter, and that the relief sought was not available (id. at pp. 9-26).

B. Impartial Hearing Officer Decision

After a prehearing conference on June 22, 2022, the parties continued with the impartial hearing on August 8, 2022, which concluded on October 14, 2022, after three hearing dates devoted to the presentation of evidence (Tr. pp. 1-565).[5, 6] During the impartial hearing, the IHO denied the district's motion to dismiss the parent's due process complaint notice on grounds of insufficiency but reserved decision on the remaining grounds alleged (see Tr. pp. 14-17).

In a decision dated November 23, 2022, the IHO dismissed the parent's due process complaint notice (IHO Decision at p. 18). The IHO determined that, in May 2021, the district properly administered the NYSAA testing for the student (id. at p. 14). In addition, the IHO held that the April 2022 CSE used the 2021 "NYSAA results and other relevant reports to revise the student's [present levels of educational performance] on his IEP" (id. at pp. 14-15). The IHO found that development of annual goals, modification of the general education curriculum, and providing for an increase in the student's access to the general education curriculum were tasks that "were beyond the scope of the April 7, 2022 meeting" (id. at pp. 15-16). Finally, the IHO reviewed the transcript of the April 2022 CSE meeting, noted the opportunities afforded to the parents to give their opinions and recommendations, and found that the parents were afforded the opportunity to meaningfully participate in the CSE (id. at pp. 17-18).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in failing to find that the district denied the student a FAPE for the 2021-22 school year. The parent argues that, contrary to the IHO's decision, the district's delay in convening a CSE to review the NYSAA scores and amend the student's IEP, including the present levels of educational performance and annual goals, resulted in a denial of a FAPE to the student for the 2021-22 school year. The parent alleges that the NYSAA results were available to the district in July 2021 but that, because the district did not make the results available to the CSE until February 2022, the CSE was unable to incorporate the results of the NYSAA into the student's IEP for the 2021-22 school year. The parent asserts that the district "did not even push" for a CSE to convene after it uploaded the NYSAA test results and that, instead, it was the student's mother who had to "independently implore" the district to convene the CSE, which did not occur until April 2022, well into the 2021-22 school year. The parent argues that NYSAA testing is "the only 'assessment methodology' mandated by regulation," is "designed to assess a student's mastery of the grade-level learning standards . . . that must be taught to all students," and is an "essential component" of the Dynamic Learning Maps system. The parent argues that the student's quarterly progress reports prove that he was failing to meet his educational goals. As for the April 2022 CSE meeting, the parent alleges that the district's refusal to discuss how the student's "'alternate assessment testing history and evolution' impacted" the student's present levels of

[5] A status conference was held on August 31, 2022 (Tr. pp. 537-544).

[6] The transcripts from the conferences and impartial hearings in this matter were consecutively paginated for the following dates: June 22, 2022, August 8, 2022, August 12, 2022 and August 31, 2022, but the pagination started anew for the October 14, 2022 impartial hearing; therefore, transcript citations in this decision relating to the October 14, 2022 impartial hearing will be preceded by reference to the date (i.e., "Oct. 14, 2022 Tr. pp. 1-113").

educational performance denied the parents the opportunity to meaningfully participate in the CSE process.

In an answer, the district denies the material allegations contained in the request for review and asserts that the IHO's decision should be upheld in its entirety. Additionally, the district argues that the parent's request for review fails to comply with the practice regulations governing appeals to the Office of State Review. The district also argues that claims that the June 2021 failed to offer the student a FAPE are barred by res judicata.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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. Scope of Review

The parent's claims in this appeal essentially distill to his belief that the student's results on the May 2021 administration of the NYSAA should have been obtained and used in the development of an IEP for the student for the 2021-22 school year. As a result, the parent asserts

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

that the student's present levels of educational performance, and by extension the student's annual goals, were not properly developed for the 2021-22 school year. In a prior impartial hearing, the parent challenged the June 2021 CSE and IEP, but, in that prior matter, the IHO found that the parent's claims were without merit and that the June 2021 IEP offered the student a FAPE for the 2021-22 school year; the IHO's determination was upheld on appeal (see Application of a Student with a Disability, Appeal No. 22-010). In its answer, the district correctly asserts that any claims directed at the June 2021 CSE and IEP would be barred by the doctrine of res judicata.[8] However, the parent's claims, while perhaps not clearly articulated as such, focus on the lack of a CSE meeting subsequent to the district's alleged receipt of the student's NYSAA scores as early as July 2021, after the June 2021 CSE meeting which was the subject of the prior matter, but before the meeting that ultimately occurred to review the NYSAA results in April 2022. Accordingly, the first issue to examine is whether the district had an obligation to convene the CSE during the 2021-22 school year, prior to April 2022.

