The University of the State of New York

The State Education Department
State Review Officer
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No. 23-182

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 New York City Department of Education

Appearances:
Law Offices of H. Jeffrey Marcus, PC, attorneys for petitioner, by Nicole Q. Saldana, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered her son an appropriate educational program and denied her request to be reimbursed for her son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2022-023 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case will not be recited here in detail. Briefly, the student has received diagnoses including dyslexia, specific learning disability with impairment in mathematics, developmental disorder of scholastic skills (processing speed), and mild cognitive impairment (memory delays) and attended Mary McDowell since first grade (Dist. Ex. 4 at p. 2).[1] The CSE convened on May 11, 2022, to formulate the student's IEP for the remainder of the 2021-22 school year and the 10-month 2022-23 school year (fourth grade) (see generally Dist. Ex. 2). Finding the student eligible

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

for special education as a student with a learning disability, the CSE recommended a 12:1+1 special class placement with occupational therapy (OT), speech-language therapy, and counseling services (id. at pp. 23-24).[2] In a school location letter dated May 18, 2022, the district notified the parent of the particular public school to which the district assigned the student to attend to receive the program and services recommended in the May 2022 IEP (Dist. Ex. 3 at p. 5). The parent disagreed with the recommendations contained in the May 2022 IEP, as well as with the assigned public school site, and, as a result, by letter dated August 22, 2022, notified the district of her intent to unilaterally place the student at Mary McDowell and seek funding for that placement from the district (see Dist. Exs. 2; 3; Parent Exs. A; B).

A. Due Process Complaint Notice

In a due process complaint notice, dated February 3, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. B). In particular, the parent alleged that the district failed to conduct assessments of the student leading up to the May 2022 CSE meeting, that the CSE predetermined its recommendations, and that the CSE ignored the student's "individual needs," the recommendations contained within a private neuropsychological evaluation, and information from Mary McDowell that the student required a lower student-to-teacher ratio with support of two instructors in the classroom, specialized reading and math support, sensory supports to make progress, and related services delivered in the classroom, which the parent asserted could not be provided in the recommended 12:1+1 special class with pull-out related services (id. at pp. 2-4). The parent alleged that the May 2022 IEP included vague, unachievable annual goals, no assistive technology services, and no transitional support services (id. at pp. 3-4). The parent also alleged that she was not given the opportunity to tour the assigned public school site, that the school was inappropriate, and that a 12:1+1 special class would include students "with social-emotional behaviors which would cause [the student] to emulate and regress" (id. at p. 4). For relief, the parent sought district funding of the costs of the student's tuition at Mary McDowell for the 2022-23 school year along with transportation, as well as independent educational evaluations at district expense (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 3, 2023, and concluded on May 1, 2023, after three days of proceedings (Tr. pp. 1-81). In a decision dated July 18, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year, and, as such, she did not reach a determination on the appropriateness of Mary McDowell as a unilateral placement or whether equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 6-15).

Specifically, the IHO held that the May 2022 CSE had before it updated testing including the March 2022 neuropsychological reevaluation, which the parent did not allege was "insufficiently comprehensive," and found that the CSE accepted the descriptions of the student's

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

classroom conduct and performance provided by Mary McDowell teachers such that the district was not required to undertake "independent observations" of the student (IHO Decision at p. 10). Overall, the IHO found no deficiency with the evaluative information available to the May 2022 CSE (id. at p. 11). The IHO also held that there was no evidence that the parent made a request for the district to conduct any additional evaluations including an assistive technology evaluation, audiology consult, or an auditory processing evaluation (id. at pp. 10-11). Regarding the CSE's consideration of the information before it, the IHO determined that the documentary evidence supported a finding that the May 2022 CSE considered the recommendations in the March 2022 neuropsychological reevaluation, the recommendations made by the Mary McDowell representative during the CSE meeting, and the student's needs, particularly his social/emotional needs, as well as the concerns of the parent when determining a placement for the student (id. at p. 12).[3]

Turning to the CSE's recommendations, the IHO held that the private evaluators who recommended that the student attend a "specialized non-public school setting" were not constrained to consider the LRE for the student, that the student's participation in a kindergarten class with ICT services was too far in the past to be relevant to his then-currently presenting needs at the time of the May 2022 CSE, and that his prior experience in a dual language immersion public school placement was not comparable to the CSE's recommended 12:1+1 special class with related services, which was smaller and more supportive to address the student's needs (IHO Decision at pp. 12-13). Next, the IHO held that there was no evidence in the hearing record which indicated that the special education teachers at the recommended assigned public school needed assistance or support to ease the student's transition from Mary McDowell, or that the student "required any special services" related to that transition (id. at p. 13).

