



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-100

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 Office of Michelle Siegel, PLLC, attorneys for petitioners, by Noelle C. Forbes, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Hanna Giuntini, 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 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 Stephen Gaynor School (Stephen Gaynor) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail.

Briefly, the student exhibited speech-language delays and difficulty with attention and impulsivity as a young child (Parent Ex. B at p. 3). On May 29, 2020, during the 2019-20 school year while the student was in "[p]re-[k]indergarten" and receiving special education teacher support (SEIT) services, the district conducted a functional behavioral assessment (FBA) due to concerns about the student's behavior (see Dist. Ex. 1). For the 2020-21 school year, the student attended kindergarten in another school district where he received integrated co-teaching (ICT) services in a class of 11 students, speech-language therapy, and occupational therapy (OT) and the parents obtained a private neurodevelopmental evaluation of the student in November 2020 (Parent

Exs. B; F at p. 2). The evaluators determined that the student met the criteria for diagnoses of developmental disorder of speech and language, and attention deficit hyperactivity disorder (ADHD), combined type (id. at p. 13).

The student returned to the district during the summer of the 2021-22 school year and for that year and the following 2022-23 school year he attended Stephen Gaynor (Parent Ex. F at pp. 2-3). On January 27, 2023, the parent signed a contract with Stephen Gaynor for the student to attend Stephen Gaynor during the 2023-24 school year (see Parent Ex. E).¹

On April 23, 2023, a CSE convened to develop the student's IEP to be implemented beginning May 3, 2023 (Dist. Ex. 4 at pp. 1, 35). Finding the student remained eligible for special education as a student with an other health-impairment, the CSE recommended that he receive ICT services for core academic instruction and five periods per week of special education teacher support services (SETSS) in English-language arts (ELA) and math in a district "[n]on-specialized" school (id. at pp. 1, 28, 33).² For related services, the CSE recommended that the student receive one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group, one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of OT in a group, one 30-minute session per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at pp. 28-29). The attendee list indicated that participants at the April 2023 CSE meeting included a related services provider/special education teacher, the parent, a school psychologist who also served as district representative, and a classroom teacher from Stephen Gaynor (id. at p. 35).

The district prepared prior written notice and school location letters dated May 15, 2023 informing the parents of the April 2023 CSE's recommendations and the public school to which the district assigned the student to attend for the 2023-24 school year (see Dist. Ex. 5).

The parents submitted a notice to the district, dated June 9, 2023 (see Parent Ex. F).³ In the letter, the parents asserted that the April 2023 CSE failed to recommend an appropriate program for the student and notified the district that they intended to unilaterally place the student at Stephen Gaynor for the 2023-24 school year and seek tuition reimbursement for the cost of the student's placement, including door-to-door transportation (id. at p. 3). In a letter dated August 23, 2023, the parents indicated that they had previously informed the district that they were enrolling the student at Stephen Gaynor as a "12-month student" and that, as their prior letter was "deemed premature," they again notified the district that they were continuing the student's unilateral placement at Stephen Gaynor for the 2023-24 school year (see Parent Ex. J).⁴

¹ The Commissioner of Education has not approved Stephen Gaynor as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

² The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ The parents received confirmation that the district received the notice on June 9, 2023 (Parent Ex. G).

⁴ The parents received confirmation that the district received the notice on August 23, 2023 (Parent Ex. K).

In a due process complaint notice, dated June 21, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents contended that the April 2023 IEP was procedurally and substantively deficient (id. at pp. 3-4). In particular, the parents asserted that the CSE failed to evaluate the student in all areas of suspected disability and, more specifically, improperly removed the student's 1:1 paraprofessional from his IEP "since an FBA/[behavioral intervention plan] (BIP) had not been conducted (id. at pp. 4, 5). The parents further argued that the CSE predetermined the student's programming, which was contrary to information provided by the parents such as the neuropsychological evaluation and information from his educational providers, the CSE failed to consider a 12-month program for the student, and the CSE rejected the consensus of the recommendations in the evaluations before it (id. at pp. 4-6). The parents raised further concerns, including that the CSE was not duly constituted as there was no general education teacher at the meeting, that the goals and management needs were not discussed at the meeting, that the CSE failed to discuss how the student would be able to tolerate a large ICT class, that the present levels of performance, goals and related services were not appropriate, and that the recommendation for SETSS and ICT services did not offer adequate or appropriate instruction (id. at pp. 5-6). The parents requested findings that the student required a 12-month placement, that student's placement at Stephen Gaynor continue was appropriate, and that the district reimburse the cost of Stephen Gaynor as well as door-to-door transportation, and the cost of meals for the student for the 2023-24 school year (id. at pp. 7-8).⁵