The parent's challenges to the April 2022 CSE and IEP are less clear, except with respect to the allegation that the district denied the parents the opportunity to participate in the meeting. The parent takes issue with the IHO's findings that the April 2022 CSE convened to review the NYSAA results and updated the student's present levels of performance; however, in articulating the grounds for his disagreement, the parent focuses the district's failure to utilize the NYSAA to modify the present levels of performance or annual goals "for the 2021-22 academic year" and indicates that the April 2022 CSE meeting "was entirely irrelevant" insofar as it could not "meaningfully impact[]" the goals and instruction delivered to the student during the 2021-22 school year, which again seems to harken back to the allegation that the CSE should have convened earlier but perhaps also includes an allegation that the April 2022 CSE should have further amended the student's IEP for the 2021-22 school year as a result of the student's NYSAA results. In any event, as discussed further below, the parent does not allege with any particularity what substantive changes he believes should have been made to the student's IEP(s), including the present levels of performance, annual goals, or programming recommendations, based on the NYSAA results and does not allege that the present levels of performance, annual goals or programming recommendations included in the April 2022 IEP were otherwise inappropriate.[9]

B. Obligation to Reconvene the CSE

As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's

[8] Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]).

[9] The parent also does not challenge the IHO's finding that, in May 2021, the district properly administered the NYSAA testing for the student (IHO Decision at p. 14). Accordingly, that determination has become final and binding on the parties and will not be further reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]). However, there is no requirement that a CSE reconvene "whenever additional information comes to its attention" (MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *12 [S.D.N.Y. Dec. 21, 2020]).

Here, the CSE chairperson testified that the student's annual review was required to be held prior to the July 2021 distribution of the results of the NYSAA (i.e., in June 2021), as the student was a 12-month student (Tr. p. 123). According to the assessment coordinator manual for the 2020-21 administration of the NYSAA, individual student score reports become available to the State assessment administrator "in mid-June to mid-July, depending on when each [S]tate's spring assessment window closes" (Parent Ex. B at pp. 1, 34). As indicated above, correspondence between the student's mother and NYSED revealed that school districts were provided access to the results of the May 2021 administration on July 27, 2021 (Parent Ex. D at p. 1). Nevertheless, the CSE chairperson testified that it was the district's past practice to wait for the State to notify it that the reports were available before logging into the system to access them (Tr. pp. 141-43).

The CSE chairperson also testified that "[she] believe[d]" the district received the results of the May 2021 administration of the NYSAA either at the "end of January or the beginning of February" 2022 (Tr. p. 117). She testified that, on February 17, 2022, she uploaded the NYSAA results to a repository that was accessible to all CSE members (Tr. pp. 144-45). However, on cross-examination the CSE chairperson acknowledged that the NYSAA results were electronically available to the district "in the educator portal" at the "end of July, beginning of August" 2021 (Tr. pp. 141-43).

With regard to review of the NYSAA results, the CSE chairperson testified that it was not always necessary to convene a CSE to review NYSAA results (Tr. p. 122). She further testified that the results could be reviewed at a team meeting and that the teacher "has access to the learning profile in the educator portal" and could review the results for the purpose of developing lessons and assessing the student (Tr. p. 122). Additionally, the CSE chairperson testified that, "[i]f the team fe[lt] that . . . these results [we]re going to have a significant impact on goals or what the student's needs [we]re, then a CSE w[ould] be held" (id.).