Regarding the assigned public school site, the IHO found that the evidence showed that there was a space available for the student as to the implementation date of the IEP, "even though it was at the end of the year" and that he could continue there for the following 2022-23 school year (IHO Decision at pp. 13-14). The IHO also determined that "the assertion that some students in some 12:1+1 classrooms may have unspecified 'behavioral issues' [was] speculative and, even if true, d[id] not make a recommendation for a class with that staffing ratio a denial of FAPE" (id. at p. 13). Finally, the IHO found that, given that the parent had phone conversations with staff from the assigned public school site, the inability to arrange a tour of the school did not amount to a denial of a FAPE (id. at pp. 14-15).

The IHO ordered the district to "make direct payment" of tuition to Mary McDowell pursuant to pendency and dismissed the due process complaint notice with prejudice (IHO Decision at. p. 15).

[3] The IHO also found that the May 2022 CSE was properly composed (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in determining that the district offered the student a FAPE during the 2022-23 school year.[4] Generally, the parent asserts that the IHO mis-weighed the evidence and erred in certain credibility findings.[5]

More specifically, the parent contends that the IHO erred in finding that the district did not deny the parent the opportunity to meaningfully participate in the planning for the student's education, specifically asserting that the hearing record shows that the district's CSE members lacked the requisite "open mind" with respect to the student's recommended program and only considered class placements for the student that contained 12 students. In addition, the parent argues that the IHO erred in finding that the district had sufficient updated evaluations "in all suspected areas of his disability," particularly noting that the March 2022 neuropsychological reevaluation recommended assistive technology services, an audiological consult, and a central auditory processing evaluation. Further, the parent argues that the IHO improperly determined that the CSE "gave meaningful consideration" to the student's March 2022 neuropsychological reevaluation, Mary McDowell 2021-22 progress reports, and the parent's concerns.

Regarding the CSE's recommendations, the parent argues that the IHO erred in finding the 12:1+1 special class for the student appropriate, arguing that the 12:1+1 for core academic subjects and a general education class setting without restriction for all other subjects and extracurricular activities "would likely result in regression, not progress." The parent further argues that the student's social/emotional needs could not be met in the 12:1+1 special class and that the IEP "fail[ed] to provide two classroom teachers, smaller ELA and math classes, [a] specialized reading program," sensory supports, "a slow pace of instruction, multi-sensory learning and direct one-to-one teaching." Additionally, the parent asserts that the IHO erred by failing to properly analyze the testimony of the Mary McDowell representative on the basis that she "specified" that a 12:1+1 special class would be too distracting for the student and that he required a smaller class, a slower pace of instruction, and a "myriad of specialized supports" that "simply" could not be provided in the recommended 12:1+1 special class. The parent also contends that the CSE's recommendation for the student to receive his related services "in a separate location" as opposed to push-in related services within his special class, which was how Mary McDowell provided related services to the student during the 2022-23 school year, was not appropriate and did not facilitate "frequent collaboration" and consultation among the student's classroom teachers and related services providers. Finally, the parent contends that the IHO erred in failing to find a denial of a FAPE due to the district's failure to provide transitional support services in the IEP. Specifically, the parent contends that "[w]ithout the support of transitional [or] other special education services, the recommended program would overtax [the student's] learning, language, and attentional deficits and cause regression instead of progress."

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[4] The parent sought and was granted leave to amend the request for review. For purposes of this decision, description of the parent's appeal is as set forth in the parent's amended request for review.

[5] The parent alleges that the IHO erred in ruling on evidentiary issues that were not disputed, including the composition of the CSE, and relied on these findings to, in part, to conclude that the district offered the student a FAPE (see IHO Decision at p. 11). To the extent the IHO erred in this regard, the error is harmless insofar as the evidence in the hearing record supports the IHO's determination that district offered the student a FAPE.

Regarding the assigned public school site, the parent contends that the IHO erred in finding that the parent's inability to tour the assigned public school site did not amount to a denial of a FAPE given that CSE members told the parent at the May 2022 CSE meeting that she would be permitted to do so. Furthermore, the parent contends that the IHO improperly minimized the parent's concerns about the student's safety and ability to "remain regulated, focused and perform in the recommended public school" given the parent's assertions that the school location was "described by the [district] employee as a 'jungle' and subject to frequent drills due to shootings in broad daylight."

The parent alleges that Mary McDowell was an appropriate unilateral placement and that no equitable considerations would warrant a reduction or denial of relief. The parent seeks an order requiring the district to fund the student's tuition at Mary McDowell for the 2022-23 school year.