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). An impartial hearing convened on April on July 27, 2023 and concluded on December 15, 2023 after seven total days of proceedings inclusive of prehearing and status conferences (see Tr. pp. 1-275). In a decision dated February 9, 2024, the IHO found that the student's IEP was appropriate and reasonably calculated to provide the student with an educational benefit in light of his circumstances (IHO Decision at pp. 8, 21). The IHO credited the district's school psychologist's testimony "in full" and held that she offered a credible explanation as to how the IEP appropriately described the student, how the CSE made its recommendations, and how the IEP was meaningfully calculated to confer an educational benefit on the student (id. at p. 9). Regarding the parents' procedural claims, the IHO found that the CSE included the "requisite parties needed for the meeting" and that the parents' concerns were noted throughout the IEP, suggesting an interactive process (id. at pp. 9-10).⁶ The IHO held that the CSE had sufficient evaluative information at the time of the CSE which was reflected in the student's present levels of performance (id. at pp. 10-11). The IHO noted that the 2020 neurodevelopmental evaluation provided the CSE with an "overall picture" of the student and that the 2020 FBA provided the CSE with information

⁵ Additionally, the parents requested pendency for the 2023-24 school year pursuant to an unappealed IHO decision dated August 31, 2022 that ordered the district to reimburse the parents for Steven Gaynor (Parent Ex. A at pp. 3, 7-8). The IHO excluded the prior decision and the parties' pendency agreement as irrelevant, and while it has not erupted into a dispute in this proceeding, it is poor hearing practice to exclude the documentation of prior, recent litigation between the parties or pendency agreements as they often contain useful history regarding the student or the reoccurrence of particular disputes between the parties. The IHO is not bound by the prior IHO's fact finding or decision (unless the same dispute is being brought before a second IHO), but it is relevant and should not have been excluded.

⁶ The IHO gave little weight to the parent's testimony because there were several instances where the parent's participation was documented (IHO Decision at p. 10).

regarding the student's behaviors and how to manage them (id. at p. 10; see Parent Ex. B; Dist. Ex. 1). The IHO determined that the goals included in the April 2023 IEP were appropriate for the student as they addressed the student's areas of need and the IHO further noted that the goals developed at the student's nonpublic school were similar to the goals on the IEP (IHO Decision at pp. 11-13). Again, crediting the school psychologist's testimony, the IHO found that ICT services with the recommended related services of speech-language therapy, counseling, and OT were appropriate for the student and in the student's least restrictive environment (id. at pp. 13-15). The IHO held that the parents' contention that the CSE failed to consider the neuropsychologist's recommendations were unpersuasive, noting that the CSE had more updated information before it than the 2020 neurodevelopmental evaluation (id. at p. 15).

Despite finding that the CSE's recommendations were appropriate, the IHO made alternative findings of the appropriateness of the unilateral placement and equitable considerations (IHO Decision at pp. 16-20). The IHO found that the unilateral placement was appropriate for the student based on similarities between the nonpublic school program and the program recommended by the district, which he had already found appropriate (id. at pp. 17-18). As for equitable considerations, the IHO held in the alternative that they did not favor the parents' request for relief and noted that he would have denied the parent's request for relief due to equitable considerations (id. at pp. 19-20). In particular, the IHO determined that the parents did not "give due consideration" to the district's proposed program (id.).

IV. Appeal for State-Level Review

The parents appeal.⁷ The parents contend that the IHO erred in not finding the student's mother's testimony credible and in determining that some parental concerns being listed in the IEP meant that the parents did not have other concerns. The parents further assert that the IHO erred by finding the ICT placement appropriate. According to the parents, the IHO relied solely on restrictiveness and suggest that the district provided no evidence that the student could make progress with ICT services. The parents argue that the IHO mistakenly indicated that the student was only one grade level behind, when he was two grade levels behind, and that this would "qualify him for a 12:1:1 setting" according to the district school psychologist. According to the parents, the IHO failed to assess the student's ability to make progress towards his goals in the district's recommended program, contending that the goals were designed for the student to attend Stephen Gaynor and he needed the classroom setting and supports given to him at Stephen Gaynor to make progress on those goals. The parents contend that the May 2020 FBA was not sufficient because it did not comply with State regulations regarding an FBA and because it was three years old. The parents further assert that the only reason given by the district as to why a paraprofessional was not recommended for the student was due to the lack of an FBA or a BIP. The parent also appeals

⁷ The parents' request for review was signed by the student's mother only, but the parents appeared by the same attorney that represented them during the impartial hearing who completed, signed, and served the parents' notice of intention to seek review and case information statement, served and filed the Request for Review, and made two requests to amend the parents' request for review prior to withdrawing that request after settlement negotiations were discontinued between the parties. The parents' attorney failed to sign the request for review and is reminded that she was required to sign the request for review if she represents a party, which she clearly did so in this case (8 NYCRR 279.9[a]). If the parent's attorney believes further explanation or clarification was needed regarding the scope of representation or the extent of her participation at this stage of the matter, the place to do so was in a transmittal letter accompanying the request for review.

from the IHO's findings regarding equitable considerations. The parents request that the district be ordered to reimburse them for the actual tuition paid for the 2023-24 school year. In the alternative, the parents request remand for the IHO to apply the proper standard.