In an email to the district, dated February 14, 2022, the student's mother indicated that the student's results on the NYSAA administration had been available to the district since July 2021 and that the CSE chairperson had withheld the results and further prevented the CSE "from consideration and meaningful input" (Parent Ex. C at pp. 1-2). The student's mother further stated that she was "aga[i]n requesting a CSE for the review of [the student]'s [NYSAA] testing results

and learning profile" (id. at p. 2). During the April 2022 CSE meeting, the student's mother stated that she had "asked more than 15 times for a CSE to review" the results of the student's NYSAA results and that her requests had been denied (Dist. Ex. 1e at p. 55). When asked what precipitated the scheduling of the April 2022 CSE meeting, the student's mother testified that she "was requesting, begging . . . for a meeting" (Tr. pp. 524-25).

On cross-examination, the CSE chairperson denied that the parent had begun requesting a CSE meeting to review the student's NYSAA results in September 2021 (Tr. p. 126). According to a prior written notice dated April 7, 2022, the April 2022 CSE "met on parent request to review [the student's] 2020-21 NYS Alternate Assessment results" (Dist. Ex. 1a at p. 1). The CSE chairperson also testified that the April 2022 CSE convened at the request of the student's mother for the purpose of reviewing the NYSAA results and the student's present levels of educational performance (Tr. pp. 88-89).

None of the legal authority set forth above requires a district to convene a CSE within a specified period of time upon receipt of results of administration of the NYSAA (see MN, 2020 WL 7496435, at *12). Accordingly, even assuming that the district had the results of the NYSAA available to it, there is no requirement in law or regulation that the district immediately convene the CSE to review the results. The parent asserts that the student's mother made many requests that the district convene the CSE to review the student's NYSAA results to no avail. While the hearing record indicates that the mother made many requests to obtain the results of the NYSAA (see, e.g., Parent Ex. D), there is only one written request for the district to convene the CSE in the hearing record, which is an email dated February 14, 2022 (Parent Ex. C at p. 2), and, as noted, the CSE chairperson denied that the parent requested a meeting beginning in September 2021 (Tr. p. 126).[10] Accordingly, the weight of the evidence does not support the parent's claim that the district failed to convene the CSE earlier than April 2022 despite the parent's request. Further, during the 2021-22 school year, the district did not make any new decision with respect to the provision of a FAPE to the student and did not attempt to implement a change in the student's placement in a manner that would have required a new CSE meeting. To the extent the results of the NYSAA results constituted new information about the student, the CSE was required to review it at its annual or periodic review and revise the IEP at such review only "as appropriate" (see 20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see also Kings Local School Dist., Bd. of Educ. v. Zelazny, 325 F.3d 724, 731 [6th Cir. 2003] [noting that "[t]he federal courts have said little on the failure to revise programs, but the school district is required to revise the programs as appropriate"]).

On the whole, the hearing record does not indicate that the CSE was required to reconvene a CSE meeting earlier than April 2022 and, even if the district was procedurally obligated to reconvene the CSE earlier during the 2021-22 school year, the hearing record also does not support

[10] It is also unclear if the parent counts the mother's requests for "a parent/teacher meeting" as among the purported several requests for a CSE meeting (see Tr. pp. 505-06). In particular, the student's mother testified that, in early March, she "asked for a parent/teacher meeting on probably five different occasions just for the purposes of reviewing [the student]'s educational result" but that she "wasn't asking for a CSE" meeting at that time (Tr. pp. 504-06). She further indicated that, before the CSE meeting was scheduled, the CSE chairperson "attempted to have a team meeting for the purposes of reviewing those results, which [she] definitely rejected as that was not an appropriate platform for reviewing new alternate assessment testing results" and amending an IEP (Tr. pp. 506-07).

a finding that the failure to do so in this instance (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 (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). That is, as set forth below, the hearing record does not indicate that, had the CSE reviewed the NYSAA results earlier, it would have warranted a revision to the student's IEP. Nor does a review of the April 2022 CSE meeting and IEP indicate that the district denied the student a FAPE as a result of the manner in which it incorporated the NYSAA results into the IEP present levels of performance or in its determinations with regard to the annual goals.

