



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-124

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

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Kerry McGrath, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Bulban Salim, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered appropriate educational programming to their son and denied their request to be reimbursed for their son's tuition costs at The Gateway School (Gateway) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of this matter is presumed and will not be recited in detail here. Briefly, the student received speech-language therapy in preschool due to articulation difficulties and attended a nonpublic general education kindergarten program during the 2018-19 school year (Parent Ex. E at p. 2; *see* Apr. 26, 2023

Tr. pp. 22, 32).¹ The student experienced "several instances of social conflict," struggled with reading and writing, and the district conducted an evaluation of the student in summer 2019 (Parent Ex. E at pp. 2-3). During the 2019-20 school year (first grade), the student began receiving occupational therapy (OT) due to sensory regulation and fine motor needs, and reports indicated he continued to struggle academically (id. at p. 3). A neuropsychological evaluation of the student, conducted in October 2019, indicated that he demonstrated strong cognitive skills (high average range) "coupled with difficulties in expressive language, grapho-motor efficiency, reading, writing, and self-regulation" (id. at p. 15). At that time, the student received diagnoses of attention deficit hyperactivity disorder (ADHD), combined presentation, and specific learning disorder with impairment in reading (id. at p. 17).

At the start of the 2020-21 school year (second grade), the student continued to attend the nonpublic school and received speech-language therapy and OT (Dist. Ex. 5 at p. 1). Reports indicated that the student struggled in the classroom and required 1:1 support to grasp some of the academic concepts taught (id. at p. 4). In January 2021 the student began attending Gateway, where he continued for the remainder of second grade and the 2021-22 school year (third grade) (Parent Ex. N ¶ 19).^{2, 3}

On February 12, 2022, the parents entered into a contract with Gateway for the student's enrollment for the 2022-23 school year (see Parent Ex. G).

In a decision dated May 29, 2022, an IHO in a prior matter determined that the district denied the student a free appropriate public education (FAPE) for the 2020-21 school year, that Gateway was an appropriate unilateral placement for the student, and that equitable considerations favored the parents' request for tuition reimbursement at Gateway for the portion of the 2020-21 school year he attended Gateway (see Parent Ex. C).

The CSE convened on July 20, 2022, and determined the student was eligible for special education as a student with a learning disability (Dist. Ex. 1 at pp. 1, 32).⁴ For the 10-month 2022-23 school year, the CSE recommended that the student receive integrated co-teaching (ICT) services, special education teacher support services (SETSS), counseling, OT, and speech-language therapy (see Dist. Exs. 1; 2). By letter dated August 5, 2022, the district notified the parents of the public school site the student was assigned to attend (Dist. Ex. 4).

¹ The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the proceedings and the page number, such as "Apr. 26, 2023 Tr. p. 1."

² The hearing record includes an unsworn affidavit from the director of academic support at Gateway (director) (see Parent Ex. N at pp. 1, 10). At the April 26, 2023 hearing, the director swore that the testimony provided in her affidavit was truthful (Apr. 26, 2023 Tr. pp. 9-11).

³ The Commissioner of Education has not approved Gateway as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

In a letter dated August 22, 2022, the parents informed the district of their disagreement with the recommendations contained in the July 2022 IEP, as well as with the assigned public school site and, as a result, notified the district of their intent to unilaterally place the student at Gateway for the 2022-23 school year and seek funding for that placement from the district (see Parent Ex. B). The student attended Gateway during the 2022-23 school year (fourth grade) in a class of seven students and two teachers (see Parent Exs. I; M; N ¶ 22).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year on procedural and substantive grounds (see Parent Ex. A). The parents raised allegations related to the evaluative information relied on by the July 2022 CSE; the parents' participation in the development of the IEP; the present levels of performance; the recommended management needs, annual goals, and program consisting of ICT services, SETSS, and related services; and the assigned public school site (id. at pp. 3-4).

The parents asserted that the student's unilateral placement at Gateway was appropriate to meet his needs and that there were no equitable considerations that would bar funding for that placement (Parent Ex. A at p. 4). To resolve the due process complaint notice, the parents requested that the district fund the student's placement at Gateway for the 2022-23 school year and transportation to and from that placement (id.).

