The University of the State of New York

The State Education Department
State Review Officer
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No. 15-020

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

Appearances:
Law Offices of Regina Skyer & Associates, LLP, attorneys for petitioners, Lara Damashek, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2014-15 school year was appropriate. The district cross-appeals from that portion of the IHO's decision which directed the district to fund the costs of related services at the student's nonpublic school. The appeal must be dismissed. The cross-appeal must be sustained.

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 hearing record reflects that the student presents with strong academic skills but also demonstrates deficits in receptive, expressive and pragmatic language skills; fine motor, visual motor, and motor planning skills; attending skills; auditory processing; and social skills (Dist. Exs. 3 at p. 1; 5 at p. 1; Parent Exs. C at pp. 1-3; D; E; F at pp. 1-2).

The hearing record reveals that the student has attended a nonpublic general education preschool program since the 2012-13 school year (Tr. pp. 205-08). At the beginning of the 2012-13 school year, the student received 1:1 special education itinerant teacher (SEIT) services and speech-language therapy, pursuant to an IEP developed by a district committee on preschool special education (CPSE) (Tr. pp. 145, 204; see Dist. Ex. 6 at p. 1). Occupational therapy (OT) services were added in spring 2013 (Tr. pp. 204-05). During the 2013-14 school year, the student received 12 hours per week of 1:1 SEIT services, as well as three 45-minute individual speech-language therapy sessions per week and two 30-minute individual OT sessions per week, pursuant to an IEP developed by the CPSE in June 2013 (Tr. p. 76; Dist. Exs. 6 at p. 1; 9 at p. 14). At the time of the impartial hearing, the student continued to attend the nonpublic preschool program and received the same duration and frequency of SEIT and related services that he received for the 2013-14 school year (Tr. pp. 207-08, 229).

On May 7, 2014, a CSE convened to develop the student's IEP for the 2014-15 school year (Dist. Ex. 3). The CSE found the student eligible for special education and related services as a student with a speech or language impairment and recommended placement in a general education kindergarten classroom with the support of integrated co-teaching (ICT) services for English language arts (ELA), mathematics, social studies, and science (id. at pp. 1, 7-8).[1] The CSE also recommended that the student receive two 30-minute individual OT sessions and three 30-minute individual speech-language therapy sessions per week (id. at p. 7).

In a final notice of recommendation dated June 13, 2014, the district summarized the services recommended in the May 2014 IEP and identified the particular public school site to which the district assigned the student to attend for the 2014-15 school year (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated August 4, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2014-15 school year (Dist. Ex. 1). Initially, the parents alleged that the annual goals contained in the May 2014 IEP failed to include a "grade level baseline" and did not "reference appropriate grade level performance standards" (id. at pp. 3-4). Next, the parents argued that the May 2014 CSE's recommendation for ICT services was not appropriate for the student (id. at p. 3). More specifically, the parents argued that the recommended program (1) was not supported by the documentation available to the CSE, (2) was based on policy considerations rather than the student's needs; and (3) would not provide the student with an adequate level of individualized support (id.). The parents further argued that the recommended program would not be able to meet the student's management needs as identified in the IEP (id.). Additionally, the parents argued that the CSE recommendation for 21 periods of ICT services per week was insufficient to address the student's needs, as the IEP indicated that the student required the "full-time support of a special education teacher" (id. at p. 4). With respect to the recommended related services, the parents argued that the CSE improperly reduced the duration of the student's speech-language therapy sessions from 45 minutes to 30 minutes (id.). The parents also raised several claims regarding the assigned public school site (id.). As relief, the parents requested that the district continue to fund the student's SEIT and related services at the student's preschool

[1] The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this proceeding (see 34 CFR 300.8 [c][11]; 8 NYCRR 200.1[zz][11]).

program (id.). The parents also invoked the student's right to a pendency (stay put) placement, identifying the June 2013 IEP as the student's last agreed-upon placement (id. at p. 3).

B. Impartial Hearing Officer Decision

A hearing was held on August 19, 2014, to address the student's pendency (stay put) placement during the due process proceedings (Tr. pp. 1-7). On August 21, 2014, an IHO issued an interim order, noting the parties' agreement that the June 2013 IEP was the last agreed upon IEP for the student and determining that the student's pendency placement consisted of 12 hours per week of 1:1 SEIT services, three 45-minute sessions of individual speech-language therapy per week, and two 30-minute sessions of individual OT per week (Interim IHO Decision at p. 3).[2]

An impartial hearing was convened on October 21, 2014, and concluded on December 15, 2014, after two days of proceedings (Tr. pp. 8-251). By decision dated January 7, 2015, the IHO found that the district offered the student a FAPE for the 2014-15 school year (IHO Decision). With respect to the annual goals and short-term objectives, the IHO found that the May 2014 IEP contained goals to address the student's needs and criteria to measure the student's progress (id. at p. 14). The IHO further noted that there was no testimony in the hearing record indicating that the annual goals were not appropriate (id.). Next, the IHO found that the CSE's recommendation for placement in a general education class with ICT services was appropriate for the student, that the student did not require SEIT services for the 2014-15 school year, and that the hearing record was devoid of evidence that the student "would have difficulty following the directions of the special education teacher in the ICT class" (id. at pp. 15-16). The IHO denied the parents' request to increase the duration of the student's speech-language therapy from 30 minutes to 45 minutes, as well as their request for public funding for the student's SEIT services, but ordered the district to fund the costs of the student's related services as reflected in the May 2014 IEP, including three 30-minute sessions of individual speech-language therapy and two 30-minute sessions of individual OT per week (id. at p. 16).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2014-15 school year. First, the parents maintain that the May 2014 IEP was not appropriate because the annual goals failed to include a "grade level baseline." Next, the parents argue that the IHO erred in finding that the May 2014 CSE's recommendation for placement in a general education class with ICT services was appropriate for the student. Additionally, the parents argue that since the CSE recommended that the student receive 21 periods of ICT services per week, during academic periods only, the student would receive no special education supports and would not be able to function during the non-academic portions of the school day. Next, the parents contend that the CSE's reduction of the student's speech-language therapy sessions from 45 minutes to 30 minutes was not appropriate. With respect to the assigned public school site, the parents maintain that it was not appropriate for the student. As relief, the

[2] The hearing record indicates that the IHO who issued the pendency order recused herself (Tr. p. 10). On September 2, 2014, a second IHO, who later issued the final decision on the merits, was appointed to preside over the impartial hearing (id.).

parents request that the district continue to fund the student's SEIT and related services at the nonpublic preschool program.

In an answer, the district denies the parents' material assertions and argues that the IHO correctly concluded that it offered the student a FAPE for the 2014-15 school year. The district cross-appeals the IHO's order that the district fund the student's related services as reflected in the May 2014 IEP.

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. 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; 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. Florida 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]). 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., 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, [2d Cir. 2008]).

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 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. 2012]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. May 2014 IEP

1. Annual Goals

The parents argue on appeal that the May 2014 IEP was not appropriate because the annual goals failed to include a "grade level baseline" or "grade level performance standards." For the reasons set forth below, the parents' assertions are without merit.

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]).

Initially, the parents' allegations are true to the evidence in the record when they state that the annual goals in the May 2014 IEP did not include a "grade level baseline" or "grade level performance standards." However, their claim nevertheless falls short because neither the IDEA nor State or federal regulations require a CSE to develop goals that are expressed in terms of a specific "baseline" or "grade level" (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. 2014]); see R.B. v New York City Dept. of Educ., 15 F.Supp.3d 421, 434 [S.D.N.Y. 2014], aff'd, 2015 WL 1244298 [2d. Cir. Mar. 19, 2015]). Furthermore, a review of the hearing record indicates that the annual goals in the May 2014 IEP were designed to address the student's needs. The May 2014 IEP included 10 goals to address the student's identified needs in the areas of receptive, expressive and pragmatic language skills; attention; sensory processing; fine and visual motor skills; and social skills (Dist. Ex. 3 at pp. 3-6). The IEP did not include any academic goals; however, the hearing record indicates that the student did not exhibit any deficits in academics and was on grade level academically (see id. at pp. 1, 3-6, 11). Rather, consistent with testimony by the district school psychologist and State regulations, the student's annual goals included the specific skills or tasks that the student was expected to demonstrate and the required evaluative criteria (i.e., 85% accuracy, 4 out of 5 trials), the evaluation procedures (i.e., class activities, teacher and provider observations, teacher made materials), and the schedule that would be utilized to determine if the student's goals have been achieved (i.e., one time per quarter) (Tr. pp. 61-62; Dist. Ex. 3 at pp. 4-6). Furthermore, the IEP included several goals which indicated that the student would perform at a level appropriate for his age: for example, to demonstrate the ability to understand age-appropriate grammatical forms or formulate age-appropriate sentences (id. at p. 4).

Overall the evidence in the hearing record supports a finding that the annual goals in the May 2014 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *11 [S.D.N.Y. Dec. 3, 2014]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. 2013]).

2. Integrated Co-Teaching Services

The parents contend on appeal that placement in a general education class with ICT services was not reasonably calculated to address the student's needs. More specifically, the parents argue that the student required 1:1 SEIT services. Upon review of the evidence in the hearing record, the IHO properly concluded that the student's needs did not warrant 1:1 SEIT services and that the May 2014 CSE's recommendation of a general education classroom with ICT services was reasonably calculated to provide educational benefit to the student.

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 an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

In the instant case, the hearing record reveals that the May 2014 CSE reviewed evaluative information regarding the student's functioning including the June 2013 IEP, a classroom observation of the student, a social history update, and progress reports completed by the student's preschool teacher, SEIT, speech-language pathologist, and occupational therapist, as well as information provided at the CSE meeting by the student's SEIT and preschool teacher (Tr. pp. 50-51, 80-105; see Dist. Exs. 3; 9; Parent Exs. C; D; E; F). Based on the aforementioned information, the CSE determined that the student's academic skills were strong and at the prekindergarten level, and that the student demonstrated needs in the areas of receptive, expressive and pragmatic language; social/emotional skills; fine motor, visual motor, and motor planning skills; sensory regulation; and in his ability to attend to task, maintain his focus of attention, and process auditory information (see Dist. Ex. 3 at pp. 1, 2, 4-6, 11; Parent Exs. C at pp. 1-3; D; E; F at pp. 1-2). The CSE recommended placement in a general education classroom with ICT services in English language arts (11 periods per week), mathematics (5 periods per week), social studies (3 periods per week), and science (2 periods per week) (Dist. Ex. 3 at p. 7). Additionally, the CSE incorporated strategies in the IEP to address the student's management needs, including the environmental modifications and human/material resources that the student needed in order to be successful in the general education setting, including the provision of redirection, focusing prompts, advance warning of schedule/routine changes, and 1:1 support and small group instruction (Tr. pp. 50-51, 105; Dist. Ex. 3 at p. 2). Moreover, as mentioned above, the May 2014 CSE developed annual goals designed to address the student's deficits in attending and impulsivity, reasoning skills, and social skills (see Tr. pp. 32, 35; Dist. Ex. 3 at p. 5). The CSE also developed annual goals to address the student's deficits in receptive, expressive, and social/pragmatic language skills and recommended the provision of individual speech-language therapy services of three 30-minute individual sessions per week (Dist. Ex. 3 at pp. 4, 7). In addition, the CSE created annual goals designed to target the student's fine motor deficits in writing and printing skills and sensory regulation needs including his ability to register and tolerate sensory input, respond to verbal cues, remain seated during large group activities, reduce sensory seeking behaviors, and handle a variety of materials without behavioral over reaction, and recommended OT services of two 30-minute individual sessions per week (id. at pp. 6-7).

In making its placement recommendation, the district school psychologist testified that the CSE considered and rejected special education teacher support services (SETSS) because, as the student was on grade level at that time, SETSS would not be an appropriate recommendation (Tr. p. 36).[3] Testimony by the district school psychologist also indicated that the CSE considered recommending the additional support of a 1:1 paraprofessional for the student but because the student was not presenting with significant academic, behavioral, or health problems, the CSE determined there was no need to provide additional paraprofessional support (Tr. p. 42). The district school psychologist and social worker also testified that the CSE determined that the student's needs could be addressed in a classroom providing ICT services with related services (Tr. pp. 43, 85).

A review of the hearing record reveals that the CSE's recommendation for ICT services, along with related services, was reasonably calculated to enable the student to receive educational benefit.[4] The parents argue that the student required 1:1 SEIT services during the 2014-15 school year (Tr. pp. 230-31); however, the hearing record reveals that the student's needs did not warrant the support of a 1:1 special education teacher. The hearing record indicates that the student's SEIT provided the student with supports such as refocusing and redirection to task, gentle reminders, verbal prompts, and modeling of language for social interaction (Dist. Ex. 5 at p. 1; Parent Exs. C at pp. 1-3; F at pp. 1-2). Both the SEIT and the student's preschool teacher indicated in reports that the student benefitted from knowing what comes next and that he could be "thrown off when plans change" (Parent Exs. C at p. 1; F at p. 1). However, the SEIT report indicated that "a gentle reminder of a change in advance is all [the student] needs to feel comfortable" and that the student "does extremely well when he knows the rules and what to expect" (Parent Ex. F at p. 1). Both teachers also indicated that the student was easily distracted, however, his SEIT report indicated that "[h]e generally attend[ed] well at class lessons," was "learning to refocus and remain at the task at hand," and responded to using a visual clock to expand his attention with new activities (Parent Exs. C at p. 2; F at pp. 1, 2). The preschool teacher reported that she utilized a timer set for a certain amount of time, helped the student think about his work in order to help him stay focused and increase his attention span, and used verbal redirection when the student veered off topic (Parent Ex. C at p. 2). In addition, during the district social worker's classroom observation of the student, the social worker reported that the student appeared focused and attentive during circle time, responded immediately to the SEIT calling his name to deter him from placing his fingers in his mouth, and responded to redirection to complete an activity and modeled language to interact with another student (Dist. Ex. 5 at p. 1). Thus, with respect to the parents' argument that the ICT program would not be able to meet the student's management needs as identified in the IEP, based upon the above, the regular education teacher and the special education teacher in

[3] Testimony by the district social worker indicated that SETSS provides academic supports and, because the student was on grade level academically at the time, he was not in need of such support (see Tr. pp. 36, 41, 89).

[4] The parents claim that district policy drove the failure to recommend continued SEIT services. However, the May 2014 CSE could not recommend "SEIT" services for the student, as State law identifies SEIT services as a service provided to preschool students (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]). Nonetheless, a CSE can, if necessary, recommend other similarly supportive services, such as consultant teacher services (8 NYCRR 200.1[m][1]; 200.6[d]). In any case, the hearing record is devoid of any evidence supporting the parents' assertion and claims relating to district policies, which cannot be considered here from a systemic perspective as my jurisdiction is limited to the review of individual matters relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a FAPE to such child (see Educ. Law § 4404[2]).

the ICT classroom would have been able to implement similar interventions, strategies and level of support that the SEIT had provided the student, which were specified in the management needs section of the student's IEP (compare Dist. Ex. 3 at p. 2, with Dist. Ex. 5 at p. 1, Parent Ex. C at pp. 1-3, and Parent Ex. F at pp. 1-2; see Tr. pp. 105-06, 155-57, 159, 167, 174, 187, 190-91).

Based on the above, the hearing record supports the IHO's finding that the ICT services recommended in the May 2014 IEP were appropriate to meet the student's needs and were reasonably calculated to enable the student to receive educational benefits.

Next, the parents argue that the CSE recommended ICT services for 21 periods of the week, leaving the student without any special education support during "non-academic times." A review of the hearing record reveals that the student was able to function appropriately during the non-academic portions of the school day without 1:1 support. In the instant case, the student's SEIT testified that she provided services to the student three days per week for four hours in the morning, and that the student functioned without her support in the afternoon during activities that were predominantly nonacademic in nature, such as music, art studio, singing and dancing, and clean up (Tr. pp. 166, 182-84).[5] Moreover, the SEIT's testimony indicated that the student did not receive any SEIT services on the remaining two days of the week (see Tr. p. 166). As the hearing record contains no indication that the student received any other support in his general education preschool classroom during these two days, it appears that the student participated independently in the general education preschool classroom setting for two days per week. Notably, there is nothing in the hearing record that indicates that the student had any difficulty functioning without 1:1 SEIT support on those two days or during the afternoon activities that were predominately nonacademic in nature.

3. Related Services

On appeal, the parents claim that the CSE improperly recommended a reduction in the duration of the student's speech-language therapy from 45 minutes to 30 minutes, "without necessary evaluations." The parents assert that the student should have been evaluated before "any significant change in the [student's] placement," citing to section 504 of the Rehabilitation Act of 1973 (section 504). However, the New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and an SRO does not review section 504 claims (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]; see also Educ. Law § 4404[2]). Nevertheless, the hearing record supports a determination that the speech-language services recommended in the May 2014 IEP were reasonably calculated to enable the student to receive educational benefits pertaining to his speech-language needs. First, the district school psychologist and the district social worker testified that the change in duration from 45 to 30-minute speech-language therapy sessions was a function of the length of periods that the kindergarten utilized, in order to minimize the time that students are pulled out of the classroom, missing instruction (Tr. pp. 39-40, 87-88). Although the parent indicated that the student required the 45-minute sessions because it took some time at the

[5] In ruling against the parents, the IHO found that that the student's SEIT was not credible. There is insufficient reason to overturn the IHO's ruling in this regard; however, even if the IHO found the SEIT entirely credible a review of the SEIT's testimony would not support continuation of 1:1 supportive services as a necessary for the student to receive a FAPE.

beginning of each session to "acclimate him to focus his attention" and that if the sessions were cut to 30-minutes, there would only be 15 minutes left (Tr. pp. 219-20), the May 2014 speech-language progress report did not reflect that such a need existed during the student's therapy sessions (Tr. pp. 219-20; see Parent Ex. E). Additionally, while the progress report reflects that the student had difficulties related to his ability to follow multiple step directions in the classroom setting, it does not reflect that the student required additional time at the start of his speech-language therapy sessions, which took place individually in the therapist's office, to focus his attention (see Dist. Ex. 3 at p. 7; Parent Ex. E). Thus, the evidence does not indicate that the student would be precluded from receiving educational benefits from the 30-minute speech-language sessions provided by the May 2014 IEP.

B. Challenges to the Assigned Public School Site

Finally, with respect to the parents' contentions regarding whether the assigned school would have been able to implement the student's May 2014 IEP, challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. 2014] [holding that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'"], quoting R.E., 694 F.3d at 187 n.3; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. 2013] [holding that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed"], quoting R.E., 694 F.3d at 187; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. 2013] [holding that "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child"]; see also R.B., 2015 WL 1244298, at *2-*3; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the determination of the type of educational placement their child will attend, the IDEA confers no rights on parents with regard to school site selection]; Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).[6] Here, the parents rejected the program recommended by the May 2014 CSE and instead chose to enroll the student in a program of their choosing (Tr. pp. 6, 229;

[6] However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e])

see Dist. Ex. 1 at p. 4). Accordingly, as the student never attended the assigned public school site pursuant to the May 2014 IEP, any conclusion that the district would not have implemented the student's IEP—based on the parents' observations during a visit to the assigned public school site—would necessarily be based on impermissible speculation (R.B., 589 Fed. App'x at 576; D.N. v. New York City Dep't of Educ., 2015 WL 925968, at *7 [S.D.N.Y. Mar. 3, 2015]; J.F. v. New York City Dep't of Educ., 2015 WL 892284, at *5 [S.D.N.Y. Mar. 3, 2015]; B.K., 12 F. Supp. 3d at 371). Accordingly, the parents cannot prevail on their claims regarding the assigned public school site.

C. Cross-Appeal

As a final matter, with regard to the district's cross-appeal of the IHO's order directing it to fund the student's related services, including speech-language therapy and OT, the district correctly argues that absent a determination that it failed to offer the student a FAPE, the IHO had no basis upon which to award relief in the form of related services (see 34 CFR 300.148[a]). Additionally, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733-34 [2d Cir. 2007] [noting that the IDEA incorporates some but not all state law concerning special education]). However, under New York State law, a district is obligated to provide special education services to students with disabilities who are enrolled by their parents in nonpublic schools provided that a request for such services is filed with the board of education in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request is made (Educ. Law § 3602-c[2][b]; see generally Bd. of Educ. v. Kain, 60 A.D.3d 851, 852 [2d Dep't 2009]).[7] The CSE must review the request for services and develop an individualized education service program (IESP) based upon the student's individual needs and "in the same manner and with the same contents" as an IEP (Educ. Law § 3602-c[2][b][1]). In addition, the CSE "shall assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).

The IHO's directive in this instance granting relief to the parents is not supported by the evidence in the hearing record. As described above, there is no evidence that the district violated the IDEA in a manner that denied the student a FAPE. Additionally, review of the evidence in the hearing record does not reveal that the parents made a timely request to dually enroll the student in the district pursuant to Education Law § 3602-c. Additionally, the hearing record does not include evidence that the CSE reviewed a request for services by the parents, developed an IESP, or that the parents filed a request for services with the district on or before June 1 of the preceding school year. Furthermore there were no allegations by the parents in this case that could be

[7] The State Education Department has published a guidance memorandum to "inform school districts of their responsibilities to provide special education services to students with disabilities who are enrolled in nonpublic elementary or secondary schools by their parents" (see "Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] and New York State (NYS) Education Law Section 3602-c," VESID Mem., [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf).

reasonably construed as charging the district with noncompliance with the requirements of Education Law § 3602-c.[8] Thus, absent a determination by the IHO that there was a denial of a FAPE, or allegations by the parents of noncompliance under Education Law § 3602-c, no basis exists upon which to predicate an award of related services (see 34 CFR 300.148[a]). Consequently, the IHO's award to the parents for district funding of the student's related services of speech-language therapy and OT must be vacated.

VII. Conclusion

The hearing record supports the IHO's determination that the district offered the student a FAPE for the 2014-15 school year and, accordingly, does not support the IHO's determination that the district must fund the student's related services. Accordingly, I annul that portion of the IHO's decision that ordered the district to fund the student's speech-language therapy and OT. I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated January 7, 2015, is modified, by vacating that portion which ordered the district to fund the costs of the student's related services at the nonpublic school.

Dated: **Albany, New York**
April 8, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER

[8] The header on one page of a district exhibit references the term "IESP," but this singular reference—which is not mentioned by either party or the IHO—is insufficient to predicate an award of services (Dist. Ex. 3 at p. 14).