C. Consideration of Alternate Assessment Results

As noted above, on appeal, the parent does not focus his challenges on the April 2022 IEP, targeting instead the alleged delay in the CSE's consideration of the student's NYSAA results, arguing that, for the entirety of the 2021-22 school year, the student's present levels of performance and annual goals were deficient given that the NYSAA tests were not taken into consideration in their development. The timing of the CSE's consideration of the NYSAA results is discussed above. The following discussion of the impact of the NYSAA results on the student's present levels of performance and annual goals demonstrates that any delay in the consideration of the results did not result in a denial of a FAPE, and further that, once considered, the April 2022 CSE sufficiently incorporated the results.

Initially, there is no merit to the parent's view that "'alternate assessment testing' is the only recognized assessment methodology designed for purposes of ascertaining an 'alternately assessed student's' academic [present levels of educational performance]" (Parent Mem. of Law at p. 9). Rather, any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a][1]-[2]; 8 NYCRR 200.4[d][2]). While not explicitly required by federal regulation (see 34 CFR 300.324[a][1]-[2]), State regulation provides that a CSE's review of the student's academic, developmental and functional needs of the student should include "as appropriate, the student's performance on any general State or districtwide assessment programs" (8 NYCRR 200.4[d][2] [emphasis added]).

A CSE's failure to consider results of alternate assessment testing in the development of an IEP is, at most, a procedural violation (K. v. Westhampton Beach Sch. Dist., 2021 WL 4776720, at *8 [E.D.N.Y Oct. 11, 2021]). In a decision arising from a matter involving this same student, the United States District Court for the Eastern District of New York held that, in light of evidence that the CSE considered other information, including input from the parents, that the parent did not otherwise articulate a specific disagreement with the present levels of performance, and that the alternate assessment results were described as of limited valuing, the failure to consider

alternate assessment results did not rise to the level of a denial of a FAPE (K., 2021 WL 4776720, at *8-*9).[11]

Here the hearing record shows that the April 2022 CSE had available verbal reports from an educational consultant, the parents, and the student's teacher, a March 2022 progress report, and cognitive, language, academic and behavioral testing results from 2019 and 2018, as well as the NYSAA results (Dist. Exs. 1a at pp. 1-2, 4-7; 1e). The March 2022 progress report described the student's progress towards his annual goals and short-term objectives in writing, reading, and mathematics (id. at pp. 1-2). During the April 2022 CSE meeting, the special education teacher discussed the student's progress during the 2021-22 school year (Dist. Ex. 1e at pp. 11-23).

At the start of the April 2022 CSE meeting the CSE chairperson stated that the focus of the meeting was on the NYSAA results and that all of the CSE members had access to and had read the NYSAA results (Tr. p. 242; Dist. Exs. 1 at p. 5; 1e at pp. 7-8). Further, the hearing record reflects that the CSE chairperson reviewed the results of the NYSAA at the April 2022 meeting and that the results were included in the April 2022 IEP and the April 2022 prior written notice (Dist. Ex. 1e at pp. 9-10; see Dist. Ex. 1a at pp. 1-2, 7-10).

Concerning the relative importance of the NYSAA results to the overall evaluation of the student, the CSE chairperson testified that there were many types of assessments that could be used and that are used by the CSE, noting that the alternate assessment was only one piece of information, which was only administered once while a student was in high school (Tr. pp. 93-95). The CSE chairperson stated that the NYSAA results were "more geared towards the teachers and providing information to the teachers to utilize this information in lesson planning and in setting goals for the student" and then the CSE chairperson asked the special education teacher to "talk a little about how [NYSAA's] essential elements are reflected in the lesson planning that she is doing" (Dist. Ex. 1e at pp. 8-9).[12, 13] The CSE chairperson testified that there were "many, many

[11] The court also rejected the parent's related positions that the district was required to educate the student pursuant to the general education curriculum and align annual goals with grade-level learning standards (K., 2021 WL 4776720, at *10-*12).

[12] The Dynamic Learning Maps Assessment Coordinator Manual for 2020-21 defines essential elements as follows:

> Essential Elements are the content standards used for assessment for students with the most significant cognitive disabilities. Essential Elements are reduced in depth, breadth, and the level of complexity, and they build a bridge from the content in the grade-level standards to academic expectations. They are specific statements of knowledge and skills linked to the grade-level expectations identified in K-12 grade-level standards for English language arts and mathematics. Essential Elements are linked to the National Research Council's Framework for K-12.

(Parent Ex. B at p. 38).

[13] Specific information about the curriculum or content that a teacher would use to instruct a student is the sort of information that would more appropriately be found in a teacher's lesson plans, rather than in an IEP (see Opportunity To Examine Records; Parent Participation in Meetings, 71 Fed. Reg. 46,689 [Aug. 14, 2006] [explaining a change of language in 34 CFR 300.501[b][3] in order to avoid the impression "that teaching

pieces of information" that were used to inform a student's goals, present levels, strengths and needs (Tr. p. 93).

During the CSE meeting, the parents requested that the CSE compare the student's "seventh, eighth, [and] ninth grade alternate testing" results to the NYSAA results to see if an analysis could be made to see if the student was progressing or regressing (Dist. Ex. 1e at p. 31). During the impartial hearing, the CSE chairperson explained that the comparison might not yield useful information insofar as the middle school testing was on different "bands" than high school testing but noted that the CSE members were able to review all of the alternate testing results "and maybe comment on if there was anything significant that would show progression or regression" (Tr. pp. 136-37). However, the CSE chairperson opined that the most important thing that happened at the meeting was that the special education teacher "confirmed the testing results . . . based on [the student's] present levels of performance" (Tr. p. 137).

With respect to the student's academic achievement, functional performance, and learning characteristics, as well as his social and physical development, the April 2022 IEP included the same information contained in the June 2021 IEP (compare Dist. Ex. 1b at pp. 6-7, with Dist. Ex. 1a at pp. 7-9). The present levels of educational performance identified student needs in the areas of reading including answering open ended questions and making inferences; mathematics including multiplication and adding and subtracting decimals; writing including developing paragraphs and using punctuation; fine motor skills including in-hand manipulation and bilateral skills; expressive and receptive language including social/functional communication, fluency, and speech intelligibility; motor development including strength and agility, coordination, balance and motor planning; and noted that the student benefitted from the use of visual cues, prompts, manipulatives and sentence starters (Dist. Ex. 1a at pp. 8- 10).

Additionally, the April 2022 IEP present levels of educational performance were amended to include the results from the student's NYSAA results, a March 2022 progress report, and verbal reports from the student's educational consultant, special education teacher, and parents (Dist. Ex. 1 at p. 15; compare Dist. Ex. 1b at pp. 6-7, with Dist. Ex. 1a at pp. 7-9). The April 2022 IEP included the results of the NYSAA indicating that the student was performing at level three (at target) in English/language arts (ELA) and mathematics and at level two (approaching the target) in science (Dist. Ex. 1a at p. 7; see Dist. Ex. 1e at pp. 9-10).[14]

In the area of reading, the present levels of educational performance stated that, according to the results of the NYSAA in ELA, the student's understanding of and ability to apply content knowledge and skills represented by the essential elements was "at target" (Dist. Ex. 1a at p. 8). It was reported that the student demonstrated the ability to identify descriptive words, cite textual

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methodologies and lesson plans must be included in the IEP"]; see also Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *6 [E.D. Wash. Nov. 3, 2014] [finding that "[a]n IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided"]).

[14] The CSE chairperson explained during the April 2022 meeting that the NYSAA used four performance categories to assess a student's mastery level: emerging, approaching the target, at target, and advanced (Dist. Ex. 1e at pp. 9-10).

evidence for inferred information, identify details relevant to the topic of text, identify key details, understand difference of perspective, understand subgroups within categories, identify the beginning and end of a story, determine which events come first, use letters to create works, and produce a two-word message (id.). In the area of writing, the April 2022 IEP's present levels of educational performance stated that, according to the results of the NYSAA in ELA, in essential elements for writing, the student was able to respond to yes/no questions and identify functional words to describe nouns (id.).

Regarding math, the IEP's present levels of educational performance stated that, according to the results of the NYSAA in mathematics, the student's understanding of and ability to apply content knowledge and skills represented by the essential elements was "at target" and that the student knew place value, could combine and partition sets, and recognized a unit, tens and ones, and objects that were the same and different (Dist. Ex. 1a at p. 8).

