The University of the State of New York

The State Education Department
State Review Officer
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No. 16-024

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:
Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) recommended and provided to her daughter for the 2015-16 school year was appropriate and denied the parent's request for prospective placement at a specific State-approved non-public school (NPS). 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 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 student has been the subject of two prior administrative appeals (Appeal of a Student with a Disability, Appeal No. 13-015; Appeal of a Student with a Disability, Appeal No. 13-223). The student in this appeal has multiple medical and physical impairments, requires the use of a wheelchair and/or posterior walker, and has attended a special education class within one of the district's community schools for the entirety of her educational career (Tr. pp. 34, 38; see Dist. Exs. 6 at p. 1; 7 at p. 1; 8 at p. 1; 9 at p. 1).

On October 8, 2014, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented October 22, 2014 (see Dist. Ex. 10 at pp. 1, 7-8, 11). Finding that the student was eligible for special education and related services as a student with an orthopedic impairment, the CSE recommended a 12-month school year program in a 12:1+1 special class in a barrier-free community school with related services consisting of two 30-minute sessions per week of speech-language therapy in a small group, three 30-minute sessions per week

of individual physical therapy (PT), and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 2, 7-9). In addition, the October 2014 CSE recommended a full-time 1:1 paraprofessional, adapted physical education, testing accommodations, modified promotion criteria, and special transportation (id. at pp. 2, 7-12).

On September 30, 2015, the CSE convened to conduct the student's annual review and to develop an IEP to be implemented October 12, 2015 (see Dist. Ex. 3 at pp. 1, 6-7, 10). Finding that the student remained eligible for special education and related services as a student with an orthopedic impairment, the CSE recommended a 12-month school year program in a 12:1+1 special class in a barrier-free community school, and related services consisting of two 30-minute sessions per week of speech-language therapy in a small group, three 30-minute sessions per week of individual PT, and two 30-minute sessions per week of individual OT (id. at pp. 6-7).[1] Additionally, the CSE recommended that the student receive seven testing accommodations, as well as modified promotion criteria and special transportation, and recommended that she participate in adapted physical education, noting that the student had physical limitations that affected her participation in school activities (id. at pp. 2, 6-8, 10-11). In addition, the CSE recommended a full-time 1:1 paraprofessional to provide support with respect to the student's health, ambulation, and activities of daily living (ADL) needs (id. at pp. 2, 7).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated September 30, 2015, the parent raised concerns regarding the student's use of a wheelchair in school (see Dist. Ex. 1 at pp. 3-4).[3, 4] Specifically, the parent asserted that "[the student] spends the majority of her day in school confined to a wheelchair," that staff at the public school "deliberately keep [the student] wheelchair-bound" and "ignore her ability to walk," and that it has a negative impact on the student's "mental and physical well-being" (id. at p. 4).[5] In addition, the parent asserted that, unlike the district's schools, a particular State-approved NPS has the proper structure that the student requires, as well as staff that encourage ambulatory independence (id. at p. 3). Further, the parent contended that the NPS

[1] The student's eligibility for special education programs and related services as a student with an orthopedic impairment was not in dispute at the time of the impartial hearing (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]; see also Dist. Ex. 1). However, the parent has asserted in her petition that multiple disabilities is a more appropriate disability category for the student (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]; see also Pet. at p. 4).

[2] By prior written notice dated October 6, 2015, the district summarized and explained the recommendations of the September 2015 CSE (Dist. Ex. 4).

[3] Although the due process complaint notice is marked as District Exhibit 1, the IHO did not receive the exhibit into evidence during the impartial hearing. However, as the due process complaint notice is required to be a part of the hearing record (8 NYCRR 200.5[j][5][vi][a]), and it was marked as District Exhibit 1 by the parties, for ease of reference it is referred to herein as District Exhibit 1.

[4] The parent's allegations are all contained in a document attached to the due process complaint notice (see Dist. Ex. 1 at pp. 3-4). The attached document is dated August 10, 2015, which was more than one month prior to the September 2015 CSE meeting (id.; see Dist. Ex. 3 at p. 1).

[5] The due process complaint notice also contained an allegation that the student's IEP lacked ambulatory goals; however, that sentence was partially crossed out by hand (Dist. Ex. 1 at p. 4).

uses the TEACCH methodology, applied behavior analysis counseling, and assistive technology (id. at p. 3).[6] For relief, the parent requested an order placing the student at the NPS (id.).[7]

B. Impartial Hearing Officer Decision

Following a conference on January 26, 2016, an impartial hearing convened on February 26, 2016, and after three days of hearings, concluded on March 15, 2016 (Tr. pp. 1-243). In a decision dated April 5, 2016, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2015-16 school year (IHO Decision at pp. 10, 14). The IHO determined that the September 2015 IEP was reasonably calculated to enable the student to receive educational benefits based upon the student's substantial progress during the prior school year with the same level of educational services (id. at pp. 10-11). The IHO found that the student made academic progress (e.g., advancing grade levels in math and English), social progress (e.g., progressing from describing peers as "mean" to "making friends"), and physical progress (e.g., walking up to 25 feet with a posterior walker, which led to a new goal of walking 50 feet using the posterior walker) (id.).

The IHO addressed a concern the parent raised during the impartial hearing that the student's test scores on the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) recorded on the October 2014 IEP and September 2015 IEP were the same (IHO Decision at pp. 11-12). The IHO first noted that the scores reflected testing dates of July 2014 and December 2014 and that the student was reassigned to a special class in September 2014 (id.). Thus, the IHO determined that because the December 2014 testing results only related to the student's development over a period of three months and did not reflect the student's progress for the remainder of the school year, the scores did not "implicate the efficacy" of the October 2014 and September 2015 IEPs (id. at p. 12).[8]

The IHO also found that the evidence demonstrated that the student made progress during the 2015-16 school year under the September 2015 IEP (IHO Decision at pp. 12-14). The IHO concluded that the student's progress supported a finding that she had been receiving a FAPE during the 2015-16 school year (id. at p. 14).[9]

The IHO also compared the district public school with the NPS desired by the parent and determined that the two offered similar programs (IHO Decision at pp. 15-16). The IHO noted that both schools are primarily academic programs which focus on the student's physical and

[6] Although TEACCH is not defined in the hearing record, it is presumed to refer to the "Treatment and Education of Autistic and Related Communication Handicapped Children" teaching methodology.

[7] The parent did not challenge the September 2015 IEP's present levels of performance, annual goals, or the type and level of related services found within the September 2015 IEP (see generally Dist. Ex. 1).

[8] In a footnote, the IHO commented that the district school psychologist's testimony was "troubling" because the psychologist did not use a "variety of assessment tools" as required and, instead, solely relied upon the WJ-III ACH (IHO Decision at p. 14 n.2). The IHO determined that while this error called the psychologist's conclusions into question, it was a procedural violation of the IDEA which did not amount to a denial of FAPE (id.).

[9] To the extent that the IHO made findings regarding the student's progress during the 2015-16 school year and the implementation of the September 2015 IEP, as discussed below, those issues were not properly raised by the parent and accordingly should not have been considered by the IHO.

learning disabilities, have similar class sizes (8:1 versus 9:1), offer the same level and type of related services, offer the same programs in a 12-month school year, and are barrier-free (id.). Further, the IHO observed that the public school allowed the student to interact with nondisabled peers, opportunities which she would not receive at the NPS (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred by not considering letters provided by various medical professionals and by giving too much weight to the testimony of the district's witnesses.

The parent objects to the IHO's finding that interacting with nondisabled peers was a benefit to the student. The parent contends that the student "does not have the same privileges as her peers." The parent asserts that the student is not allowed to move freely around the school environment and "is not allowed to interact with her peers using her walker in the hallways, cafeteria, and schoolyard. The parent further asserts that the student cannot run with her classmates, cannot go to the bathroom unassisted, and cannot walk in the cafeteria while holding a food tray, which reminds the student of "all the things she can't do" and in turn causes the student stress and a dislike of attending school.

The parent also asserts that the district violated its child find obligation and that the CSE improperly classified the student as a student with an orthopedic impairment. The parent contends that the student is also eligible for special education programs and services as a student with an intellectual disability and therefore she should have been classified as a student with multiple disabilities.

The parent also sets forth allegations that relate to the student's attendance at the district public school during the 2015-16 school year. Specifically, the parent asserts that because there is only one elevator in the three-story school, the student cannot get to class when the elevator is out of service and that due to reconstruction of the school and playground, the student is restricted to an area of the playground, the student is not allowed to use her walker in the playground, and the student's wheelchair is locked in place so that she is unable to move around during recess.

The parent also asserts that the IHO's determinations violated the IDEA, section 504 of the Rehabilitation Act of 1973 (section 504), and the Americans with Disabilities Act (ADA). The parent further alleges that a December 21, 2015 letter from the United States Department of Justice to the district shows that the district is not in compliance with the ADA.

For relief, the parent requests that the student's eligibility classification be changed from a student with an orthopedic impairment to a student with multiple disabilities, and that the student be placed at the NPS.

In an answer, the district admits or denies the parent's allegations and supports the IHO's determination that the district offered the student a FAPE. In the alternative, the district argues that the NPS is not an appropriate placement for the student. The district also asserts that an SRO

lacks jurisdiction to adjudicate section 504 and ADA claims, as well as issues relating to the issuance of a Nickerson Letter.[10]

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]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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, 2010 WL 3242234 [2d Cir. Aug. 16, 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, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v.

[10] A "Nickerson letter," is a remedy for a systemic denial of a FAPE that was imposed by the U.S. District Court based upon a class action lawsuit, and this remedy is available to parents and students who are class members in accordance with the terms of a consent order (see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The remedy of a Nickerson letter is intended to address the situation in which a student has not been evaluated or placed in a timely manner, and authorizes a parent to immediately place the student in an appropriate special education program in a State-approved nonpublic school at no cost to the parent (see Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; R.E., 694 F.3d at 192 n.5; see also Application of the Dep't of Educ., Appeal No. 13-209; Application of the Dep't of Educ., Appeal No. 13-190; Application of a Student with a Disability, Appeal No. 12-184; Application of the Dep't of Educ., Appeal No. 09-114).

Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 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]; Perricelli, 2007 WL 465211, at *15). 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, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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. Scope of Review

Before addressing the parents' claims on appeal, it is necessary to determine which claims are properly presented. The parent raises, for the first time on appeal, claims related to violations of the ADA and section 504, child find, and the student's classification, as well as claims related to the public school site, such as ongoing maintenance and construction in the playground area and the school having only one elevator.[11] The parent did not identify these issues in the due process complaint notice as issues to be resolved during the impartial hearing (see Dist. Ex. 1). The IDEA and its implementing regulations provide that 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 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[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]; see also B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). Accordingly, these issues raised for the first time on appeal will not be considered.[12]

The parent's allegations regarding implementation require further discussion. The due process complaint notice included an allegation that the student spent the majority of her day confined to her wheelchair; however, to the extent that this allegation relates to implementation, it necessarily pertains to the October 2014 IEP as the September 2015 IEP had not yet been implemented at the time the parent filed her due process complaint notice (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at p. 1). Additionally, while the September 2015 IEP described the student as using a walker to go small distances (less than 10 feet) and included an annual goal targeting the student's use of a walker, the October 2014 IEP focused on the student's use of a wheelchair and did not include any goals related to the use of a walker (compare Dist. Ex. 3 at pp. 2, 5, with

[11] In her petition, the parent alleges for the first time that the student should have been classified as multiply disabled because the student could have also been classified as a student with an intellectual disability. The IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R., 2011 WL 6307563, at *9 [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). Thus, while the issue of classification is not properly presented on appeal, the underlying inquiry is addressed below; specifically, whether the September 2015 CSE addressed each of the student's needs, including the student's academic needs.

[12] Even if properly presented, State law does not make provision for review of ADA or section 504 claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; 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 D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

Dist. Ex. 10). Because the October 2014 IEP did not include any annual goals or requirements regarding the student's use of a walker or the amount of time the student should spend outside of her wheelchair, the parent's allegation that the student spent the majority of her day confined to her wheelchair does not call the district's implementation of the October 2014 IEP into question. However, in order to address the crux of the parent's claims, the parent's allegations are treated as relating to the appropriateness of the October 2014 and September 2015 IEPs' substantive recommendations and whether the IEPs as written appropriately addressed the student's ambulatory needs.

Although the parent's allegations are read as relating to the substantive appropriateness of the October 2014 IEP, a finding that the October 2014 IEP did not provide the student with a FAPE cannot support the relief the parent is requesting (i.e., prospective placement at a specific NPS) in light of the subsequently developed and implemented September 2015 IEP (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]; Application of a Student with a Disability, Appeal No. 15-077). Accordingly, as the parent's request for prospective placement at the NPS must be based on the September 2015 IEP, a substantive analysis of the October 2014 IEP is not undertaken and the analysis focuses on the appropriateness of the September 2015 IEP.

The parent also raised claims for the first time related to the 2015-16 school year, i.e. that the school's playground is under construction and that the elevator is out of service. These claims can be read as relating to the student's ability to successfully navigate the school environment. Accordingly, they can also be construed as challenges to the implementation of the student's IEP, which called for a "barrier free" environment. However, a review of the hearing record shows that these issues were not discussed at the impartial hearing, nor were they placed into question through documentary evidence. Accordingly it would not be proper to address these issues at this point in the proceeding. Nevertheless, while the parent's concerns regarding the district's implementation of the September 2015 IEP are not an appropriate subject of this proceeding, the parent is not precluded from filing a subsequent due process complaint notice to address them (see 34 CFR 300.508; 8 NYCRR 200.5[i]-[j]).

B. September 2015 IEP

The parent contends that the recommendations of the September 2015 CSE were insufficient to meet the student's physical needs, in particular her ambulatory needs related to the use of her walker during the school day. While the adequacy of the present levels of performance as described in the September 2015 IEP are not in dispute in this matter, a discussion thereof is relevant to the determination of whether the recommendations were appropriate and reasonably calculated to provide the student with educational benefit.

Regarding academic skills, the September 2015 IEP noted the student was performing below grade expectations in all areas (Dist. Ex. 3 at p. 1). Results of an administration of the WJ-III ACH to the student reflected in the IEP show that she performed in the low average range in reading and writing; and performed in the very low range in math (id.). According to the September 2015 IEP, the student performed at "Level 1" on both the English language arts (ELA) and mathematics New York State assessments in third grade indicating the student was "well below proficient" in standards for the grade; and demonstrating limited knowledge, skills, and

practices embodied in State common core standards (Dist. Ex. 3 at p. 1 see Parent Ex. E). With respect to ELA, the student was able to decode, but needed to work on her reading comprehension, and her ability to describe the overall structure of events, ideas, concepts or information in text read or that was read to the student (Dist. Ex. 3 at p. 1). The student liked to write, but needed to work on developing and strengthening her writing by planning, revising, and editing (id.). With respect to math, the IEP indicated that the student was doing simple math problems using whole numbers involving all four operations, but needed to expand her math skills to include larger numbers (id.). The student was working on reading and writing multi-digit whole numbers, comparing two multi-digit numbers, and using symbols; as well as learning to solve two-step word problems (id.). The student needed to work on checking in with her paraprofessional to make sure she was prepared for homework and schoolwork (id.).

With regard to social/emotional needs, the September 2015 IEP described the student as sweet and friendly, reporting that she got along with her peers and teachers (Dist. Ex. 3 at p. 2). The IEP further indicated that the student tried her best in all tasks (id.). The IEP also stated that the student usually came to school in a happy mood, but experienced times where she wanted to go home (id.). Further, the September 2015 IEP noted no parental concerns in this area (id.).

According to the September 2015 IEP, the student had received a diagnosis of cerebral palsy that affected her motor skills (Dist. Ex. 3 at p. 2). The IEP indicated that the student exhibited fine motor and dexterity skill deficits that affected her hand manipulation skills and her ability to complete self-help activities (id.). The IEP indicated that the student used a wheelchair to navigate the school setting and needed constant reminders to avoid obstacles (id.). According to the IEP, the student needed close supervision to transfer from a regular chair to her wheelchair, and with assistance during PT sessions, transferred from chair to a standing position (id.). The student attempted to walk when instructed and used her posterior walker to walk small distances of less than ten feet (id.). The IEP noted that the student tired easily, and requested frequent breaks (id.).

In order to address the student's academic needs, the September 2015 CSE recommended five annual goals specifically designed to address the student's ELA and math deficits (Dist. Ex. 3 at pp. 3-5, 10).[13] Further, the CSE recommended annual goals to address the student's attention and homework organization needs, vocabulary skills, and ability to make inferences, predict outcomes, and problem solve (id. at pp. 3-6). The annual goals incorporated several strategies to address the student's academic needs including fading reminders to check for homework, prompts, and graphic organizers (id. at pp. 4, 6). The IEP provided the student with testing accommodations such as extended time, revised test format, revised test directions, breaks, on-task focusing prompts, answers recorded in any manner, and separate location (id. at p. 8). As the CSE determined that the student "continues to require the support of a small class," it recommended a 12-month 12:1+1 special class placement for the student, with the services of a full time 1:1 paraprofessional (id. at pp. 6-7).

Contrary to the parent's general assertion that the September 2015 IEP did not address the student's physical needs, a review of the IEP shows that it provided annual goals to improve the

[13] One of these academic annual goals is labeled as an "OT" goal; however, it addresses skills that are germane to ELA, such as demonstrating appropriate heading, capitalization, and punctuation, as well as proofreading for mistakes and self-correcting errors.

student's ability to safely travel through the school building, to the school bus, and playground using appropriate speed and visual attention to the environment, while navigating across a classroom, through a doorway/narrow opening, and moderate distances (Dist. Ex. 3 at p. 4). The IEP also included annual goals for the student to walk 50 feet with a posterior walker without a rest period, wheel herself up a ramp of approximately 60 feet, and participate in adapted physical education to improve fine and gross motor skills (id. at pp. 5-6). The IEP provided the student with a barrier-free school building, adapted physical education services, a full time 1:1 paraprofessional to assist in part with ambulation and ADLs, two individual OT sessions per week, and three individual PT sessions per week (id. at pp. 2, 6-7).[14]

The parent contends on appeal that the IHO erred by failing to consider, or afford appropriate weight to, documentation from medical professionals who worked with the student. As a preliminary matter, the fact that the IHO did not discuss this evidence in her decision does not mean that she did not consider it. Second, although the parent stated in her closing statement that she submitted some of this medical documentation to the district (Tr. p. 240), there is no other information in the hearing record suggesting that it was submitted to the September 2015 CSE and each of the letters are generally addressed to "whomever it may concern" (Parent Ex. B at pp. 1-4, 6, 7-8, 11-12).[15] Because the hearing record does not demonstrate that these documents were available to the September 2015 CSE, they are of limited probative value in assessing the CSE's recommendations.

However, assuming that the September 2015 CSE received and considered the medical documentation, the IEP reflects some of the recommendations made by the medical professionals (compare Dist. Ex. 3 with Parent Ex. B). For example, the doctors' and physical therapists' letters contained some, if not all of the following recommendations: provision of PT services including use of a walker; a barrier free school; a school setting that allowed the student to participate in all activities that meet her academic and physical needs; a 12-month program; and therapeutic interventions in the classroom (id.).[16] The prevalent concern which emerges from the student's treating doctors and therapists is that, as reported by the parent, the student spends most of her day in her wheelchair and would benefit from more frequent use of her walker (see Parent Ex. B at pp. 1, 3, 4, 6, 7, 11). And, as noted above, the September 2015 IEP explicitly incorporated use of the student's walker, unlike the October 2014 IEP (compare Dist. Ex. 10 at pp. 3-7, with Dist. Ex. 3 at pp. 3-6). While the September 2015 IEP may not have required the degree of walker use desired

[14] The parent offered into evidence two psychoeducational evaluation reports dated July 2014 and September 2015 that she had privately obtained, but a review of these documents shows they contain little information regarding the student's physical development (see Parent Ex. D at pp. 1-9). Additionally, an adaptive behavior assessment in the motor domain dated October 15, 2015 was included in the hearing record, but this information postdates the September 2015 CSE meeting and cannot be used to assess the CSE's recommendations (id. at pp. 15-16; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]). In any event, the October 2015 adaptive behavior assessment does not reflect how much time the student spent in her wheelchair versus how much time she used a walker (Parent Ex. D at pp. 15-16).

[15] The exhibit also includes what appear to be prescriptions and a scanned insurance card (Parent Ex. B at pp. 9-10, 13-14).

[16] The September 2015 IEP indicated that the student's OT and PT sessions were to be provided in a separate location "at provider's discretion" (Dist. Ex. 3 at p. 7).

by the parent, the district is not otherwise required to "maximize" the potential of students with disabilities (see Dist. Ex. 3; see generally Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132).

Finally, the parent contends that the information provided by the September 2015 IEP and the testimony from the student's physical therapist are contradictory, and that the IHO erred by resolving these divergent accounts in favor of the district. However, the evidence cited by the parent is not contradictory: the physical therapist based much of her testimony on the student's then-current physical abilities in February 2016, approximately five months after the September 2015 CSE meeting (Tr. pp. 1, 66; see Dist. Ex. 3 at p. 10).[17] For example, while the parent argues that the physical therapist's testimony that the student could walk 100 feet without her walker was contrary to the description of the student's abilities in the September 2015 IEP, the physical therapist testified that the student's abilities had improved during those five months (compare Tr. p. 66, with Dist. Ex. 3 at pp. 2, 5). Similarly, the student's ability to walk without the use of her wheelchair had improved by the time the physical therapist testified in February 2016 such that the description in the September 2015 IEP was no longer accurate (compare Dist. Ex. 1 at p. 2, with Tr. pp. 70-72). Therefore, the evidence in the hearing record shows that the district did not introduce, and the IHO did not rely upon, contradictory evidence as to the student's abilities at the time of the September 2015 CSE meeting.[18]

VII. Conclusion

Based on the foregoing, I find that the IHO should not have considered the student's progress or implementation of the September 2015 IEP during the course of the 2015-16 school year. However, I concur with the IHO's finding that the September 2015 IEP was reasonably calculated to enable the student to receive educational benefits (Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

I have considered the parties' remaining contentions and find that I do not need to address them in light of my decision herein.

[17] This evidence is being discussed to address the parent's claim on appeal, and not as evidence of the appropriateness of the September 2015 IEP (see R.E., 694 F.3d at 186).

[18] The parent also suggests that the district's witnesses were not credible, as one witness on the witness list did not testify and another would not swear under oath. Both objections are without merit. With respect to the former challenge, there is no evidence in the hearing record that the district's decision not to call a witness, which appears to have been motivated by a desire to bring the hearing to a prompt resolution, should result in an adverse inference against the district (Tr. pp. 167, 190-91). As for the latter objection, there is no evidence that the witness's refusal to swear related to her veracity; the witness declined to do so based on her religious beliefs (Tr. pp. 56-57). In this respect, I note that, while formal rules of evidence do not apply in IDEA due process hearings, even applicable state and federal rules of evidence would not have required the witness to swear an oath under these circumstances (see Fed. R. Civ. P. 603; CPLR § 2309[b]; see also People v. Calderon, 143 Misc. 2d 315, 316 [N.Y. Sup. Ct. 1989], quoting 58 Am. Jur. 2d, Oath and Affirmation, § 1 ["The purpose of an oath is to secure truth. In its broadest sense, an oath is any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully"] [internal quotations omitted]). While the IHO initially erred by excluding this testimony, she indicated later in the hearing that she would allow the witness to testify, but the district voluntarily decided not to call the witness again (see Tr. pp. 135-36).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 15, 2016

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STEVEN KROLAK
STATE REVIEW OFFICER