In an answer, the district responds to the parent's allegations and contends that the IHO correctly determined that the district offered the student a FAPE for the 2022-23 school year.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural

inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

the 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

A. May 2022 CSE Process

1. Parent Participation and Predetermination

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. v. New York City Dep't of Educ.,, 2015 WL 4597545 at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; 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], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], 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]).

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, in addition to the parent attending the meeting via telephone, district attendees via telephone included a related service provider/special education teacher, a regular education teacher, a district representative who also served as a psychologist, a social worker, and a bilingual psychologist (Dist. Ex. 2 at pp. 30-31). Additionally, a "MMFS Representative" from Mary McDowell attended via telephone (id. at p. 31).[7]

The May 2022 IEP present levels of performance reflects information shared during the CSE meeting by the parent and the Mary McDowell representative (see Dist. Ex. 2 at pp. 7-10, 30). The IEP also reflects the CSE's consensus that the student should receive instruction in English, the addition of a multisensory reading program to the student's management needs as recommended by the Mary McDowell representative, and the inclusion of other management strategies in the IEP that the student was reported to use at Mary McDowell (e.g. movement breaks, check lists, small group instruction) (id. at pp. 7-9, 11).

The May 2022 IEP indicates that the CSE considered two other placement options which were rejected as inappropriate (Dist. Ex. 2 at p. 30). First, a 12:1 special class in a community school was rejected as not providing enough support in the student's areas of weakness (id.). Second, a 12:1+1 special class in a specialized school was considered and rejected as being too restrictive a setting given all of the student's areas of strength (id.).

The May 2022 IEP indicates that during the May 2022 CSE meeting district CSE members encouraged the parent to consider the recommended placement and the parent informed the CSE that she was open to the CSE's recommendations (Dist. Ex. 2 at p. 30). The IEP reflects the Mary McDowell representative's opinion that a large public school would be overwhelming for the student and that the student benefitted from a smaller environment with students that were similar to him (id.). Other information from the representative from Mary McDowell and the parent discussed during the meeting was that the 12:1+1 class setting could "have students with more social emotional or behavioral issues and that would not benefit [the student]"; the parent further stated that the student did not have behavioral problems and needed a smaller class (id.). The

[7] The parent testified that the Mary McDowell representative was a "[s]chool [p]sychologist/[c]ounselor" (Parent Ex. I ¶ 8).

district representative explained that the recommendation for a 12:1+1 special class in a community school was intended to address the student's attention and social/emotional concerns (id.).

The foregoing evidence demonstrates the type of active and meaningful participation that defeats a claim of predetermination. The parent and the private school representative had an opportunity to express their preferences regarding the student's placement. The district members of the CSE did not adopt the parent's preference; however, while school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement does not amount to a denial of the parent's meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of the Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F., 2013 WL 4495676, at *17; DiRocco, 2013 WL 25959, at *18-*20; P.K., 569 F. Supp. 2d at 383; Sch. For Language & Commc'n Dev., 2006 WL 2792754 at *7).

Further, contrary to the parent's contention, once a CSE determines that an appropriate class placement for the student is available within the district, the district is not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K., 12 F. Supp. 3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). The parent's preference for the student to remain at Mary McDowell is understandable because it is readily apparent that she believes her unilateral selection of a private school has proven to be a beneficial experience for her son; however, the district was not required to consider placement of the student in a nonpublic school once it determined that a less restrictive placement was appropriate to address the student's needs.

Therefore, the evidence in the hearing record does not support the parent's claims that the district predetermined its recommendations.

2. Sufficiency and Consideration of Evaluative Information

The next issue to be addressed is the sufficiency of the evaluations available to the CSE and the CSE's consideration of the information available to it. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by

the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).[8]

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "'review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers'"]).

Here, the parent is correct that the district last conducted an evaluation of the student in March 2019 (see Parent Exs. A-I; Dist. Exs. 1-4). However, even if the district staff themselves did not conduct a triennial evaluation of the student leading up to the May 2022 CSE meeting, the evidence in the hearing record reveals that the CSE had sufficient information before it to identify all of the student's special education and related services' needs.

The prior written notice from the May 2022 CSE meeting indicated that the CSE relied on the March 2022 neuropsychological reevaluation and a March 29, 2019 psychoeducational assessment (Dist. Ex. 3 at pp. 1-2).[9] The May 2022 IEP included test scores from the Wechsler

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[8] While State regulations do not specify what assessments a district must complete in order to conduct a reevaluation, State regulations do list the required components of an initial evaluation: a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]).

[9] In its answer, the district acknowledges that the prior written notice contained an error in the list of documents relied upon by the CSE in that it did not list Mary McDowell progress reports.

Intelligence Scale for Children-Fifth Edition (WISC-V) and the Woodcock Johnson Tests of Achievement-Fourth Edition (WJ-IV ACH) and narrative information from the March 2022 neuropsychological reevaluation, as well as information from Mary McDowell mid-year and mid-end reports that provided information about the student's academic, social/emotional, OT, and speech-language needs (Dist. Ex. 2 at pp. 1-11).[10] Additionally, review of the IEP shows that information provided by the Mary McDowell representative and the parent at the meeting was incorporated into the IEP (id. at pp. 7, 8, 9). The hearing record includes a copy of the March 2022 neuropsychological reevaluation report but does not include the March 2019 psychoeducational assessment or 2021-22 reports from Mary McDowell (see Parent Exs. A-I; Dist. Exs. 1-4).

Review of the May 2022 IEP present levels of performance—which are not in dispute on appeal—shows that the student's full scale IQ as measured in March 2022 was 86, in the average range, and his processing speed index was 83, which indicated that the student's "overall processing speed performance was less developed" than his same-age peers (Dist. Ex. 2 at pp. 1-2). The IEP reflected discussion during the May 2022 CSE meeting that the processing speed index was a "discrepant score from [the student's] individual profile of scores," and about a potential medication assessment for the student (id. at pp. 8, 9-10). Regarding academic skills, the May 2022 IEP reflected March 2022 WJ-IV reading, mathematics, and written language index and subtest standard scores, as well as information from the Mary McDowell "2021-22 mid-year report" (id. at pp. 1-7). Additionally, the IEP included the results of Fountas and Pinnell administrations to the student in fall 2021 and May 2022, which were relayed during the CSE meeting, as well as discussion regarding the student's English language arts (ELA), and math skills (id. at pp. 7-8). With respect to the student's social/emotional and language functioning, the IEP present levels of performance indicated that quoted information was from the Mary McDowell 2021-22 mid-year report and discussion at the meeting (see id. at pp. 2-4, 6-7, 9). Information about the student's skills measured by OT included in the IEP indicated it was taken from the Mary McDowell "2021-22 mid-end OT report" (id. at pp. 8, 10-11). Further, the May 2022 IEP included the parent's concerns and additional information about the student that was discussed during the CSE meeting (id. at pp. 9-11).

Review of the May 2022 IEP shows that it incorporated some of the March 2022 neuropsychological reevaluation report recommendations, including for a small classroom that provided specialized, multisensory reading and small group instruction; OT and speech-language therapy; accommodations such as preferential seating, teacher check-ins, and verbal rehearsal; and testing accommodations (compare Dist. Ex. 2 at pp. 11, 23, 24, 25, with Dist. Ex. 4 at pp. 58-61).

As summarized above, the parent also asserts that the CSE failed to conduct an evaluation of the student to determine his need for assistive technology services (i.e. a laptop to support reading and writing), an audiology consult, and a central auditory processing disorder evaluation, despite recommendations in the March 2022 neuropsychological reevaluation for such supports or further assessments (see Dist. Ex. 4 at pp. 58-59). On this point, while the CSE was required to

[10] The March 2022 neuropsychological reevaluation of the student was conducted over several dates in 2021 and early 2022 (Dist. Ex. 4 at p. 1). The evaluators offered the following updated diagnoses: ADHD, combined type; phonological processing delays; dyslexia in reading and writing; specific learning disability, with impairment in mathematics; neurocognitive disorder, processing speed; and generalized anxiety disorder (Dist. Ex. 4 at pp. 1, 58).

consider reports from privately retained experts, it was not required to adopt their recommendations (see, e.g., Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). Additionally, the May 2022 IEP provided accommodations such as refocusing and redirection, preferential seating, multisensory approach to teaching, checklists, visuals, graphic organizers, and review and repetition to support the student's auditory processing skills, and a multisensory reading program, scribing for extended writing, alphabet strip to support with letter reversals, a list of high frequency words, teacher support in organizing language and verbal rehearsal with the teacher, modified outlines, and lines on the page to support the student's reading and written language needs (Dist. Ex. 2 at p. 11).

Based on the foregoing, the evidence in the hearing record does not support the parent's allegation that the evaluative information available to the May 2022 CSE was insufficient for the CSE to develop the student's IEP for the 2022-23 school year. Nor does it support the parent's contention that the CSE failed to adequately consider the evaluative information in development of the May 2022 IEP. Further, review of the May 2022 IEP supports the IHO's finding that the CSE reviewed, considered, and incorporated information from the March 2022 neuropsychological reevaluation, Mary McDowell 2021-22 progress reports, and discussion held at the CSE meeting, and was not required to include all of the March 2022 neuropsychological reevaluation report recommendations for the student to receive a FAPE.

B. May 2022 IEP

1. Educational Placement – 12:1+1 Special Class

Turning to the May 2022 CSE's recommendation for a 12:1+1 special class, State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). By way of comparison, State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive or highly intensive and requiring a significant or high degree of individualized attention and intervention shall not exceed eight or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction"(8 NYCRR 200.6[h][4][ii][a]-[b]).

The May 2022 IEP stated that the student needed the support of a 12:1+1 special class with related services to address his educational needs, including his ability to: add or substitute individual sounds to create new words correctly; read CVC words; complete sentences independently; count up to 20 objects; solve subtraction and addition word problems in picture

form; write with proper formation, directionality, spacing, sizing, and placement; improve fine motor skills; improve phonemic awareness skills; improve auditory memory; generate rhyming words independently; use counting on as a strategy; encode current reading words; and self-monitor for focus and attention (Dist. Ex. 2 at p. 12).

In conjunction with the supports provided by the special education teacher and supplementary school personnel in the 12:1+1 special class, the CSE determined that the student would benefit from the following management needs: refocusing and redirection; preferential seating; multisensory approach to teaching; positive reinforcement; check lists; visuals; graphic organizer; review and repetition; movement breaks; praise and encouragement; verbal prompting; reminders; multisensory reading program; frequent teacher check-ins; small group instruction as needed; tests read (to support focus and comprehension); directions read (to support focus and attention); separate location and focusing prompts for assessments (to support focus and attention); scribe for extended writing; number line; alphabet strip to support with letter reversals; a list of high frequency words; teacher support in organizing language and verbal rehearsal with the teacher; modified outlines; and lines provided on the page for the number of words in his sentences (Dist. Ex. 2 at p. 11).

In addition, the May 2022 IEP included the following testing accommodations to address the student's learning needs: extended time (time and a half); separate location/room (all examinations); minimal distractions (no more than eight students); tests read (passages, questions, items and multiple, human reader); choice responses read to student for all classroom, local and State tests, excluding those measuring reading skills; directions read one additional time; preferential seating (seating near the teacher or proctor); on-task focusing prompts; verbal or non-verbal prompt when student appears off task; breaks (two minutes every 25 minutes) (see Dist. Ex. 2 at p. 25).

Further, to address the student's social/emotional needs, the CSE recommended that the student receive one 30-minute session of counseling per week in a group of three, positive reinforcement, frequent teacher check-ins, and praise and encouragement (Dist. Ex. 2 at pp. 11, 23). While the parent is correct that the May 2022 IEP did not include the specific sensory supports the student used at Mary McDowell, "absent a showing that a specific sensory diet is critical to the Student's development, a particular diet need not be prescribed by the IEP" (E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 [S.D.N.Y. Sept. 26, 2018]). Moreover, the May 2022 CSE recommended that the student receive two 30-minute sessions per week of OT, and included an annual goal for the student to "self-monitor for focus and attention, implementing taught self-regulation strategies when he [wa]s distracted (Dist. Ex. 2 at p. 17). Further, the parent's contention that the IEP did not recommend a specialized reading program or multisensory instruction is belied by the recommendations for the same as supports for the student's management needs (Dist. Ex. 2 at p. 11).

The parent argues that, given the CSE's reliance on the March 2022 neuropsychological reevaluation and the Mary McDowell progress reports, the CSE should have adopted the recommendations therein for a smaller class setting. Within the March 2022 neuropsychological reevaluation report, the evaluators recommended, among other things, placement in a small, structured classroom in a specialized and individualized nonpublic school "geared towards children who have specialized learning needs, including individualized development of executive skills as well as specialized reading instruction" (Dist. Ex. 4 at pp. 58-59). However, the

neuropsychological evaluation does not specify what was meant by a small class size and, as alluded to above, while the private evaluators recommended a nonpublic school, they were not bound to adhere to the same LRE mandates as the district personnel in formulating recommendations for the student.

In addition, as discussed above, the Mary McDowell representative expressed at the CSE meeting that the student would benefit from a small school with students with similar needs (Dist. Ex. 2 at p. 30). According to the parent, at the time of the CSE meeting, the student was attending a class at Mary McDowell that consisted of nine students and two teachers and that he received reading and math support in small groups (Parent Ex. I ¶ 9).[11] At the time of the impartial hearing, the Mary McDowell CSE coordinator testified that he did not agree with the district's recommendation for a 12:1+1 special class placement (Parent Ex. H ¶ 29). Specifically, he testified that the student required the support of two special education teachers due to his difficulty with "reading, written expression, math and attention" (id.).

Although the CSE's recommended 12:1+1 special class setting may not have had the same number of students or certified teachers as the student's special class at Mary McDowell, review of the evaluative information available to the May 2022 CSE did not suggest that the student required the precise student-to-staff ratio provided at Mary McDowell in order to receive educational benefit (see Parent Ex. H ¶ 13; Dist. Exs. 2; 4 at pp. 58-61). The May 2022 IEP included a description provided by the student's teacher at Mary McDowell that, during academic lessons, the student "laid his stomach across his desk and stool, frequently got out of his seat, called out and made loud shrieking noises," and described his "struggles" with "body regulation, attention and working memory" (Dist. Ex. 2 at p. 3). Supports Mary McDowell had used with the student included movement breaks, teacher check ins, visuals, preferential seating, multisensory activities, repetition and refocusing, and similar supports were included in the May 2022 IEP, as was a recommendation for small group instruction as needed (id. at pp. 3-4, 11). Additionally, according to the student's Mary McDowell classroom teacher, he demonstrated strengths in his participation during preferred whole group learning times, demonstrated skills during small writing group, and became increasingly independent in the journal writing process with support (id. at p. 2). The teacher reported that during nonpreferred activities, the student maintained his engagement and attention during lessons that were multisensory or if technology was used (id. at p. 3). In addition, during whole group social/emotional lessons, the student's teacher noted that he "frequently participated by asking related questions, offering related knowledge and giving accurate answers to questions," and became "increasingly independent navigating social conflict among his peers" (id. at pp. 2-3). Accordingly, the information before the May 2022 CSE supported the committee's view that, at that time, the student would be able to receive educational benefit in the 12:1+1 special class setting.

Further, while the student may have been successful with two certified classroom teachers at Mary McDowell, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Overall, the evidence in the hearing record does

[11] Consistent with this, the IEP indicates that, at the time of the CSE, the student's ELA and math instruction were delivered in a "ratio of 4:1" (Dist. Ex. 2 at pp. 7-8).

not lead me to conclude that the student could only successfully receive instruction in a special class with two New York State certified teachers, especially here, as he would have received the support of a special education teacher and a supplementary school personnel while also provided with related services consisting of two 30-minute sessions of OT and speech-language therapy per week and one 30-minute session of counseling per week (see Dist. Ex. 2 at pp. 23-24).

The parent also challenges the CSE's recommendation to the extent that for those periods of the school day that the student would not be in the special class, he would be in a general education setting. The CSE recommended that the student attend a non-specialized school with nondisabled peers and the IEP indicated that the student would "participate in all regular class[es] and extracurricular activities without restriction, except he w[ould] be in a special class for the core subjects" (i.e., four periods per day for ELA, math, social studies, and sciences) "and pulled out of regular classes for related services" which totaled five 30-minute sessions per week (Dist. Ex. 2 at pp. 23-24, 27-28). The parent argues that the student's learning, language, attentional and body regulation struggles" required special education support throughout the day and not just during core subjects; however, as summarized above, the IEP provided for several supports for the student's management needs that could be utilized throughout the school day to address the student's needs, including during those periods outside of the special class (Dist. Ex. 2 at p. 11). The parent expressed concern at the CSE meeting about the "large public school" but the district members of the CSE felt that a specialized school was "too restrictive a setting given all of [the student's] areas of strength" (id. at p. 30). Indeed, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers to the maximum extent appropriate in light of the IDEA's LRE requirements. Here, the district appropriately balanced the student's needs and the requirement to educate the student alongside nondisabled peers to the extent possible by placing him in a special class setting, but it was not necessary to remove him to a specialized school that served only disabled students (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

In light of the above, the evidence in the hearing record supports the IHO's determination that the May 2022 CSE's recommendation for a 12:1+1 special class in a non-specialized school was reasonably calculated to enable the student to receive educational benefits.

3. Related Services

With respect to the parent's claim about the location for delivery of related services, her argument focuses on a comparison of Mary McDowell's recommendations for the student for the 2022-23 school year. Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CPSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its

similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

The parent opined in her direct testimony by affidavit that the student required push-in related services because, when he last attended public school, "he was pulled out of class for related services, and it caused him to miss instruction and that made him feel less worthy than his classmates" (Parent Ex. I ¶ 12).