The April 2022 IEP contained 18 annual goals with accompanying short-term objects which targeted the student's identified areas of need (compare Dist. Ex. 1a at pp. 7-10, with Dist. Ex. 1a at pp. 12-17). The annual goals in the April 2022 IEP mirrored those set forth in the June 2021 IEP (compare Ex. 1a at pp. 12-17, with Dist. Ex. 1b at pp. 10-15). Consistent with State regulations each annual goal included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 1a at pp. 12-17).

The hearing record shows that the April 2022 CSE reviewed and discussed the student's work and progress on his then-current annual goals and their relationship to NYSAA's essential elements (Dist. Ex. 1e at pp. 11-24). During the April 2022 CSE meeting, the CSE chairperson stated that, over the years, the student's educational consultant "worked with the teacher before to develop both the IEP, the [present levels of educational performance] and the goals and [that] the goals [we]re derived from the essential elements" (id. at p. 42).

At the April 2022 CSE meeting, the CSE chairperson stated that, as the committee reviewed the NYSAA results, if the information "applie[d] to the goals," changes could be made (Dist. Exs. 1 ¶ 16; 1e at p. 8). The CSE chairperson testified that, at the April 2022 CSE meeting, "there was no discussion about any goals needing to be amended, so we did not amend the goals" (Tr. pp. 179-80).

As noted above, the evidence in the hearing record does not demonstrate that the district committed a procedural violation by failing to convene the CSE to review the NYSAA results earlier during the 2021-22 school year. Further, the hearing record shows that, when it did convene, the April 2022 CSE reviewed the NYSAA results consistent with the parent's request and the requirements of State regulation (see 8 NYCRR 200.4[d][2]). Moreover, even if the district committed a procedural violation related to the timing or degree of the CSE's consideration of the NYSAA results, the parent has not alleged in any particularity what substantive changes to the IEP the review of the NYSAA results would have warranted. Specifically, the parent fails to assert on appeal what particular aspects or areas of the student's special education needs as described in the present levels of performance were inadequately represented due to the CSE's failure to include additional NYSAA testing results or analysis, especially given the CSE's ultimate inclusion of the high-school level NYSAA results in the April 2022 IEP in tandem with its decision at that time to continue to recommend that same annual goals and programming for the student. Based on the

foregoing, there is no merit to the parent's claim that the district failed to offer the student a FAPE for the 2021-22 school year.

D. April 2022 CSE—Parent Participation

As a final matter, the parent argues in the request for review that the IHO's determination that the parents were afforded meaningful participation in the April 2022 CSE "misses the point" and alleges that the response of the CSE chairperson to the parent's "inquiries during the April 7 CSE was merely to assert that such inquiries were not relevant" (Req. for Rev. at p. 9).

With regard to 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 & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], 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]).

In this matter, the parents were present at the April 2022 CSE meeting (see Dist. Ex. 1e). The details of the discussions held at the meeting are summarized in more detail above. Generally, the April 2022 CSE meeting minutes and the April 2022 IEP reflect the parents' input regarding the student's NYSAA results, their request that the student join the district's general education curriculum, and the parents' statements that all of the student's cumulative NYSAA results should be reviewed together to revise the student's present levels of educational performance (see Dist. Ex. 1e; 1a at p. 9). The parent takes issue with the manner in which the CSE chairperson limited the agenda for the April 2022 CSE meeting and "abruptly terminat[ed] the meeting" without a discussion of the student's annual goals or programming (see Parent Mem. of Law at p. 7). While the CSE chairperson may have been somewhat rigid in her adherence to the stated agenda for the April 2022 CSE meeting, review of the hearing record shows that the parents were not prevented from contributing to the discussion and that they did in fact contribute to the amendments made to

the student's IEP. The parent may have hoped that the CSE's review of the NYSAA results would have a greater impact on the educational planning for the student; however, as discussed above, the CSE met its obligation to review the information and determined that it did not warrant substantive changes to the student's IEP annual goals or programming. There is no evidence in the hearing record that the information before the April 2022 CSE warranted a different outcome and, as noted above, the parent has not specifically challenged the overall appropriateness of the April 2022 IEP.

VII. Conclusion

Based on the foregoing, there is no merit to the parent's claim that the district failed to offer the student a FAPE for the 2021-22 school year based on the timing or sufficiency of the CSE's review of the student's NYSAA results. In light of this determination, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 18, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER