The University of the State of New York

The State Education Department
State Review Officer
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No. 24-248

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

Appearances:
Ian Girshek, Esq., attorney for petitioner

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied his request that respondent (the district) fund the costs of his daughter's tuition at the Bay Ridge Preparatory School (Bay Ridge) 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 here in detail.

Briefly, the CSE convened on November 29, 2022, and determined that the student was eligible for special education as a student with a learning disability (see generally Dist. Ex. 3).[1] At the time of that CSE meeting, the student was attending 11th grade in the Bridge program at Bay

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

Ridge and "mandated for special education teacher support services five times a week" (id. at p. 1; Dist. Ex. 5 at p. 1). The November 2022 CSE developed an IEP and recommended that the student receive integrated co-teaching (ICT) services in English language arts (ELA), math, social studies and sciences, and related services consisting of one 30-minute session per week of individual counseling and one 30-minute session per week of counseling in a group, with all services to commence on December 13, 2022 (Dist. Ex. 3 at p. 6).

On August 5, 2023, the parent signed an enrollment contract for the student to attend the Bridge program at Bay Ridge for 12th grade during the 2023-24 school year (Parent Ex. H).[2, 3]

In a prior written notice and school location letter, both dated August 8, 2023, the district summarized the November 2022 CSE's recommendations in the IEP and notified the parent of the public school site to which the district assigned the student to attend (Dist. Exs. 8-9).

In a 10-day notice dated August 23, 2023, the parents, through their advocate, informed the district that they believed the student's IEP did not offer the student a free appropriate public education (FAPE) and that they intended to enroll the student at Bay Ridge for the 2023-24 school year and seek funding for that private placement from the district (Parent Ex. D).

In a due process complaint notice sent to the district on February 29, 2024, the parent, through the same lay advocate who sent the August 2023 notice, alleged that the district denied the student a FAPE for the 2023-24 school year and raised, among other things, the following allegations: the district failed to timely develop an appropriate IEP for the student for the 2023-24 school year; the district failed to sufficiently evaluate the student; the student's IEP was predetermined; the student's IEP did not include appropriate services to meet her academic needs; the recommended ICT services were insufficient to address the student's needs; and the recommended program in the IEP was not appropriate to allow the student to learn and make progress (see Parent Ex. A).[4] The parent also alleged that Bay Ridge was an appropriate placement for the student (id. at p. 4). For relief, the parent requested reimbursement for the cost of the student's tuition at Bay Ridge for the 2023-24 school year (id.).

The district appeared for a prehearing conference before the Office of Administrative Trials and Hearings (OATH) on April 10, 2024, and the parties proceeded to an impartial hearing on May 14, 2024, which concluded on the same day (Tr. pp. 1-67).[5]

In a decision dated May 20, 2024, the IHO found that district met its burden to show that it offered the student a FAPE for the 2023-24 school year and denied the parent's requested relief

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

[3] The Bay Ridge tuition was in the amount of $78,700 (Parent Ex. G at p. 1).

[4] The parent's due process complaint notice did not identify the date of the student's IEP from which his claims derived (see Parent Ex. A).

[5] Neither the parent nor his lay advocate appeared for the prehearing conference (see Tr. pp. 1-6).

(IHO Decision at p. 5). More specifically, the IHO determined that the November 2022 CSE was properly constituted, that it developed an IEP aligned with the evaluative information before it, and that it considered the least restrictive environment (LRE) for the student (id.). Additionally, the IHO determined the district's evidence led to the conclusion that the contents of the November 2022 IEP were appropriate and reasonably calculated to confer an educational benefit on the student, and the assigned public school was able to implement the IEP (id.). Having found that the district met its burden of proving it offered the student a FAPE, the IHO denied the parent's request for relief (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail.[6]

The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining the district offered the student a FAPE for the entire 2023-24 school year based on the November 2022 IEP, despite the IHO noting that the CSE did not convene for the student's annual review in November 2023 to develop an IEP for the remainder of the 2023-24 school year; and

2. Whether the IHO erred in determining that ICT services were appropriate to meet the student's needs.

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]).

[6] The parent submits a reply to the district's answer. The reply contained an allegation that the district's answer "opened the door to various issues" and the parent raises a number of new claims in his reply. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, review of the district's answer does not indicate that the district raises any new claims for review such that a reply would be appropriate. Additionally, it would be fundamentally unfair to a respondent to allow claims raised for the first time by a petitioner in a reply pleading. The place to assert claims for a due process proceeding is in a due process complaint notice so they can be addressed by an IHO, not after the impartial hearing process has concluded and during the 11th hour in an appeal (8 NYCRR 200.5[i]). Accordingly, the reply does not fit within the acceptable conditions precedent for a reply in this administrative forum. As such, the parent's reply fails to comply with the practice regulations and the contents of the reply will be not considered.

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]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

The parent's central argument raised on appeal is that the district failed to convene the CSE for the student's annual review after November 29, 2023, and that although the IHO acknowledged this fact, she erroneously determined that the district nonetheless offered the student a FAPE for the 2023-24 school year. However, a review of the parent's due process complaint notice reveals that the parent did not raise this allegation as part of the scope of this proceeding.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal

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

No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parent's February 2024 due process complaint notice raised allegations regarding the student's IEP and also alleged failures by the district asserting that the student was deprived of a FAPE for the 2023-24 school year, but the parent did not raise an allegation that the district failed to convene the CSE for the student's annual review within one year after the November 2022 CSE (see Parent Ex. A at pp. 2-4). The closest allegation presented in the due process complaint notice was an assertion that the district "[f]ailed to develop an appropriate and timely IEP for [the student] for the 2023-24 school year" (Parent Ex. A at p. 3). However, this more general assertion must be read in conjunction with the parent's other allegations, including that the parent "was not in agreement with the [CSE's] recommendations" and that the student's mother "was clear . . . that the recommended program and services would not be appropriate for her daughter" (id. at pp. 2-3). Accordingly, as the parent's due process complaint notice did not include a specific allegation that the CSE failed to convene for an annual review in or after November 2023, and a review of the allegations contained in the parent's due process complaint notice tend to focus on the appropriateness of the November 2022 IEP, without specifically identifying it by date, the scope of this hearing did not include any issues related to a failure to hold an annual review meeting during the 2023-24 school year.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

After a review of the hearing record, the evidence shows the district did not "open the door" to this issue, as it introduced witness affidavits and did not elicit direct testimony of its witnesses during the impartial hearing (Tr. pp 7-67; see Dist. Exs. 11-12). Review of such affidavits does not show that the district was on notice that the parent was asserting a claim that the November 2022 IEP expired and the district failed to develop an IEP for the remainder of the 2023-24 school year (Dist. Exs. 11-12). The parents' 10-day notice indicated reasons that they felt the November

2022 IEP was insufficient and their resulting decision to place the student in Bay Ridge for the 2023-24 school year and seek "tuition reimbursement and/or direct payment" from the district (Parent Ex. D at p. 1). Moreover, it appears that after the impartial hearing commenced, during the opening statement of the parent's lay advocate, she posed a question to the opposing side and alleged for the first time that the November 2022 IEP was "not a timely IEP for the entire [2023-24] school year" (Tr. p. 19). However, even if it were permissible to raise new claims in an opening statement rather than in a due process complaint notice, the advocate was not clear if she was questioning the lack of an annual review or a failure to convene the CSE prior to the start of the 2023-24 school year, as, just prior to the above statement, the parent's advocate indicated that the CSE contacted the parent during summer 2023 about "a possible CSE meeting" but the district informed the parent it was too early and would contact the parent again, but never did (Tr. p. 19).

In responding to the parent's assertion, during its closing statement, the district contended that the parent "alluded" that the November 2022 IEP was out of date, or that there was no IEP in place prior to the start of the 2023-24 school year (Tr. pp. 59-60). Accordingly, the district defended its position by arguing that, in accordance with its obligations, the district had an IEP in effect at the start of the 2023-24 school year—the November 2022 IEP, and further argued that the November 2022 IEP offered the student a FAPE for the 2023-24 school year (Tr. pp. 60-62). In the parent's closing statement, the advocate then reiterated that the parent's position was that the November 2022 IEP was not timely for the entire 2023-24 school year as it was an IEP for the 2022-23 school year (Tr. pp. 62-63).

On appeal, the district continues to defend against the parent's allegations by asserting that the November 2022 IEP was in place at the start of the 2023-24 school year, when the parent made his decision to place the student at Bay Ridge for the 2023-24 school year (Answer at ¶¶11-14).[8]

Although the alleged failure of a CSE to convene for an annual review before November 2023 was not properly raised, and the district did not open the door to the issue during the impartial hearing, I will address the district's position that the November 2022 IEP was the operative IEP at the start of the 2023-24 school year and how the district's assertion impacts the parent's position that the CSE did not hold an annual review meeting during the 2023-24 school year.

As a general matter, the district has an obligation to review the IEP of a student with a disability periodically but at least annually, and the CSE, upon review, must revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In guidance letters, the United States Department of Education indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation

[8] In his reply, the parent first asserted that the November 2022 IEP was not appropriate for the start of the 2023-24 school year because the CSE should have reconvened closer in time to the start of the year (Reply ¶¶ 6-7). As noted above, raising this allegation at such a late stage of the proceeding and appeal was improper.

of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Frumkin, 79 IDELR 233 [OSERS 2021]; Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). The United States Department of Education's Office of Special Education Programs has indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]). However, there is no requirement that a CSE reconvene "whenever additional information comes to its attention" (MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *12 [S.D.N.Y. Dec. 21, 2020]).

The parent contends that the evidence is clear that the November 2022 IEP expired in November 2023 and that the district's failure to convene the CSE to create a new IEP in November 2023 denied the student a FAPE for the remainder of the school year. The district in its answer argues that the November 2022 IEP was the operative IEP at the time of the parent's unilateral placement decision and in place at the beginning of the 2023-24 school year, and also that the assigned public school could have implemented the IEP.

Here, the district is correct that the November 2022 IEP was in effect at the beginning of the 2023-24 school year, and therefore, the district met its obligation to have an IEP in place at the beginning of the school year, and the CSE was not required to conduct an annual review and develop a new IEP prior to September 2023. Additionally, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).[9] The evidence in the hearing record indicates that the parent based his decision to unilaterally place the student for the 2023-24 school year on his disagreements with the November 2022 IEP and the assigned school recommendation (see generally Parent Ex. D). The parent's advocate made this clear during her opening statement when she indicated the parent received a school location letter, visited the school, and determined that it was not going to be appropriate for the student (Tr. pp. 18-19).

Thus, in line with the prospective analysis required by the Second Circuit, the November 2022 IEP was the operative IEP at the time of the parent's placement decision and the district is correct in its answer that it was not required to defend any subsequent IEP developed after the student was attending the unilateral placement (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88). The evidence shows that the parent signed a Bay Ridge enrollment contract for the 2023-24 school year on August 5, 2023, and then sent a 10-day notice letter to the district dated August 23, 2023, which indicated his disagreement with the student's

[9] There is some authority that indicates that a later-developed IEP is operative that has arisen from circumstances where a school district attempts to defend an IEP developed later (usually after the beginning of the school year) that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215).

IEP, which at that time was the November 2022 IEP (Parent Exs. D; H). In any event, the hearing record does not include evidence that the parent requested a new CSE meeting at any time during the 2023-24 school year or otherwise show that he indicated to the district that the student was leaving Bay Ridge and would require special education programming from the district (see Tr. pp. 1-67; Parent Exs. A-K).[10]

Additionally, as discussed above, the district had an IEP in place at the start of the school year, when the parent made the decision to place the student at Bay Ridge for the 2023-24 school year and, accordingly, review of the parent's placement of the student at Bay Ridge must focus on the IEP in place, the November 2022 IEP.

B. November 2022 IEP

Although the student's present levels of performance, as detailed in the November 2022 IEP, are not in dispute on appeal, a brief discussion of the student's needs is necessary to evaluate the parent's claim regarding the appropriateness of the November 2022 CSE's recommendation for ICT services.

1. The Student's Needs

A review of the student's November 2022 IEP shows that the CSE relied on the student's 2022-23 nonpublic school progress reports and the October 2022 psychoeducational evaluation report when developing the student's special education program (see Dist. Exs. 3 at pp. 1-2; 4). Specifically, administration of the Wechsler Abbreviated Scale of Intelligence-Second Edition (WASI-II) to the student yielded a full-scale IQ of 80 (low average range), with both verbal comprehension and conceptual reading indexes also falling in the low average range (Dist. Ex. 3 at p. 1).

Regarding academic skills, an October 2022 administration of the Wechsler Individual Achievement Test, Fourth Edition (WIAT-4) to the student yielded reading and math subtest scores all within the very low or low average range, and an essay composition subtest score in the average range (Dist. Ex. 3 at p. 1). The November 2022 IEP reflected that, according to the progress reports, in the area of reading the student struggled with reading comprehension and using context clues to determine the meaning of new vocabulary words, which made it difficult for her to comprehend grade-level texts independently (id.). The student benefitted from reminders to annotate as she read and having details pointed out, vocabulary defined, and nuanced concepts explained to understand underlying themes while reading (id.). In the area of writing, the IEP indicated that the student required explicit instruction in the writing process, struggled to organize her thoughts and support her ideas with appropriate text references, was easily overwhelmed by lengthier assignments, and required support to create outlines for each essay (id. at pp. 1, 2). According to the IEP, the student needed extended time to elaborate on ideas and use appropriate transitions (id. at p. 2). Further, the student's writing skills were affected by weaknesses in spelling, punctuation, syntax, and grammar, and she primarily used simple sentences when writing independently (id.). Additionally, the student required graphic organizers, sentence starters,

[10] The Bay Ridge bridge program upper school director testified in May 2024 that the student was then-currently "on track to graduate from the 12th grade at the end of this school year, in June of 2024" (Parent Ex. K ¶¶ 6, 54).

scaffolding, visual prompts, assignments broken down into manageable pieces, one to one instruction, and frequent check-ins (id. at p. 1). As for math, the student was enrolled in a modified algebra/geometry class with one other student and exhibited difficulty applying learned concepts to new problems, and required "much repetition and scaffolding to understand most topics," "prompting and review for most examples," and a calculator as she struggled with "basic arithmetic" (Dist. Ex. 3 at p. 1; see Dist. Ex. 7 at p. 1). Further, the student had difficulty initiating class assignments, and benefited from individualized support, repetition, immediate feedback, and extra time to complete assignments (Dist. Ex. 3 at p. 1). The November 2022 CSE identified strategies to support the student's management needs, which generally addressed her academic skill deficits (id. at pp. 2-3).

With regard to language skills, the November 2022 IEP reflected a report that the student presented with "weaknesses in the areas of receptive and expressive language" (Dist. Ex. 3 at p. 1; see Dist. Ex. 5 at p. 1). The IEP indicated that the student's receptive language challenges were "characterized by difficulties with aspects of listening comprehension, reading comprehension, and language processing" (Dist. Ex. 3 at p. 1). The student had difficulty comprehending complex directions and answering comprehension questions about what she had read or listened to (id.). She had difficulty understanding figurative and idiomatic language (id.). The student's expressive language challenges were "characterized by difficulties with word retrieval, grammar and syntax," and she had "difficulty accessing and retrieving a variety of vocabulary words to express herself" both verbally and when writing (id.).

Turning to the student's social/emotional development, the November 2022 IEP reflected that the student had appropriate relationships with both peers and adults at school, was working toward improving her self-advocacy skills, and had improved her frustration tolerance (Dist. Ex. 3 at pp. 1, 2). Regarding physical development, the IEP indicated the student was in good physical health, and that there were no social or physical developmental concerns shared by the parent at the November 2022 CSE meeting (id. at p. 2).

2. Integrated Co-Teaching Services

To address the student's above stated needs, the November 2022 CSE recommended that the student attend a general education class with the support of ICT services for 10 periods per week in ELA, and five periods per week each in math, social studies, and science, with both one individual and one group 30-minute session per week of counseling (Dist. Exs. 3 at p. 6; 11 ¶ 8).

The parent asserts on appeal that the ICT class sizes at the assigned school location for the 2023-24 school year were "significantly larger than those at Bay Ridge," which had a maximum of 15 students and "allowed for more individualized attention and support."[11] According to the parent, the "larger class sizes at [the assigned school location] were unsuitable for [the student's] learning needs," and affected her "ability to receive a FAPE, as smaller class environments ha[d] been shown to be essential for her progress and well-being." Additionally, the parent argues that

[11] Contrary to the form requirements governing appeals to the Office of State Review, the parent's request for review is not paginated (see 8 NYCRR 279.8[a][3]; Req. for Rev. at pp. 1-6).

the ICT "class[es] were 'too large and too crowded to provide the individualized instruction, quiet and distraction-free environment' that the student needed to benefit from instruction."

Turning to the merits of whether the November 2022 CSE's recommendation for ICT services was appropriate, State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

The district school psychologist who conducted the student's October 2022 psychoeducational evaluation participated at the November 2022 CSE meeting as both a school psychologist and district representative (Dist. Exs. 3 at p. 10; 4 at p. 1). The school psychologist testified that for the November 2022 CSE meeting he reviewed the student's October 2022 psychoeducational evaluation report, a November 2022 speech and language progress report, an October 2022 vocational assessment, an October 2022 English progress report, and an October 2022 math progress report (Dist. Ex. 11 ¶ 6). Further, the school psychologist testified that "according to data from the psychoeducational evaluation," the recommended ICT services were appropriate for the student as she "ha[d] low-average IQ, decoding, spelling, and math fluency scores" and she was "at a high enough functioning level to be placed in a general education classroom" (id. ¶ 9). The school psychologist testified that the student's skills "being two grade levels below in math and reading [wa]s not enough of a justification for a recommendation for a special class program," as "[s]he would still be able to function in a general education classroom" (id. ¶ 10). Additionally, the school psychologist testified that a "15:1" special class program was considered for the student, but the CSE rejected that option as the student "ha[d] low average cognitive functioning and d[id] not need such intensive specialized instruction to address her educational needs" (id. ¶ 12; see Dist. Ex. 3 at p. 10). The school psychologist also concluded that the student could "benefit from more interaction with non-disabled peers" in a classroom where ICT services were delivered (Dist. Ex. 11 ¶ 12).

In addition to the full time special education teacher support provided in a general education classroom with ICT services, review of the November 2022 IEP shows that the CSE developed annual goals focused on improving the student's reading, writing, and math skills, which the school psychologist stated were developed at the CSE meeting with the input of the Bay Ridge representative and parent (Dist. Exs. 3 at pp. 4-5; 11 ¶¶ 11, 12). To address the student's social/emotional needs, the annual goals developed for the student were designed to improve her appropriate emotional responses to various situations, and her ability to initiate conversations with peers, and the CSE recommended that she receive both individual and group counseling services (id. at pp. 5, 6). The school psychologist testified that the annual goals "were appropriate based on the information provided to the [district]," "were clear, adequate, realistic, and specifically designed to address [the student's] needs and enable her to make progress," and that they "identified the deficit areas in which [the student] needed support" (Dist. Ex. 11 ¶ 15).

The November 2022 CSE identified supports to address the student's management needs including: preferential seating, editing checklists, visual models, graphic organizers, sentence

starters, assignments and information broken down into manageable pieces, one to one instruction, frequent check-ins, repetition, review, immediate feedback, extra time to complete assignments, use of calculator, prompts/cues, explicit instruction, extended time on quizzes/tests, teacher check-in, scaffolding, practice with quizzes/tests items, frequent praise/encouragement, practice, preview and review, aid with math word problems, break down problems into steps, and modified classwork and homework (Dist. Ex. 3 at pp. 2-3). Many of these management strategies were recommended in the student's Bay Ridge progress reports (compare Dist. Ex. 3 at pp. 2-3, with Dist. Ex. 5 at p. 2, and Dist. Ex. 6 at p. 2, and Dist. Ex. 7 at p. 2).

The parent, citing to State regulations, argues that the student's management needs were "highly intensive" and required her to be in a special class not to exceed six students, with one teacher and one or more supplementary personnel (citing 8 NYCRR 200.6[h][4][ii][a]). While the November 2022 IEP list of strategies identified to address the student's management needs covers a broad range, most if not all were designed to address her academic and executive functioning needs and did not equate to being "highly intensive" such that she required removal from her nondisabled peers and placement in a 6:1+1 special class (Dist. Ex. 3 at pp. 2-3). Rather, the IEP indicated that the student was "quiet," "hard working," and a "pleasure to have in class," did not exhibit behaviors that interfered with her learning or required a behavioral intervention plan, demonstrated independent living skills, and was interested in studying nursing after graduating from high school (id. at pp. 1-3).

The parent's concern about the size of the public school classes in which ICT services are delivered illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parent's decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

The district assistant principal for instructional support services (assistant principal) testified that ICT classes have a maximum of 32 students, with two teachers per class, one who is New York State certified in general education and the other New York State certified in special education (Dist. Ex. 12 ¶ 9). As noted above, no more than 12 special education students are permitted in the class. The assistant principal also indicated that students in ICT classes receive targeted small group intervention daily "based on their needs" within the classroom (id.). In addition, the school psychologist testified that the management needs in the November 2022 IEP, which included one to one instruction, "provide[d] an extensive list of procedures that the general and special education teachers c[ould] use to provide appropriate scaffolding for [the student] in an ICT classroom" (Dist. Ex. 11 ¶ 13). Although the parent may have desired supports for the student to be provided more in keeping with the approach at Bay Ridge, 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 v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144-45 [N.D.N.Y. 2004]).

Regarding the parent's argument that the assigned school location would not be able to provide individualized instruction in a quiet and distraction-free environment, such argument is speculative and not supported by the hearing record (see Parent Exs. A-K; Dist. Exs. 1-12; Tr. pp. 1-67).[12]

As discussed above, the parent's allegation that the IHO erred in finding that the district offered the student a FAPE during the 2023-24 school year is not supported by the evidence in the hearing record, and I agree with the conclusions of the IHO that the November 2022 IEP was reasonably calculated to enable the student to receive educational benefits to the student, even if it did not provide the same type of programming that the parent preferred for his daughter. The evidence in the hearing record also supports the IHO's finding that a general education placement with the support of ICT services, counseling, and management strategies would have provided the student with full time special education teacher support in core academic areas and individualized instruction to address her identified needs.

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 I need not reach the issues of whether the parents' unilateral placement of the student at Bay Ridge for the 2023-24 school year was an appropriate placement for the student or whether equitable considerations supported the parents' request for relief (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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**
September 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[12] The assistant principal testified that the assigned school site "had a seat for the student in an ICT class at the start" of the 2023-2024 school year, and "was able to implement the classes and services on her IEP" (Dist. Ex. 12 ¶ 10). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP must be based on more than mere speculation that the school would not adequately adhere to the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015]; see Y.F. v. New York City Dep't of Educ., 659 Fed App'x 5 [2d Cir. Aug. 24, 2016]).