In response, the district denies the parents' material allegations. The district contends that it offered the student a FAPE for the 2023-24 school year and the IHO's conclusions on the issues were correct as the IHO properly credited the testimony of the school psychologist. As to equitable considerations, the district argues that the IHO's findings were correct and that a denial of relief based on equitable considerations would have been proper.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427

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).

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

Initially, it is noted that in the due process complaint notice the parents asserted that the CSE was not duly constituted and that the IHO held that all the necessary participants attended the April 2023 CSE meeting (Parent Ex. A at p. 4; IHO Decision at p. 9). However, the parents did not appeal from this determination by the IHO and, as such, it has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Parental Participation

In regard to the issue of parental participation, the parents' pleadings and the due process complaint notice were not clear in their generalized assertions. In their due process complaint notice, the parents specifically raised a claim that the April 2023 CSE predetermined the student's programming with reasons as to why the parents believed the programming was predetermined; however, those allegations were related to the parents' claim that the district failed to follow the recommendations of the evaluations before it (Parent Ex. A at p. 4). The one allegation that indicated the April 2023 CSE failed to consider the concerns of the parents only mentioned a failure to discuss annual goals for the IEP during the CSE meeting, a failure to discuss how the student would function in a larger class with ICT services or how the CSE was offering "less support than in previous years" (id.). The IHO held that the parents were able to participate in the decision-making process, noting that the April 2023 IEP identified some of the parent's concerns but did not identify concerns related to ICT services, SETSS, or related services (IHO Decision at p. 10). Then on appeal, the parents argue that the mere fact that some of their concerns were listed on the April 2023 IEP does not mean all of their concerns were identified on the IEP. The parents further indicate that they raised concerns regarding the district's programming recommendations.

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 CSE 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 proposed IEP does not amount to a denial of meaningful participation (see Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57 [2d Cir. 2016]; Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 449 [2d Cir. 2015]; E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. 2009]; Cerra, 427 F.3d at 193; F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 2017 WL 3574445, at *11-*13

[E.D.N.Y. Aug. 15, 2017], aff'd F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 F. App'x 38 [2d Cir. 2018] [finding that the parent's participation was not impeded when the parent was "given the opportunity [to] speak, ask questions, raise concerns, and offer suggestions"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; Sch. for Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"].

Further, generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Moreover, 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 in light of the IDEA's LRE requirements, but the independent neuropsychologist was not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and her evaluation report reveals little to no consideration of the benefits of access to nondisabled peers during her assessment when she recommended continued full-time placement in a special class and/or private school (see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 119-20).

The evidence hearing record shows that the parents were afforded an opportunity to participate in the IEP development process, as they provided input, and asked and answered questions (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]). Furthermore, the IHO correctly pointed out that some of the parents' concerns were identified on the April 2023 IEP itself. Any failure on the part of the CSE to list every one of the parent's concerns does not lead to the conclusion that the parents were not able to participate in the decision-making process or that the district staff refused to consider their input.⁹ Additionally, the CSE's decision not to defer

⁹ To the extent that the parents appeal from the IHO's according to the parent's testimony little weight and the IHO's credibility findings made in relation to the parent'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, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Nevertheless, in this instance, the IHO's credibility findings go more towards equitable considerations than towards the substance of the matters being addressed on appeal. Accordingly, the credibility finding need not be further discussed.

to the parents' preferred placement does not mean that the CSE predetermined the student's program or that the parents were unable to participate in the decision-making process.¹⁰ As such, I decline to overturn the IHO's decision as to parent participation and predetermination. To the extent that the parents assert that the recommended programming, including ICT services and SETSS was not appropriate, the IHO's finding on the substance of the parents' claims is further addressed below.

B. Special Factors – FBA

On appeal, the parents argue that the IHO erred by relying on the student's 2020 FBA as it was "insufficient" and did not comport with State regulations governing FBAs. The parents further assert that the FBA was "nearly three years old" at the time of the April 2023 CSE meeting and therefore "unlikely" to accurately reflect the student's present levels of functioning.

In an answer, the district asserts that the IHO correctly determined that the CSE had appropriate evaluative information that reflected the student's present levels of performance, and that the FBA was not "dated," as the district school psychologist credibly testified that the CSE could use evaluative information within three years of the CSE meeting.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a behavioral intervention plan (BIP) for a student that is based upon a functional behavioral assessment (FBA) (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial

Additionally, the IHO's finding that the parent's testimony had little weight with respect to concerns raised at the CSE meeting is not relevant as the evidence shows the parents were able to voice concerns at the April 2023 CSE meeting. The question of whether or not the April 2023 CSE addressed the parent's concern that the program recommendation was inadequate goes to the substance of the CSE's recommendations, which is addressed below regardless of whether those concerns were specifically raised at the meeting.

¹⁰ With respect 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. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; 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. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

In this case, the evidence shows that district conducted an FBA of the student on May 29, 2020 (Dist. Ex. 1). At that time, the student was in prekindergarten and the district obtained reports from the student's preschool teachers, SEIT, and the student's mother (id. at p. 1). The district identified the student's targeted "inappropriate behavior" as hitting and pushing his peers and having difficulty transitioning independently from one activity to another, as he became easily distracted, touched materials, and engaged in other activities instead of transitioning to the appropriate location (id.). According to the FBA, the frequency with which the student engaged in these behaviors was every day, and the setting where the behaviors occurred was in the classroom, "especially when he [wa]s in close proximity to other children" (id.). The district identified "triggers" or actions that occurred immediately before the targeted behaviors, such as when he had difficulty with a task, and when he attempted to gain the attention of his peers (id.). Environmental conditions that may have affected the targeted behaviors included the student not receiving attention, having to transition, engaging in a challenging task, and interacting socially with peers (id.). According to the FBA, "[a]fter collecting and analyzing ABC data and interviewing the teachers," the district determined that the student's "behaviors serve[d] the functions of escaping (demands), gaining attention, accessing tangibles, and seek[ing] sensory stimulation" (id.). The district determined that the student gained negative attention as an immediate result of the targeted behavior (id.).

The FBA described the interventions previously attempted with the student, including that his teachers and SEIT worked collaboratively to create a list of prevention strategies to set up the environment with fewer opportunities for the student to push and hit (Dist. Ex. 1 at p. 1). The student's team also focused on teaching him replacement behaviors to use instead of pushing and hitting; he would receive verbal and tangible reinforcement when he demonstrated the replacement/appropriate behaviors (id.). Additionally, the student's teachers and "para" anticipated situations in which the student used his body rather than words to communicate and prompted the student to use language, and teachers were encouraged to use short, direct directions and explanations to reduce frustration and avoid distractibility (id.). The district identified interventions to be planned, including that before an activity began, staff would name the behaviors the student was expected to exhibit, and use a "First_, then ___" board as a visual support when giving the student a demand so that he could complete tasks on his own (id. at p. 2). Further, the district indicated that it was "important to provide [the student] with non-contingent reinforcement" (id.). Expected behavior changes included that the student would show less impulsivity and use language instead of pushing and hitting other students (id.). Lastly, the FBA indicated that teacher reports at annual reviews would be the method of outcome measurement (id.).

On appeal the parents point to portions of the FBA in which they argue the information about the student was not "sufficient" and that the FBA failed to indicate the specific duration and intensity of the student's interfering behaviors. However, even assuming it was imperfect, review

of the FBA, as a whole, does not reveal defects of such magnitude that the IHO was required to ignore it in her analysis. Furthermore, even if the FBA was flawed and that constituted a procedural violation, as discussed next, the student's April 2023 IEP described and appropriately addressed the student's behaviors.

According to the April 2023 IEP, the student was well liked by his peers, he enjoyed interacting with classmates during structured and unstructured play, and he independently initiated and sustained play (Dist. Ex. 4 at p. 9). The April 2023 IEP present levels of performance—which are not in dispute on appeal—reflected that during times of social conflict, the student attempted to express his feelings and problem solve; however, he could quickly become frustrated and impulsively reverted to using unkind words, which ended the interaction and hindered his ability to independently navigate and resolve the conflict (id. at pp. 9-10). He reportedly required teacher facilitation, individualized behavior incentives, and consistent encouragement to appropriately overcome peer disagreements (id. at p. 10). The IEP further indicated that the student had made "great progress" in the classroom and friends during the 2022-23 school year (id.). Additionally, the IEP described the parents' concerns about the student's ability to form relationships due to his difficulty with language and attention, and that he craved socialization but struggled with dysregulation, he could initiate but not sustain play and interactions with peers, he interrupted often, and he was very competitive (id.). Notably, and in contrast to the 2020 FBA, the April 2023 IEP reflected a Stephen Gaynor report that the student "d[id] not engage in aggressive behaviors" (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4 at p. 10).

The student's April 2023 IEP indicated that the student benefitted from the management supports of a highly structured and predictable routine, hands-on and multisensory instruction, language and pragmatic support for peer interaction, a visual schedule including transitions, focusing prompts, frequent movement breaks, verbal prompts from teachers to gain attention appropriately and to wait his turn to talk, praise for appropriate behavior, use of a token system, and minimal distractions (Dist. Ex. 4 at p. 11). Review of the student's annual goals, discussed in more detail below, shows that the CSE developed an annual goal addressing the student's need to improve his pragmatic, social relatedness, and problem solving skills including demonstrating appropriate conversational skills, and comprehending and responding to nonverbal cues (id. at pp. 24-25). Another annual goal was designed to improve the student's problem solving skills when faced with social conflicts by identifying the problem and identifying solutions (id. at p. 27). The IEP indicated that a focus of OT was on improving the student's self-regulation skills and increasing his attention, and the CSE recommended that the student receive one group and one individual session of OT per week (id. at pp. 10, 28-29). The CSE also recommended that the student receive two sessions per week of counseling, with one session in a group of two students (id. at p. 28).

While the student may have required an FBA as a younger child, the evidence in the hearing record shows that, as of April 2023, the student's behavior was improving as he matured, and his attention, social pragmatic, self-regulation, and problem solving skills were appropriately addressed through the management needs, annual goals, and related services provided in the April 2023 IEP (compare Dist. Ex. 1, with Dist. Ex. 4). Accordingly, the April 2023 CSE's determinations that the student did not need strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning or that of others and that the student did not need a BIP were reasonable based on the information available

to the CSE (Dist. Ex. 4 at p. 11). The IHO was not required to find a denial of a FAPE under these circumstances.

C. April 2023 IEP

A review of the student's needs is required to address the parents' allegations on appeal that the April 2023 IEP annual goals and ICT services recommendations were not appropriate.

The April 2023 CSE had before it the student's May 2020 FBA, a Stephen Gaynor midyear 2022-23 speech-language progress report, and a Stephen Gaynor midyear academic and subject-specific 2022-23 progress report (midyear report) (Dist. Exs. 4 at p. 1; see Dist. Exs. 1; 2; 3). In addition, the April 2023 CSE reviewed and considered the student's November 2020 neurodevelopmental evaluation report (Tr. pp. 81, 83-85, 95-96; Dist. Ex. 4 at p. 1; see Parent Ex. B).¹¹

The April 2023 IEP reflected the student's diagnoses of developmental disorder of speech and language and ADHD per the November 2020 neurodevelopmental evaluation (Parent Ex. B at p. 8; Dist. Ex. 4 at p. 1). Review of the April 2023 IEP present levels of performance shows that it contains large sections directly copied from the midyear report (compare Dist. Ex. 2 at pp. 1-9, with Dist. Ex. 4 at pp. 1-10).¹² The April 2023 IEP reflected the midyear report that stated the student was "well liked" by peers, enjoyed interacting with others, and independently engaged in play (Dist. Exs. 2 at p. 1; 4 at p. 9). The student attempted to express his feelings and problem solve during times of social conflict but was prone to becoming frustrated and impulsively used "unkind words" at times (Dist. Exs. 2 at p. 1; 4 at pp. 9-10). Additionally, the student required prompts and incentives from a teacher in order to resolve disputes (Dist. Exs. 2 at p. 1; 4 at p. 10).

¹¹ To the extent the parents assert on appeal that the district "did not offer an evaluative basis demonstrating that [the student] could make progress in a larger classroom with less supports," this is not the process envisioned for the development of special education programming. Federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]). As noted in State guidance, the IEP development process should flow from one step to the next and the development of annual goals should be based on individual need determinations, which should be identified in the student's present levels of performance ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at pp. 18, 30 [revised Sept. 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf>). The program recommendations should then "identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum . . . in the least restrictive environment" (id. at p. 39). Moreover, as one court explained, "[n]othing in the IDEA requires that new formal evaluations be conducted for every student before any single change in an IEP" (Cruz v. Banks, 2024 WL 1309419, at *8 ([S.D.N.Y. Mar. 27, 2024]), and, as further discussed below, the fact that the parents preferred a special class or a private school, did not require the CSE accede to that request.

¹² The April 2023 IEP reflected that the "parent indicated that [the midyear] teacher report [wa]s an accurate reflection of the student's current functioning" (Dist. Ex. 4 at p. 9).

Regarding reading, the April 2023 IEP reflected the midyear report, which indicated the student was a "strong sight reader" who consistently read age-appropriate fiction accurately, and he exhibited "strong foundational reading skills" (Dist. Exs. 2 at p. 2; 4 at p. 1). The student benefitted from hands-on instruction, kinesthetic activities, visual prompts, and "over-learning concepts to support retention" (*id.*). The student was able to produce rhyming words and was working on understanding syllables (Dist. Exs. 2 at pp. 2-3, 4 at p. 2). Additionally, the student was making "great progress" in reading at an appropriate rate (Dist. Exs. 2 at p. 3, 4 at p. 2). He was working on independently and consistently focusing on attending to punctuation and he enjoyed reading with expression (*id.*).

In the area of reading comprehension, the April 2023 IEP reflected the midyear report, which indicated that the student worked on predictions, inferences, and identifying essential story elements using a graphic organizer (Dist. Exs. 2 at p. 4; 4 at p. 3). In addition, the student was working on building vocabulary, reading for meaning, making connections, sequencing, and comparing and contrasting (Dist. Exs. 2 at p. 4; 4 at pp. 3-4). The student was working on becoming more comfortable making predictions, as his fear of being incorrect made him hesitant to share his thoughts (Dist. Exs. 2 at p. 4; 4 at p. 4). His ability to identify the meaning of homophones, independently make text-to-self and text-to-text connections, and accurately identify setting, characters, problems, and solutions of a story had improved (Dist. Exs. 2 at p. 4; 4 at p. 4). Further, the student had made progress in his ability to make inferences, sequence events, and compare and contrast versions of stories (Dist. Exs. 2 at p. 5; 4 at p. 4).

The April 2023 IEP reflected the midyear report which stated that, in the area of writing, the student was provided with individualized instruction in the writing process, including brainstorming, drafting, editing, and understanding sentence composition (Dist. Exs. 2 at p. 5; 4 at p. 5). The student was working on understanding capitalization, punctuation, and parts of speech, proofreading, and independently generating and writing complete, expanded sentences (Dist. Exs. 2 at p. 6; 4 at p. 5). He understood the writing concepts introduced in class and enjoyed illustrating his written sentences (*id.*). The IEP described the student as a "capable writer" who needed occasional language support, such as orally conferencing prior to writing (Dist. Exs. 2 at p. 6; 4 at pp. 5-6). The student had made progress in his ability to use appropriate capitalization and punctuation, proofread, use an editing checklist, and apply phonetic spelling rules (Dist. Exs. 2 at p. 7; 4 at p. 6). Additionally, the student's spelling accuracy had improved, he had become more receptive to feedback during spelling activities, and he was able to independently group words into meaningful phrases and form all letters correctly (Dist. Exs. 2 at p. 3, 4 at pp. 2, 3). The student was working on staying on task, as he became distracted during spelling activities (Dist. Exs. 2 at p. 3; 4 at p. 3).

In math, the April 2023 IEP reflected the midyear report that the student was able to count forwards and backwards by ones, twos, fives, and tens; understand three-digit place value; identify and write numbers; identify number patterns; compute double digit addition and subtraction; identify operations in word problems; identify two and three-dimensional shapes; understand the relationship between seconds, minutes, and hours; identify a.m. versus p.m.; and tell time to the half-hour (Dist. Exs. 2 at p. 8; 4 at p. 7). The student continued to improve his independence with using strategies to solve problems (Dist. Exs. 2 at p. 9; 4 at p. 9).

According to the midyear speech-language progress report, the student's receptive language was an area of strength (Dist. Ex. 3 at p. 1). The student was able to follow routine

classroom directions, but he occasionally exhibited difficulty with multi-step directions containing embedded language concepts (id.). Additionally, the student was able to recall details of text, answer WH questions based on short passages, made steady gains in his ability to make predictions, and was able to make connections between instructional content and prior knowledge (id.). The student benefitted from scaffolding to understand language that was long and complex (id.). He exhibited age-appropriate vocabulary but occasionally demonstrated difficulty with word retrieval and disfluencies (id.). To improve his oral narrative skills, the student benefitted from using a sequencing board containing visuals of story elements, reminders to slow down, reminders to use transition words, and clarifying questions (id.).

The April 2023 IEP indicated that information about the student's OT services came from a midyear OT report (Dist. Ex. 4 at p. 10). According to the IEP, the focus of the student's OT services was on self-regulation and attention through an activity or task, as the student was described as "highly distractible" (id.). The IEP noted the student would benefit from continued OT to address increasing attention to promote task follow through with classroom activities, and improving self-regulation to support engagement in classroom and therapeutic activities (id.).

In order to address the student's identified needs, the April 2023 IEP featured 13 broad annual goals designed to improve the student's reading, writing, mathematics, executive functioning, language, social, graphomotor and fine motor skills (Dist. Ex. 4 at pp. 13-27).¹³ Most of the annual goals had additional goals subsumed within them.¹⁴ Specifically, to address his needs in decoding and reading comprehension, the student's annual goals were to improve his ability to use phonics to decode text, and demonstrate understanding of what he had read (id. at pp. 13-14). To address writing needs, the IEP indicated the student would improve his spelling and early writing skills in order to share experiences and communicate (id. at pp. 15-16). The CSE developed a math annual goal to improve his understanding of arithmetic and number concepts and improve mathematical processes by solving conceptual problems (id. at pp. 17-18). To address the student's executive functioning needs, the annual goals were designed to improve his attention and focus, task initiation, organization, and self-advocacy skills (id. at p. 19-21). In the area of language skills, the annual goals were to improve the student's receptive, expressive, and pragmatic language skills, vocabulary, word retrieval skills, and social relatedness (id. at pp. 22-25). In the area of skills addressed by OT, the student's annual goals were to improve graphomotor and fine motor skills (id. at pp. 25-26). Finally, to address the student's social skill development he was working towards demonstrating problem solving skills during social conflicts (id. at p. 27).

¹³ 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]).

¹⁴ For example, the annual goal to improve graphomotor and fine motor skills included goals for the student to write upper and lowercase letters correctly, increase endurance for writing, and improve pencil control for writing words (see Dist. Ex. 4 at pp. 25-26).

Review of the April 2023 annual goals shows that they include criteria to determine when the goal had been achieved (e.g. 70 or 80 percent accuracy during four out of five consecutive activities), methods of how progress would be measured (e.g. observation, classroom participation, verbal explanations, checklists, homework, examinations), and a schedule of when progress would be measured (once per quarter) (Dist. Ex. 4 at pp. 13-27). The school psychologist who attended the April 2023 CSE meeting testified by affidavit that the student's annual goals corresponded to his areas of need and addressed "foundational skills," which is borne out by review of the student's IEP present levels of performance and annual goals (compare Dist. Ex. 4 at pp. 1-10, 13-27, with Dist. Ex. 6 ¶¶ 1, 7, 14).

Consistent with the above, the IHO found that the annual goals the April 2023 CSE developed for the student were appropriate to meet the student's needs and complied with State regulations (IHO Decision at pp. 11-12). The parents do not appeal from the IHO's determination that the annual goals developed for the student were appropriate to meet the student's needs; rather, the parents assert that the annual goals were designed to be implemented at the student's program at Stephen Gaynor and that they could not be implemented in the district's recommended program. This is not a claim against the annual goals themselves but is instead an attack on the appropriateness of the district's recommended program, including ICT services and SETSS, the which is discussed below.

Nevertheless, related to the parents' argument, it is notable that under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability for a particular methodology or their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (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]). Here, there is nothing in the hearing record to indicate that the annual goals in the April 2023 IEP could not be implemented in a district public school program (see Dist. Ex. 4 at pp. 12-27; cf. R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. 2014]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *12 [S.D.N.Y. Mar. 19, 2013]).

1. ICT Services

On appeal, the parents argue that the IHO erred in finding that a general education placement with ICT services was appropriate, in part because it was less restrictive than the small class and small student-to-teacher ratio the parents requested. According to the parents the IHO overlooked a lack of evidence that the student could make progress in the recommended program by focusing on it being less restrictive, and the IHO also mistakenly found the student to be one grade level behind, rather than two grade levels, which the parents assert would have made a 12:1+1 special class placement an appropriate recommendation.

In an answer the district asserts that the IHO properly found that the April 2023 CSE's programming recommendations were appropriate to confer an educational benefit to the student in the LRE.

Turning to the appropriateness of the recommended program, the April 2023 CSE recommended 25 periods per week of ICT services in core academic classes (Dist. Ex. 4 at p. 28).

State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

In conjunction with the supports inherent in a classroom where the student would receive ICT services, the April 2023 CSE recommended that the student receive five periods per week of direct group SETSS in a separate location at school (Dist. Ex. 4 at p. 28).¹⁵ The school psychologist testified that SETSS was "small group instruction" provided by a special education teacher, who worked on the student's areas of academic deficit (Tr. pp. 152-53). Further, as discussed above, the CSE determined that the student needed the support of a highly structured and predictable routine, hands-on and multisensory instruction, language and pragmatic support for peer interaction, a visual schedule including transitions, focusing prompts, frequent movement breaks, verbal prompts from teachers to gain attention appropriately and to wait his turn to talk, praise for appropriate behavior, use of a token system, and minimal distractions (Dist. Ex. 4 at p. 11). The CSE also recommended that the student receive individual and group counseling, OT, and speech-language therapy services (id. at pp. 28-29).

In written testimony, the school psychologist stated that in an ICT class, the student would have access to a special education teacher and a regular education teacher as well as both special education and general education peers (Dist. Ex. 6 ¶ 15). According to the school psychologist the modifications made in the ICT setting would be sufficient to provide the student with educational support, differentiated instruction, and a high student to teacher ratio (id. ¶ 10). The school psychologist testified that the higher student to teacher ratio, SETSS, and related services were appropriate and reasonably calculated to enable the student to make educational progress during the 2023-24 school year (id. ¶ 15).

The April 2023 CSE considered 12:1 and 12:1+1 special class placements, and an approved nonpublic school placement, but determined that the student did not require "such intensive specialized instruction" to address his needs (Dist. Exs. 4 at p. 35; 6 ¶ 10). The April 2023 CSE specifically determined that a 12:1 or 12:1+1 special class was too restrictive, and the peers in a special class would be functioning below the student's academic level and possibly exhibit behavior challenges; a nonpublic school was rejected as it was "a very restrictive program," and the student did not require "such an intense specialized curriculum" to address his educational needs (Tr. pp. 87-88, 109-11; Dist. Ex. 6 ¶ 10).¹⁶

¹⁵ The term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6).

¹⁶ There was some discussion during the hearing and the parents raise a claim on appeal regarding whether at the time of the April 2023 CSE meeting the student was academically functioning one or two years below grade level (see Tr. pp. 122-30). The school psychologist testified that Stephen Gaynor is an ungraded school and therefore it was unclear whether the grade the student would have been in due to his age corresponded to the skills exhibited for a particular grade; however, going by the student's chronological age which would have placed the student in second grade as of the April 2023 CSE meeting, he could surmise from the Stephen Gaynor reports and other information available to the CSE that the student was functioning approximately one grade level behind (Tr. p.

In direct testimony by affidavit the school psychologist stated that the recommended ICT services and SETSS would provide the student with the necessary level of attention and support he needed to access the curriculum, in the student's LRE (Dist. Ex. 6 ¶¶ 9, 10). When asked during live testimony about the November 2020 neurodevelopmental evaluation recommendation for a small, highly structured full-time special education placement of no more than 12 students, the school psychologist testified that the April 2023 CSE considered that report in conjunction with all of the other information about the student to determine the student's recommended placement and services, as well as considerations regarding the LRE, which the private evaluators had no obligation to consider (Tr. pp. 86-88, 96-99, 108-09; Parent Ex. B at p. 15).¹⁷ The school psychologist testified that a CSE did not generally adopt the recommendations from private evaluators because it was required to "also take into account how the student [wa]s functioning based on reports . . . from the school" and at times, the private evaluators' recommendations were "at odds" with the district's obligation to recommend a placement in the student's LRE (Tr. pp. 150-51).

While the neuropsychologist who conducted the November 2020 neurodevelopmental evaluation was not obligated to consider the student's LRE in recommending a placement for the student, as explained by the school psychologist, 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 the support of a special education teacher within the student's academic classes as well as additional related services and SETSS. Given that a student's

127). Regardless, the school psychologist also testified that the April 2023 CSE based its programming recommendations on the skills the student exhibited at the time the IEP was developed (Tr. p. 134). Additionally, to the extent that the parents argue on appeal that the student would have been two grade levels behind at the start of the 2023-24 school year, such an argument does not take into account the expectation that the student would make some progress from the date of the CSE meeting to the end of the 2022-23 school year. It is also worth noting that the parents did not raise this argument as part of their post-hearing brief, which instead focused on the assertion that the information available to the CSE indicated the student required a class of no more than 12 students and significant 1:1 support (IHO Ex. I at pp. 5-7).

¹⁷ Although not raised on appeal, the November 2020 neurodevelopmental evaluation also included a recommendation for the student to receive 12-month services (Parent Ex. B at pp. 8, 15). However, the hearing record does not include any indication that the student exhibited a loss of skills requiring a period of review in excess of eight school weeks in order to recoup those lost skills, which is what would have been required to find extended school year services necessary for the student to receive a FAPE. The purpose of 12-month services is "to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 3d 94, 125 [E.D.N.Y. 2017]).

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 even if the parents perceive the resulting placement as less ideal (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).

As such, the IHO correctly determined that the April 2023 CSE's programming recommendations that included ICT services, SETSS, and related services were appropriate to meet the student's needs and reasonably calculated to enable the student to receive educational benefit. Therefore, I decline to find that the IHO erred in her determination that the district offered the student a FAPE for the 2023-24 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Stephen Gaynor was an appropriate unilateral placement or whether equitable considerations weigh in favor of the parents' request for relief.¹⁸

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 6, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹⁸ Although I do not reach the issue of equitable considerations, I note that the IHO's finding that the parents never intended to place the student in the district public school is not itself a legally sufficient reason to reduce or deny reimbursement when determining whether to deny a parent's request for tuition reimbursement because it is inconsistent with the controlling law of this circuit. The Second Circuit has held that when considering equities, even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). As such, the IHO is reminded of the standard used by the Second Circuit when considering whether or not to deny a parental request for tuition reimbursement based on equitable considerations.