B. Impartial Hearing Officer Decision

A prehearing conference convened on December 7, 2022, status conferences convened on January 5, 2023, January 24, 2023, and February 28, 2023, and hearings on the merits convened on March 20, 2023, March 28, 2023, March 31, 2023, and concluded on April 26, 2023 after eight total days of proceedings before an IHO from the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-249). In a decision dated May 19, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, addressing issues related to the procedures followed by the CSE, the composition of the CSE, the evaluative information relied on by the CSE, the credibility of the district witnesses, the support in the hearing record for finding the recommendation for ICT services in a general education class with SETSS, as well as the recommended management needs was appropriate, in addition to arguments related to the peer grouping at the assigned school and the projected number of students who would be in the student's class (IHO Decision at pp. 14-20). The IHO also determined that the district's failure to respond to a list of questions regarding the assigned school did not result in a denial of FAPE because the parents were provided with sufficient information about the school to make a placement decision (id. at pp. 19-20). The IHO then determined she "need not reach the issues" of whether Gateway was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (id. At p. 20). The IHO denied "any relief not specifically

discussed in this decision" and dismissed with prejudice "all the [p]arents' remaining claims not discussed herein" (*id.*).⁵

IV. Appeal for State-Level Review

The specific details of the parents' arguments in the parents' amended request for review are familiar to the parties and will not be repeated here in detail, but will be discussed in more detail below as part of the analysis of the issues to be addressed on appeal.⁶ The gravamen of the parents' appeal is that the IHO erred in determining that the district offered the student a FAPE for the 2022-23 school year, identifying the IHO's credibility findings as to the district school psychologist, the evaluative information considered by the July 2022 CSE, and the recommended annual goals, management needs, and placement including ICT services and SETSS, as well as the assigned public school, as issues to be addressed on appeal.⁷ The parents also asserted that the IHO erred in failing to determine that Gateway was an appropriate unilateral placement for the student and equitable considerations favored the parents. In an answer, the district asserts that the IHO correctly determined that it offered a FAPE to the student for the 2022-23 school year and that the assigned public school could have implemented the student's IEP, and also argues that Gateway was not an appropriate unilateral placement for the student.

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

⁵ I note that a district pendency implementation form indicated that the student's pendency program in this proceeding, commencing with the September 8, 2022 due process complaint notice, arose from the May 29, 2022 unappealed findings of fact and decision, which awarded the parents tuition reimbursement at Gateway (Parent Ex. D; see Parent Ex. C). Accordingly, it appears the parent is already entitled to full or close to full funding of the costs of the student's tuition at Gateway for the 2022-23 school year under pendency.

⁶ In letters dated June 28, 2023 and July 5, 2023 counsel for the parents requested an extension of time to amend the request for review, which the Office of State Review granted by letter dated July 5, 2023. The Office of State Review received the parents' amended request for review on July 14, 2023.

⁷ As the parents are appealing from an adverse finding of the IHO regarding FAPE, the parents' appeal is limited to the issues identified by the parents in the amended request for review (8 NYCRR 279.8[c][4] ["any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

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 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. Preliminary Matter–Credibility Determination

The parents assert on appeal that the IHO erred in finding the district school psychologist to be credible and sufficiently qualified and experienced to express the opinions proffered regarding the student's program and failed to consider the "inconsistencies with [the school psychologist's] testimony."

Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record,

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).

read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260–61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

The parents' complaints on appeal about the school psychologist's testimony include that he made factual errors (incorrectly identifying the student's classification type and inaccurately identifying the student's reading level), that he did not personally know the student and could not testify from memory, and that he testified telephonically (therefore could not be seen, at times his voice was muffled, and he reviewed the student's IEP "without permission" while testifying).⁹

Generally, review of the school psychologist's testimony shows that there were some difficulties in the sound quality, as the IHO asked the witness to "speak up and just clearer," "so that the record [could] be accurate" due to possible background noise and the parent's attorney also commented that she was "having a hard time understanding some of the responses" (see Mar. 28, 2023 Tr. p. 7, 15; Mar. 31, 2023 Tr. pp. 33, 35, 45).

The school psychologist testified that he had not ever met or conducted any assessment of the student (Mar. 31, 2023 Tr. p. 37). However, the school psychologist participated in the July 2022 CSE meeting as the district school psychologist and district representative (Tr. p. 8; Dist. Ex. 1 at p. 35).

With respect to the parents' allegation that the school psychologist could not testify from memory, review of the transcript shows that when asked about the specifics of the July 2022 CSE meeting, the school psychologist began responding and the parents' counsel requested that the witness "clarify" what he was looking at (Mar. 28, 2023 Tr. p. 10). On occasion the witness was reminded to let the parties know what document he was referring to, or he asked permission to review the IEP (see Mar. 28, 2023 Tr. pp. 11-12, 13-14, 17-18).

During cross-examination of the school psychologist, counsel for the parents requested that the witness "testify from [his] memory" and proceeded to ask questions about the student's age, classification category, diagnoses, recommendations from the 2019 neuropsychological

⁹ The parents also allege that there were "obstructions" during the school psychologist's testimony, including that the district's attorney "cut off" the witness' answer and on another occasion, answered for the witness. However, neither of these examples relate to the IHO's finding regarding credibility or non-testimonial evidence.

evaluation report, and what the student's needs were (Mar. 31, 2023 Tr. pp. 35-36, 37, 42-43, 49-53). With respect to the two inaccuracies in the school psychologist's testimony specifically pointed out by the parents in the request for review, in both instances counsel for the parent specifically requested that the witness testify based on his memory as to information that was readily available within the exhibits and shortly after each answer, the witness indicated he would only be able to answer the questions fully by looking at the exhibits to refresh his memory (Mar. 31, 2023 Tr. pp. 37, 51-52). The school psychologist testified that he participated in approximately 300 CSE meetings per year and asked that he be allowed to refer to the evidence disclosure to ensure that he answered accurately (Mar. 31, 2023 Tr. pp. 36, 42-43, 49-53). When asked whether it was difficult to remember all of the meetings he participated in, the school psychologist responded that it was "[n]ot when I have the documents in front on me," but that he was not able to recall all of the information asked from memory (Mar. 31, 2023 Tr. p. 37).

Here, the parents do not identify any non-testimonial evidence in the hearing record that would overcome the deference generally afforded to an IHO's assessment of a witness's credibility. Instead, they object to the IHO crediting and relying, in part, on the school psychologist's testimony in making her FAPE determination despite the school psychologist's need to refresh his recollection by referring to documents in evidence and a lack of personal familiarity with the student. Such argument however, while couched in terms of credibility, more accurately represents a disagreement with how much weight the IHO ultimately gave to the school psychologist's testimony in the context of her overall evaluation of the evidence in the hearing record. Relatedly, to the extent the parents also argue that the IHO relied on the school psychologist's testimony in lieu of relying on the evidence which they assert shows that the district did not offer an appropriate program, a review of the IHO's decision shows that the IHO cited to documentary evidence in her recitation of factual information and in her FAPE analysis, in conjunction with but not solely based on the school psychologist's testimony (IHO Decision at pp. 7-9, 14-18). Therefore, review of the hearing record does not afford a basis to overturn the IHO's finding that the district school psychologist was a credible witness, and, as discussed below, review of the documentary evidence in the hearing record, along with the testimony of the school psychologist, supports both the IHO's reasoning based on her weighing of the totality of the evidence contained in the hearing record and her finding that the district offered the student a FAPE.

B. July 2022 CSE Process—Evaluative Information

The parents assert that the IHO erred in finding that the district followed "proper procedures," in evaluating the student as the hearing record established that the district failed to evaluate the student in the last three years and the July 2022 CSE failed to review the student's 2019 and 2020 neuropsychological evaluations. As noted above, when 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). However, under some circumstances, the cumulative impact of procedural violations may result in a denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New

York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2nd Cir. 2017] [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

Turning to the issues raised about the evaluative information, regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

First, the parents are correct that the evidence in the hearing record does not show that the district has conducted a reevaluation of the student since summer 2019 (see Parent Exs. A-R; Dist. Exs. 1-10). However, despite this procedural violation, the parents' assertion on appeal that the July 2022 IEP was not based on the most recent evaluative information is not supported by the evidence. Specifically, the IEP referred to test scores obtained from an administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) as reported in October 2019, and teacher, counseling, and speech-language reports (Dist. Ex. 1 at p. 1; see Parent Ex. E at p. 22). CSE meeting minutes indicated that the Gateway director who participated during the meeting "referred to teacher report to discuss all subjects" (Dist. Ex. 2 at pp. 1, 2). The prior written notice arising from the July 2022 CSE meeting indicated that the CSE relied on the December 2020 social history update and "[s]chool [r]eports" dated the day of the meeting (Dist. Ex. 3 at p. 2).

The hearing record contains the October 2019 neuropsychological evaluation report, a December 2020 social history update, a spring 2022 Gateway counseling report, a May 2022

Gateway speech-language report, and a June 2022 Gateway teacher report (Dist. Exs. 5; 6; 7, 8; Parent Exs. E; J; K; L).¹⁰ Review of the July 2022 IEP shows that the CSE incorporated information from the October 2019 neuropsychological evaluation and the 2022 Gateway reports into the student's present levels of performance. Specifically, the IEP reflected that the student's cognitive skills as measured in July and August 2019 were in the average to high average range, with verbal comprehension skills in the very superior range (compare Dist. Ex. 1 at p. 1, with Parent Ex. E at p. 22). Regarding academic skills, the IEP reflected information about the student's present levels of performance directly from the June 2022 teacher report, including proposed annual goals (compare Dist. Ex. 1 at pp. 1-5, with Parent Ex. J at pp. 1-5). The IEP speech-language present levels of performance also included information directly from the May 2022 speech-language report, including proposed annual goals (compare Dist. Ex. 1 at pp. 5-6, 20-23, with Parent Ex. K at pp. 1, 3). With respect to the student's social/emotional functioning, the IEP present levels of performance reflected information directly from the spring 2022 counseling report and included some of the proposed counseling goals (compare Dist. Ex. 1 at pp. 6, 16-20, with Parent Ex. L). Regarding the student's physical development, the IEP reflected that the student had received a diagnosis of ADHD, fully participated in his physical education program, and wore glasses as documented in the October 2019 neuropsychological evaluation report and discussed during the CSE meeting (compare Dist. Ex. 1 at p. 7, with Parent Ex. E at pp. 2, 17, and Dist. Ex. 2 at pp. 3-4). The rationale for and the recommendations in the IEP that the student continue to receive speech-language therapy, counseling and OT were taken from the June 2022 teacher report (compare Dist. Ex. 1 at pp. 6, 7, with Parent Ex. J at p. 6). Many of the student's management and learning styles identified in the June 2022 teacher report were reflected in the IEP (compare Dist. Ex. 1 at p. 7, with Parent Ex. J at pp. 5, 6). Further, the July 2022 IEP included the parents' concerns and additional information about the student that was discussed during the CSE meeting (compare Dist. Ex. 1 at pp. 6, with Dist. Ex. 2 at pp. 2, 3).

Next, regarding the parents' allegation that the July 2022 CSE failed to review the 2019 and neuropsychological evaluation, the district school psychologist who participated in the July 2022 CSE meeting and also served as the district representative testified that the CSE reviewed, among other documents described above, "valid" cognitive scores from the 2019 neuropsychological evaluation provided by the parents (Mar. 28, 2023 Tr. pp. 6, 9-11; Dist. Ex. 1 at p. 34). Administration of the WISC-V to the student in July and August 2019 yielded the following index standard scores: verbal comprehension 130 (very superior), visual spatial 119 (high average), working memory 110 (high average), fluid reasoning 106 (average), processing speed 103 (average) and full scale IQ of 119 (high average) (Parent Ex. E at p. 22). Subtest WISC-V scores were all in the average to very superior range (id.). The school psychologist testified that at the time of the July 2022 CSE meeting, the cognitive portion of the 2019 neuropsychological evaluation "was still valid" and although the student may have been due for "a triennial" evaluation, the CSE was "still able to reference" the 2019 neuropsychological evaluation report and that certain portions "were still meaningful" (Mar. 31, 2023 Tr. pp. 47-

¹⁰ The hearing record contains multiple duplicative exhibits (compare Parent Exs. J, and K, and L, with Dist. Exs. 6, and 7, and 8). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. I remind the IHO that it is her responsibility to exclude evidence that she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][xii][c]).

48). According to the school psychologist, the neuropsychological evaluation report had been previously submitted and "was reviewed in the prior IEP meeting as well" (Mar. 28, 2023 Tr. p. 12).

Last, with respect to the parents' argument on appeal that the July 2022 CSE failed to review a 2020 neuropsychological evaluation, review of the evidence shows that neither party entered that report into the hearing record (see Parent Exs. A-R; Dist. Exs. 1-10). In an affidavit the parent testified that the neuropsychologist who had conducted the student's 2019 neuropsychological evaluation conducted an "updated evaluation in November 2020" (Parent Ex. R ¶ 12). According to the parent, the neuropsychologist reported that the student "had deteriorated since she last evaluated him" and at that time the student received a diagnosis of a learning disability in written expression and was "at-risk" for a learning disability in math (id.). The parent testified that the neuropsychologist stated that the student "required a small, specialized environment to learn with a multi-sensory approach to teaching" and that she emailed the updated report to the district in November 2020 (id.). The parent testified that she had the 2020 neuropsychological evaluation report at the July 2022 CSE meeting and did not recall the CSE discussing it at that time (id. ¶ 15).

Review of the evaluative information available to the July 2022 CSE shows that the CSE was aware of the academic needs the student exhibited during the 2020 neuropsychological evaluation as described by the parents. For example, consistent with the parent's description of the student's written language needs as identified in the 2020 neuropsychological evaluation report, the 2019 neuropsychological evaluation and the June 2022 Gateway teacher report indicated that the student's written language skills were "relatively weak for his grade" and "below grade level" (compare Parent Ex. R ¶ 12, with Parent Ex. E at p. 12, and Parent Ex. J at pp. 2-3). The July 2022 Gateway report described that although the student had "foundational math skills," he made computational errors, needed support for math fact fluency, and supports to solve multi-digit problems, which was in line with his "at-risk" designation stemming from the 2020 neuropsychological evaluation report as relayed by the parent (compare Parent Ex. R ¶ 12, with Parent Ex. J at pp. 3-4). Review of the 2019 neuropsychological evaluation report shows that the neuropsychologist concluded that the student required "a small, supportive classroom," similar to the "small, specialized environment" the parent stated the neuropsychologist recommended in 2020 (compare Parent R ¶ 12, with Parent Ex. E at p. 17). Therefore, even if the parents are correct that the July 2022 CSE did not review the 2020 neuropsychological evaluation report at the CSE meeting, the CSE appeared to have information about the student's written language and math skills, and placement recommendations consistent with what the parent identified from the 2020 neuropsychological update, such that the hearing record does not indicate a review of the 2020 neuropsychological update would have altered the July 2022 CSE's program review or recommendations for the student and accordingly, the lack of review of that evaluation does not rise to the level of a denial of a FAPE.

Under some circumstances, the cumulative impact of procedural violations may result in a denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M., 845 F.3d at 541 [noting that it will be a "rare case where the violations,

when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

In this matter, however, although the district may have committed procedural violations related to the student's evaluations, review of the hearing record shows that the July 2022 CSE had adequate evaluative information about the student's cognitive, academic, social/emotional, and physical development in order to develop the student's IEP. Having found that the above violations did not affect the substantive appropriateness of the July 2022 IEP or deprive the student of an educational benefit and did not significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, there is not a basis for finding that the violations would have cumulatively resulted in a denial of FAPE to the student (see A.M., 845 F.3d at 541). Nevertheless, if it has not already done so, the district should conduct a reevaluation of the student. State regulations require that, as part of a reevaluation, the CSE, with input from the student's parents should "review existing evaluation data" and, on the basis of that review, identify what additional data is needed to determine continuing eligibility for special education programs and services and present levels of academic performance and the related developmental needs of the student, and should administer tests and other evaluative materials to gather the data needed (8 NYCRR 200.4 [b][4], [5][i]-[iii]).

C. July 2022 IEP

Turning to the recommendations contained in the July 2022 IEP, the parents argue that the IHO erred by failing to issue rulings on whether the July 2022 IEP included annual goals that "addressed every area of deficit" and whether the management needs addressed the student's needs. The parents also assert that the IHO erred in finding that the July 2022 CSE's recommendation for ICT services with the additional support of SETSS was a reasonable placement for the student based on the evaluative information available to the CSE.

1. Student Needs

Although the student's present levels of performance as detailed in the July 2022 IEP are not in dispute on appeal, a brief discussion of the student's needs is necessary to evaluate the parents' claims regarding the July 2022 IEP.

As discussed above, the July 2022 IEP reflected WISC-V scores in the average to extremely high range (Dist. Ex. 1 at p. 1). With respect to reading, the IEP indicated that the student's decoding, fluency, and comprehension functioning level according to instructor estimate was in the late second to early third grade range (with supports) (id. at pp. 1-2). The student's identified reading weaknesses included reading multisyllabic words in longer passages, especially in "uncontrolled texts"; managing pacing and intonation; omitting words, misreading suffixes, or confusing vowel sound/spelling patterns in words; and answering implicit questions without direct instruction (id. at pp. 2-3). Regarding writing, the IEP indicated that the student's grammar and syntax, ability and complexity, and organization skills were below grade level (id. at pp. 3-4). According to the IEP, the student struggled with editing and revising his own written work, writing complex sentences without teacher support, and formulating and organizing relevant ideas to compose a cohesive paragraph (id.). In math, the

IEP indicated that the student often rushed through his work and made computational errors due to impulsive responses (id. at pp. 4, 5). The IEP reflected that the student needed support with basic multiplication facts, relied on a multiplication chart, and did not know multiplication or division facts automatically (id. at p. 4). Regarding word problems, the IEP indicated that without steps written out, the student was unable to analyze a word problem to identify which operation to use and required scaffolding to organize his thinking and determine which type of problem he was solving (id. at p. 5).

In the area of speech-language skills, the July 2022 IEP indicated that the student presented with mild articulation errors and at times used an increased speech rate that affected listener comprehension of his speech (Dist. Ex. 1 at pp. 5-6). His ability to participate in sessions was influenced by his emotional regulation and ability to regulate attention to tasks (id. at p. 5). According to the IEP, the student needed speech-language therapy to help him effectively process directions and information, interpret pragmatic situations, and communicate efficiently (id. at p. 6). Regarding social/emotional skills, the IEP indicated that the student's participation in his counseling group was influenced by his ability to sustain attention, frustration tolerance, and regulate emotions (id.). He at times engaged in off-task behaviors and benefitted from adult support and tools to help him maintain focus/participate in group activities (id.). According to the IEP, the student was working on developing ways to effectively engage with peers, and he required support to take others' perspective and manage peer conflict (id.). The student was also working on "moving on" after a conflict with a peer, increasing flexibility, developing social skills, and identifying and expressing emotions (id.). Counseling was needed to help the student cope with social situations that were confusing or difficult to interpret (id.). With respect to physical development, the IEP indicated that the student had received a diagnosis of ADHD for which medication was administered, he fully participated in physical education programming, and his physical development was within normal limits (id. at p. 7). According to the IEP, the student required OT services to help the student effectively process information and self-regulate (id.).

2. Annual Goals and Management Needs

The parents argue on appeal that the IHO failed to determine whether the annual goals included in the July 2022 IEP addressed "every area of deficit" for the student and whether the management needs addressed the student's needs.

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

Review of the July 2022 IEP shows that the CSE developed approximately 21 annual goals to address the student's reading, writing, math, social/emotional, speech-language,

attending, self-regulation, and visual motor skills (Dist. Ex. 1 at pp. 9-26). The IEP contained reading, writing, and math goals, which were taken from the June 2022 Gateway teacher report and directly addressed the academic needs identified in the student's present levels of performance (compare Dist. Ex. 1 at pp. 2-5, 9-16, with Parent Ex. J at pp. 2-5). To address the student's social/emotional needs, counseling annual goals targeted the student's ability to answer group social development questions, demonstrate appropriate turn-taking, report feelings, make comments, answer questions, and complete group tasks with peers consistent with the proposed goals according to the spring 2022 Gateway counseling report (compare Dist. Ex. 1 at pp. 16-20, with Dist. Ex. 8 at pp. 1-2). Regarding speech-language skills, annual goals included in the IEP and consistent with the May 2022 Gateway speech-language report were designed to improve the student's response to inferential questions, ability to identify the main idea in a paragraph, identify perspectives in social scenarios, and demonstrate appropriate conversational skills (compare Dist. Ex. 1 at pp. 20-23, with Dist. Ex. 7 at p. 3). To address the student's need to process information and self-regulate, the CSE developed annual goals for OT to improve the student's vestibular and proprioceptive processing, attention to age-appropriate tasks, and visual motor skills (Dist. Ex. 1 at pp. 7, 24-26). I note that the parents do not identify which, if any, areas of deficit the annual goals do not address, and regardless, an IEP does not need to identify annual goals as the vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011] [noting the general reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]).

As to the parents' claim regarding the management needs included in the July 2022 IEP, the IEP included supports and strategies such as extended processing time, visual and auditory cues, repeated directions, structured and predictable setting, multisensory activities, support needed for executive functioning skills, focus and attention, and multi-step directions, direct instruction, and task breakdown (Dist. Ex. 1 at p. 7). The IEP management needs were consistent with the majority of the supports identified in the June 2022 Gateway teacher report, and responsive to the student's needs identified in the present levels of performance (compare Dist. Ex. 1 at pp. 1-7, with Parent Ex. J at pp. 5, 6). Therefore, review of the IEP annual goals and management needs does not provide a basis for finding that the student was denied a FAPE.

3. ICT Services and SETSS

On appeal the parents assert that the IHO erred in determining that the district developed a reasonably calculated IEP based on the current evaluative information, and "should have found" that a program consisting of ICT services delivered in a class of up to 25 students with five periods of SETSS per week denied the student a FAPE.

State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall

minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

In conjunction with the annual goals and management needs described above, the July 2022 CSE recommended that the student receive 10 periods per week each of ICT services in English language arts (ELA) and math, and 5 periods per week of ICT services in science and social studies (Dist. Ex. 1 at p. 27). Additionally, the CSE recommended five periods per week of direct, group SETSS to be provided in "[c]ore [s]ubjects" (id.). The school psychologist testified that the CSE recommended those services for the student because at the time of the meeting, after assessing the student's skills and his level of functioning, "this was the most appropriate recommendation" (Mar. 28, 2023 Tr. pp. 15-16). According to the school psychologist, "through this comprehensive program . . . with the small group instruction of SETSS . . . this provide[d] ample remediation and intervention support, and as well as the [ICT] services throughout the day" (Mar. 28, 2023 Tr. p. 16). Additionally, the school psychologist explained that small group supports were discussed at the CSE meeting, and therefore the CSE recommended that the student receive SETSS in a small group outside the classroom (Mar. 28, 2023 Tr. pp. 16-17). Further, the school psychologist testified that the student would receive "full-time support in terms of the management needs" (Mar. 28, 2023 Tr. p. 16).

The parents argue on appeal that a program including ICT services was not reasonably calculated because the Gateway teacher report indicated that the student's current class size consisted of 7-12 students and was meeting the student's needs, the neuropsychological evaluations recommended a small class size, and the neuropsychologist testified that an ICT "class" was too large for the student.

The July 2022 IEP indicated that the CSE considered general education and related services only placements, which were rejected as the student "require[d] academic intervention support to meet his learning needs" (Dist. Ex. 1 at p. 34). The school psychologist testified that the July 2022 CSE also considered a 12:1 special class placement, which was ultimately "deemed too restrictive for [the student's] needs" (Mar. 28, 2023 Tr. p. 21; Mar. 31, 2023 Tr. p. 70; Dist. Ex. 1 at p. 34). According to the school psychologist, "it would not be appropriate to place a student such as [the student] with his level of functioning in a special class due to his abilities," as he "would have been taken out of the general education curriculum and . . . placed in a restrictive environment" with students who required " a lot more support" and who were functioning "much, much lower," which "would not be appropriate" (Mar. 28, 2023 Tr. p. 21). He continued that the CSE recommended a program consisting of ICT services and SETSS "to ensure that [the student] would be in a class with his neurotypical peers within the general education curriculum in line with the least restrictive environment, but also ensuring that these, these areas of concern were being addressed" (Mar. 28, 2023 Tr. p. 16). According to the school psychologist, while the 2019 neuropsychological evaluation recommended a "small supportive classroom" it also recommended a placement "with peers of average or above intelligence" who were "acceptable role models," which a general education setting with ICT services provided; a factor that was "especially important" when the CSE made its placement recommendation (Mar. 31, 2023 Tr. pp. 80-82). Further, regarding the 2019 neuropsychological evaluation recommendation for "daily individualized small group instruction" and "behavioral interventions" the July 2022 CSE recommended SETSS, described as a group of five to eight

students, and management needs to address inattentive behavior and executive functioning deficits as described above (Mar. 28, 2023 Tr. pp. 16-17; Dist. Ex. 1 at pp. 7, 27).

The IEP reflected concerns expressed by the Gateway director and the parents "about the class size of the potential placement" as "[t]hey noted that [the student] ha[d] made significant progress due to the level of support he ha[d] been receiving" (Dist. Ex. 1 at p. 33). However, it is worth explaining that, while the private neuropsychologist and Gateway staff were not obligated to consider the student's LRE in recommending a possible placement for the student and the parent's desire for the student to be placed in a smaller setting with more individualized attention is understandable, the CSE was required to take into consideration the restrictiveness of the recommended placement and its place on the continuum of services when recommending an educational program for the student, and, accordingly, it was reasonable for the CSE to reject a special class placement for the student based on his academic ability, concerns that a special class placement would be too restrictive for the student, and the view that the student's needs could be addressed through, SETSS, related services as discussed below, and the support of a special education teacher within the student's academic classes. Given that a student's recommended program must also be provided in the LRE, the CSE should not be faulted in making LRE considerations a part of the CSE's deliberations (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, 489 F.3d at 108; Walczak, 142 F.3d at 132). Additionally, when asked why the July 2022 CSE came "to a different conclusion" than the neuropsychologist in recommending a placement for the student, the school psychologist testified that the CSE was "tasked to look at multiple data sources"; it did not "follow just one document or one piece of data in isolation," but rather looked at multiple sources of data, which the CSE was "required to do" (Mar. 28, 2023 Tr. p. 22). He testified that, "ultimately, when looking at the documents and, and understanding . . . globally [the student's] needs, it, it was clear that this was the best recommendation for him and which [wa]s why [the CSE] did recommend an ICT placement in tandem with SETSS" (id.).

Additionally, in conjunction with ICT services and SETSS, the July 2022 CSE recommended that the student receive two 30-minute sessions per week of speech-language therapy in a group to address concerns about the student's pragmatic, comprehension, expressive, and receptive language skills as well as his articulation errors (Mar. 28, 2023 Tr. pp. 18-19; Dist. Ex. 1 at p. 27). The IEP provided two 30-minute sessions per week of individual OT to address self-regulation skills, executive functioning deficits, and visual perceptual skills (Mar. 28, 2023 Tr. p. 19; Dist. Ex. 1 at p. 27). The CSE also recommended that the student receive one 30-minute session per week of counseling in a group, to further address the student's attention, executive functioning, self-regulation, pragmatic, coping, and social skills (Mar. 28, 2023 Tr. p. 17; Dist. Ex. 1 at p. 27).

Given the above discussion, the evidence in the hearing record supports the IHO's finding that the district's programming pursuant to the July 2022 IEP appropriately addressed the student's special education needs, provided opportunities for small group instruction and adequate behavioral supports, and offered the student a FAPE in his LRE.

D. Assigned Public School Site

On appeal the parents allege that the IHO erred in considering retrospective evidence regarding the assigned public school site, as the hearing record demonstrated that the district failed to respond to the parents' request for information about the assigned school, which deprived them of "meaningful participation" and resulted in a denial of a FAPE.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

Moreover, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir. Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]).

On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding

school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Leading up to the 2022-23 school year, in a school location letter dated August 5, 2022, the district informed the parents of the public school to which the student was assigned to attend (Dist. Ex. 4). According to the parent, the district had recommended the same public school site following a December 2020 CSE meeting, and at that time the parent had emailed the district's parent coordinator "a list of questions about the placement" (Parent Ex. R ¶¶ 13b, 14, 16a). The parent received an email in February 2021 purportedly answering the parents' questions, although the parent testified that district staff did not answer questions about the classifications and academic levels of peers in the class and how much 1:1 instruction the students received (id. ¶ 14).

On August 16, 2022, the parent emailed a parent coordinator at the assigned public school requesting assistance getting in touch with the assistant principal or special education coordinator who could answer the list of questions contained in the email about the assigned school's programming, in light of the student's "newest IEP" (Parent Exs. O; R ¶ 16b). The parent coordinator replied that day indicating that staff were "on [s]ummer break" at that time and that the administration was returning to the building on August 29, 2022, and would "answer [the parent's] questions then" (Parent Ex. O at p. 1). The parents filed the due process complaint notice in this proceeding on September 8, 2022, a little over three weeks after sending the initial email asking questions and approximately two weeks after staff returned to school from break (see Parent Ex. A). Most of the allegations raised in the due process complaint notice relate to the parents' discussions with the parent coordinator at the assigned school during the 2020-21 school year (compare Parent Ex. A at p. 4, with Parent Ex. R ¶ 14).

During the hearing, the parent testified that she did not receive any further response from any assigned school staff (Parent Ex. R ¶ 16c-d); however, she also testified that she did not hear from the assigned school principal prior to September 2022 (Parent Ex. R ¶ 16e). According to the parent, the school principal did not tell her whether the assigned school "had an available seat in its ICT class, whether the school could provide the SETSS or related services" and she did not receive any information about the peers in the ICT class (id. ¶ 16e).¹¹

¹¹ Given that the parents' request for what is essentially "class profile" information was made during the summer, it is not at all clear that information concerning the students in the class to which the student would have been assigned was available at that time. Moreover, although a class profile may be a useful tool in some circumstances, e.g. for demonstrating how a student has been grouped, the Second Circuit has determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 [2d Cir. 2005]).

Although the parents may not have received all of the information they sought from the assigned school prior to the start of the school year, evidence in the hearing record supports a finding that the school was responsive to their inquiries and that previously they had received some answers to their questions about the same assigned school site in response to an email they had sent to the district. Accordingly, the parents' inability to receive every item of information they sought despite a good faith effort on the part of the district to provide or arrange to provide information to the parents concerning the assigned school site does not rise to the level of a denial of FAPE to the student by the district.

Moreover, to the extent the parents' claims could be construed to raise questions concerning the school's capacity to provide a seat for the student in an ICT class or to implement the student's mandated SETTS and related services, such arguments are unduly speculative. Additionally, in an affidavit the principal of the assigned public school testified that the school "could have accommodated the student's recommended program" of ICT services, SETSS and related services (Dist. Ex. 10 ¶¶ 5, 6). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

VII. Conclusion

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

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 11, 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**