At the time the March 2022 neuropsychological reevaluation report was prepared, the student was receiving OT and speech-language therapy at Mary McDowell twice per week, "both pull in and push out" (Dist. Ex. 4 at p. 56). The evaluators recommended that the student receive continued speech-language therapy and OT at a frequency of two 30-minute sessions per week for both services and did not specify the location where the services were to be delivered (id. at p. 59). The May 2022 CSE recommended two 30-minute sessions of OT per week in a small group, two 30-minute sessions of speech-language therapy per week in a small group, and one 30-minute session of counseling per week in a small group, and the IEP indicated that the location where the services would be provided was "[s]eparate [l]ocation [p]rovider [d]iscretion," consistent with how the student was receiving his related services at Mary McDowell (compare Dist. Ex. 2 at pp. 23-24, with Dist. Ex. 4 at p. 56).

Therefore, the evidence in the hearing record shows that at the time of the May 2022 CSE meeting the student was receiving both push in and pull out related services at Mary McDowell, the evaluators who conducted the March 2022 neuropsychological reevaluation did not indicate that the student's related services should only be provided in a push-in manner, and the May 2022 IEP allowed for provider discretion to determine whether the related services should be provided in a separate location (see Dist. Exs. 2 at pp. 23-24; 4 at pp. 56, 59).[12] Accordingly, the evidence in the hearing record does not support a finding that that the related services delivery location recommended in the May 2022 IEP was inappropriate.

4. Transitional Support Services

Transitional support services are required by State regulation to be included on a student's IEP when a student with autism has been "placed in programs containing students with other

[12] According to the Mary McDowell mid-year 2022-23 OT report, the student received OT once per week for a "pull-out session" (Parent Ex. F at p. 11). The student did not appear to receive speech-language therapy or counseling at Mary McDowell during the 2022-23 school year (Parent Ex. H ¶ 12).

disabilities, or in a regular class placement," and consist of "a special education teacher with a background in teaching students with autism [who] shall provide transitional support services in order to assure that the student's special education needs are being met" (8 NYCRR 200.13[a][6]). Elsewhere in State regulations, transitional support services are defined as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]).

Here, the student in this matter has received diagnoses which at this time do not include autism (see generally Dist. Ex. 4). Furthermore, the disability classification of the student in the May 2022 IEP is "Learning Disability" not autism (Dist. Ex. 2 at p. 1). The parent's contention here relating to the transition of the student from a special class at the private school to a special class at the assigned public school is better framed as a discussion regarding whether the CSE's recommended 12:1+1 program in a special class in a community school was appropriate. As set forth above, I have found that the May 2022 CSE's recommended program was appropriate. The district did not deny the student a FAPE by failing to include transitional support services on the student's IEP.

D. Assigned Public School Site

I turn next to the parent's allegations about the assigned public site. 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, 3012], 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]).

With respect to the parent's opportunity to tour the assigned public school site, the May 2022 school location letter stated that the parent could visit the school and provided a phone number and address for an individual to contact to arrange for a tour (Dist. Ex. 3 at p. 5). According to the parent, the school was the same school the district had assigned the student to attend the prior school year but that she had rejected it because she had been informed the school did not have a 12:1 class, which had been the CSE's recommendation at that time (Parent Ex. I ¶ 17).

In her written testimony, the parent stated that she received the school location letter "[a] few months after the meeting" (Parent Ex. I ¶ 17).[13] She further indicated that the individual identified in the school location letter (a parent coordinator) "never replied" to her request to tour the school (id.). During the impartial hearing, the parent further testified that she made several attempts to contact administrative staff at the assigned school including the assistant principal, a family coordinator, a reading teacher, and the parent coordinator identified in the school location letter, in an attempt to schedule a tour at the assigned school (Tr. pp. 66-68).[14] The parent then stated that the assigned school staff, including the parent coordinator, did speak to her on the phone but did not contact her again to schedule a tour of the assigned school (Tr. p. 68).[15] According to

[13] In contrast, the parent's August 2022 10-day notice letter stated that she received notice of the assigned public school site in May 2022 (Parent Ex. A at p. 2).

[14] Additionally, the parent noted that she had discussed concerns regarding neighborhood violence near the assigned school's physical location (Tr. pp. 66-67).

[15] According to the parent, in May 2022, she did not enroll the student at the assigned school since the student's 2021-22 school year (at MMFS) was "funded by the [b]oard of [e]d[ucation]" (Tr. p. 69).

the parent's August 2022 10-day notice letter to the district, she had contacted the parent coordinator "prior to the last day of the school year" (Parent Ex. A at p. 2).

The district is not required to allow a parent to visit an assigned school (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017]; J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14, aff'd 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]; S.F., 2011 WL 5419847, at *12). However, as noted above, a district's failure to accommodate a parent's inquiries concerning an assigned school could, under certain circumstances, constitute a procedural violation that could either contribute to a finding that FAPE was denied to a student or in itself rise to the level of a FAPE denial. Such circumstances, however, are not present here. While the evidence in the hearing record supports a finding that there were some communication difficulties in arranging for a visit to the assigned school and a school visit ultimately was not scheduled, the timing of these communications is unclear, the district did provide the parents with information pertaining to how to contact the school and arrange for a visit and did not ignore the parent's requests to visit the school or refuse to allow a school visit, and, further, the parent had some knowledge about the school location as it had also been recommended for the student the prior school year. Moreover, while a parent need not particularize his or her questions and concerns in order to justify a request to learn about an assigned school, it does appear in this instance that the information sought by the parent concerned the district's ability to implement the IEP. In particular, the parent wanted information about the size of the school, the availability to reading specialists, and the behavior of peers (Parent Ex. I ¶ 16); however, as discussed further below, information about these aspects would not have demonstrated the school's inability to implement the IEP. Accordingly, the parent's argument that the IHO should also have found that the district denied the student a FAPE on the ground that the parents were not able to visit the assigned school must fail.

With respect to the assigned school's capacity to implement the May 2022 IEP, 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]).

Regarding the information sought by the parent (see Parent Ex. I ¶ 16), even if the parent had learned that the assigned public school was larger than she preferred and did not offer the student access to a reading specialist, these items of concern are not tethered to the May 2022 IEP, which does not mandate a particular size school or require that services be delivered by a reading specialist (see Y.F., 659 Fed. App'x at 5).[16] Accordingly, even if the parent had obtained the information she sought, the concerns would not have related to the assigned public school site's capacity to implement the IEP.

In addition, the parent has consistently expressed concern that student would be grouped with peers that exhibited maladaptive behaviors (see, e.g., Parent Exs. B at p. 4; I ¶¶ 14, 16; Dist. Ex. 2 at p. 30). In addition, the Mary McDowell CSE coordinator expressed the opinion that students in "12:1:1 settings" had a wide span of learning profiles such as cognitive disabilities or behavioral challenges, and that the student in the instant case instead benefited "from being with peers who ha[d] similar learning profiles" (Parent Ex. H ¶ 29).

With respect to functional grouping of the proposed class at the assigned public school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different

[16] As noted above, the May 2022 IEP recommended multisensory reading program (Dist. Ex. 2 at p. 11). State regulation provides that specialized reading instruction included on an IEP may be provided by individuals qualified under specified provisions of State regulation that includes reading teachers as well as classroom teachers (8 NYCRR 200.6[b][6], citing 8 NYCRR 80-2.7, 80-3.3, 80-3.7[a][3][iv], 52.21[b][3][xi]).

intellectual, social, and behavioral needs, where sufficient similarities existed]).[17] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

Here, the student did not attend the recommended 12:1+1 special for the 2022-23 school year class because he was unilaterally placed at Mary McDowell. As noted by the IHO, because the student never attended the recommended placement, any claim related to a particular class or the students who may have been in a particular class was purely speculative (IHO Decision at p. 13). Nor is there evidence in the hearing record to support the parent's broad statements that all 12:1+1 special classes in the district "serve students with behavioral issues" (Parent Ex. I ¶ 11). Further, even if the parent toured the school prior to the end of the 2021-22 school year and observed a 12:1+1 special class, there would have been no guarantee that the students observed would have made up the student's class for the 2022-23 school year.

Indeed, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C. , 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at *15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245). Therefore, the IHO correctly found that all questions presented by the parents which related to other students in the classroom at the public school were speculative.

Accordingly, as the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on the size of the school, the access to a reading specialist, or the functional grouping of the proposed classroom would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 2015 WL 4256024, at *7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

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[17] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

Moreover, even the district had such burden, the evidence in the hearing record shows that the school had the capacity to implement the IEP. The district's special education coordinator from the assigned public school site testified at the impartial hearing that she had been employed at the assigned school for seven years, and the assigned school would have been able to implement the student's May 2022 IEP by offering the student a 12:1+1 special class and related services (Tr. pp. 47-48). Further, the special education coordinator stated in her testimony that the assigned school had one fourth grade 12:1+1 class with seven students at the time of the May 2022 IEP implementation date, May 25, 2022; in addition, the student's registration at the assigned school in May 2022 would have remained in effect at the beginning of the 2022-23 school year (Tr. pp. 60-61). The parent's contentions regarding the character of the community where the assigned school is located do not confront the capacity of the assigned school to implement the student's IEP.

In light of the above, there is no basis to disturb the IHO's determination that the assigned public school site had the capacity to implement the student's IEP for the student's 2022-23 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Mary McDowell was an appropriate unilateral placement 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**
November 29, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER