



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-010

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Potsdam Central School District**

### **Appearances:**

Ferrara Fiorenza, PC, attorneys for respondent, Susan T. Johns, 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 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 his son for the 2016-17 school year was appropriate. 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).<sup>1</sup> 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 received special education and related services in the district since his kindergarten year (Tr. p. 30). He has received a diagnosis of an autistic disorder and has consistently exhibited significant delays in global cognitive abilities, receptive and expressive language skills, social and adaptive function, and motor development (Dist. Exs. 3 at p. 12; 5 at pp. 12-13; 6 at p. 20; 26 at p. 2; 27 at p. 1; 39 at pp. 9-11). Academically, the student demonstrates relative strengths in decoding, math computation, and numerical operation skills, and below grade level reading comprehension, math problem solving, and written expression skills (Dist. Ex. 6 at

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<sup>1</sup> In September 2016, Part 279 of the practice regulations was amended, effective January 1, 2017, which is applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the amendments, the amended provisions of Part 279 apply, as this appeal was served upon the district after January 1, 2017.

pp. 12-14; see Dist. Ex. 41 at p. 4). The student also exhibits anxiety and difficulty sustaining attention (Dist. Ex. 39 at pp. 9, 11).

At the beginning of the 2015-16 school year, the student was enrolled in a 12:1+1 special class for math and English, and received one 40-minute period per day of resource room services, occupational therapy (OT), and speech-language therapy pursuant to a February 24, 2015 IEP (Tr. p. 32; Dist. Exs. 19 at pp. 1, 9; 21 at pp. 1, 8). In November 2015, a CSE convened and recommended that for the remainder of the school year, the student receive all of his "core" instruction in a 12:1+1 special class setting (Dist. Ex. 23 at pp. 1, 11-12). CSE meeting information indicated that the parents disagreed with the November 2015 CSE's recommendation (id. at p. 1). A subcommittee on special education (CSE subcommittee) convened in February 2016 to conduct the student's annual review, and largely continued the recommendations from the November 2015 CSE meeting (Dist. Ex. 33 at pp. 1, 12-13).

In December 2015 and March 2016, the parent filed due process complaint notices relating to the 2015-16 school year, alleging that the district failed to offer the student an appropriate program when it changed the student's placement to a 12:1+1 special class for all academic subjects, as well as its proposal to move the student to a special class consisting of students whom the parent believed did not exhibit needs and abilities similar to the student (see Dist. Ex. 38 at pp. 2-3).<sup>2</sup> By decision dated July 1, 2016, an IHO (IHO 1) determined that the district failed to offer the student a free appropriate public education (FAPE) with either the November 2015 or the February 2016 IEPs (id. at p. 19). More specifically, IHO 1 determined that the district's failure to develop an individualized reading program for the student resulted in a denial of a FAPE (id. at pp. 19-20).<sup>3</sup> In addition, IHO 1 concluded that in Classroom S, the student's academic skills were "likely higher than all of the other students in that class," and that with respect to expressive language, the student would "be the most understood of any student" in the classroom (id. at p. 22). Moreover, IHO 1 found that the student would have "very limited, if any, exposure to students he [could] actually understand," due to the articulation deficits exhibited by students in the classroom (id.). In light of the foregoing, IHO 1 determined that it was not appropriate to place the student in Classroom S, and that the student's placement in this classroom amounted to a denial of a FAPE (id.). As a remedy, IHO 1 directed the district to conduct a comprehensive neuropsychological evaluation of the student and develop a new IEP prior to the beginning of the 2016-17 school year (id. at p. 23).

On August 24, 2016, pursuant to IHO 1's order, an independent evaluator conducted a neuropsychological evaluation of the student, the report for which was received by the district in September 2016 (Dist. Ex. 39 at p. 1; see Tr. pp. 33-34).

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<sup>2</sup> For purposes of this decision, the 12:1+1 special classroom into which the district recommended the student be placed will be referred to as Classroom S. Following the filing of the parents' due process complaint notice in December 2015, the student remained in his then-current classroom (Classroom K) pursuant to pendency (Dist. Ex. 38 at pp. 2-3).

<sup>3</sup> The IHO acknowledged in his decision that the parent's due process complaint notice "did not specifically refer to a reading program," but he determined that the district was "put on notice of this issue" during the resolution session that preceded the hearing (Dist. Ex. 38 at p. 20). Neither party appealed IHO 1's decision to the Office of State Review.

On September 1, 2016, prior to the start of the school year, a CSE subcommittee convened for a review of the student's program and to develop his IEP for the 2016-17 school year (Dist. Exs. 40; 41; 42). Having found that the student remained eligible for special education and related services as a student with autism, the September 1, 2016 CSE subcommittee recommended a 10-month 12:1+1 special class placement for math, English language arts (ELA), social studies, science and reading, in conjunction with six 40-minute periods of resource room in a group per a six-day cycle, two 30-minute sessions per a six-day cycle of OT, three 30-minute sessions per a six-day cycle of speech-language therapy in a small group, two 30-minute sessions per a six-day cycle of individual counseling and one monthly one-hour session of parent counseling and training (Dist. Exs 40 at p. 2; 41 at pp. 1, 10; 42 at p. 1).<sup>4</sup> Review of the CSE meeting minutes shows that the IEP would be implemented by and the student would receive instruction from multiple teachers for core academic subjects, and the student would be "moving around more" (Dist. Ex. 40 at p. 1). The September 1, 2016 CSE subcommittee agreed to reconvene on September 20, 2016, to review the August 2016 neuropsychological evaluation report and to see how the student was doing during the first few weeks of school (*id.*).

On September 20, 2016, a CSE subcommittee convened for a reevaluation review (Dist. Exs. 43 at p. 1; 44 at p. 1). The September 20, 2016 CSE subcommittee reviewed the August 2016 neuropsychological evaluation report and determined that the student continued to need a 12:1+1 special class placement "with highly specialized instruction in all core content areas to address his individual learning needs" (Dist. Ex. 45 at p. 1; *see* Dist. Ex. 43 at pp. 1, 7, 12).<sup>5</sup> The CSE subcommittee meeting minutes reflect that the student was "already having difficulty 3 weeks into school," and accordingly, the September 20, 2016 CSE subcommittee recommended that the student transfer to Classroom S, where "he would be in the same classroom all day for core instruction" (Dist. Ex. 44 at p. 5). The September 20, 2016 CSE subcommittee further determined that the proposed full-time 12:1+1 special classroom would provide the student opportunities to learn using instructional approaches that incorporated procedural, nonverbal, visual, and hands-on learning utilizing multiple modalities (Dist. Ex. 45 at p. 1).

### **A. Due Process Complaint Notice**

By due process complaint notice dated September 23, 2016, the parent commenced an impartial hearing (Dist. Ex. 1). The parent maintained that he was "happy with" the September 1, 2016 IEP (*id.* at p. 2). However, he further alleged that the September 20, 2016 IEP recommended the student be placed in Classroom S, which IHO 1 had previously found to be inappropriate (*id.*).

### **B. Impartial Hearing Officer Decision**

After a prehearing conference on November 7, 2016, on December 21, 2016, the parties proceeded to an impartial hearing, which concluded on December 22, 2016 after two days of testimony (Tr. pp. 1-295). By decision dated December 31, 2016, the IHO dismissed the parent's

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<sup>4</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> The September 20, 2016 CSE subcommittee did not recommend that the student receive resource room services (*compare* Dist. Ex. 41 at p. 1, *with* Dist. Ex. 43 at p. 1).

due process complaint notice (IHO Decision at p. 19).<sup>6</sup> The IHO found both that the district was not required to specify on the student's IEP the classroom in which he would have been placed pursuant to the September 20, 2016 IEP, and that the hearing record supported the conclusion that the district would have been able to implement the IEP in the recommended classroom (*id.* at pp. 12-15). Turning to the parent's claims relating to the appropriateness of the functional grouping in the recommended 12:1+1 classroom, the IHO initially noted that the September 20, 2016 CSE subcommittee had new information not available to the November 2015 CSE and February 2016 CSE subcommittee, and that the teacher of the proposed classroom provided testimony regarding the functional abilities of the students in his class at the time of the September 20, 2016 CSE meeting (*id.* at pp. 16-18). The IHO expressed concern regarding the lack of a class profile in evidence, as well as witness testimony suggesting "that the classroom selection [might] have been driven more by what's available rather than finding an alternative or otherwise appropriate grouping" (*id.* at pp. 18-19). Notwithstanding these concerns, the IHO determined that "[b]y a thin margin, the weight of the evidence, both testimonial and documentary, support[ed] the appropriateness of [the student's] participation in [Classroom S] for the implementation of his September 20, 2016 IEP" (*id.* at p. 19).

#### **IV. Request for State-Level Review**

The parent appeals, alleging that the IHO erred in determining that the student was appropriately functionally grouped in Classroom S. Initially, the parent alleges that the IHO may not have conducted the hearing in an impartial manner. With respect to the merits of the parent's claim, the parent asserts that the IHO relied on selective information, misinterpreted evidence in the hearing record, and describes the IHO's conclusion that the student was appropriately grouped in Classroom S as a "subjective illogical assertion that completely lacks [] the kind of careful and rigorous reasoning that a competent professional IHO exhibits." The parent argues that the testimony of district witnesses from the first impartial hearing revealed that Classroom S was not an appropriate classroom placement for the student, and that the students in that classroom were functioning at a level well below the student when he visited it in fall 2015. In addition, the parent alleges that the student was making progress in his current classroom placement, such that the district had no basis to transfer him to Classroom S. He further argues that the IHO ignored IHO 1's July 2016 decision, which found that the student's placement in Classroom S was not appropriate because the student would not have been grouped with students of similar needs. The parent also contends that the lack of a classroom profile prevented the district from meeting its burden of proof.<sup>7</sup>

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<sup>6</sup> The IHO is commended for conducting the impartial hearing and issuing his decision in a timely fashion, despite being appointed to preside over the hearing after a prior IHO recused himself (*see* IHO Decision at p. 2; IHO Ex. 1 at p. 1). The IHO also properly used the prehearing conference and subsequent communications with the parties as an opportunity to clarify the limited focus of the parent's due process complaint notice (IHO Ex. 1 at pp. 6-8; *see* IHO Exs. 2-3).

<sup>7</sup> Although the IHO made findings that the district was not required to recommend a specific classroom in the September 20, 2016 IEP and the district could have implemented the IEP in Classroom S, the parent raises no claims relating to either on appeal. Accordingly, those determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see* M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

As a remedy, the parent requests that the district be ordered to implement the recommendations made in the August 2016 neuropsychological evaluation report, allow the student to remain in his current 12:1+1 special classroom for math or provide him with 1:1 math instruction, and provide the student with 1:1 instruction in social studies, science, and ELA/reading.<sup>8</sup>

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's decision in its entirety.

## 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; 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. 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

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<sup>8</sup> On appeal, the parent alleges that the "proposed IEP has only two learning goals for each of the reading and other subjects, which [wa]s extremely inadequate," and that the district ignored his requests for "an individualized intensive reading program, ideally one-to-one"; however, neither of these claims was raised in the parent's due process complaint notice or in the clarification of the scope of the complaint (Dist. Ex. 1; IHO Exs. 1-3). Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, they will not be reviewed for the first time on appeal. To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; 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]"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]).

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. Aug. 16, 2010]).

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 Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. \_\_\_, 2017 WL 1066260, at \*11-\*12 [Mar. 22, 2017] [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]; 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. Preliminary Matter—IHO Bias**

The parent challenges the impartiality of the IHO. In support of his claim, the parent asserts that the IHO's relationship with counsel for the district and his concern for the job security of the special education teacher who testified at the hearing may have tainted his decision. He further alleges that the IHO came to the impartial hearing with "a pre-determined conclusion." As explained in greater detail below, a review of the evidence in the hearing record provides no support for the parent's claims.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064).

The parent claims that the IHO demonstrated bias by curtailing his questioning on matters outside of the due process complaint notice; however, a review of the hearing record supports a finding that the IHO acted within his discretion by limiting the parent's questioning during the hearing, particularly with regard to matters not raised in the due process complaint notice as described above (see Tr. pp. 117-18). Furthermore, there is no evidence in the hearing record to support a finding that counsel for the district's "very inappropriate and odd" conversation with a witness regarding the witness's job at a local restaurant so affected the IHO that it impacted his ability to remain impartial (see Tr. pp. 1-295). Finally, to the extent that the parent disagrees with the conclusions reached by the IHO—or with the weight afforded to testimonial evidence presented at the impartial hearing—such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Application of a Student with a Disability, Appeal No. 13-083). Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present his case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-295). In any event, I have conducted an impartial review of the entire hearing record and rendered an independent decision thereon (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]), and find, for the reasons discussed below, that the hearing record supports the determination of the IHO regarding the appropriateness of the functional grouping in Classroom S.

## B. Functional Grouping

Turning next to the parent's allegations regarding the functional grouping in the proposed 12:1+1 special class placement, the parent alleges that the student needs better peer modeling than what is available in Classroom S in the areas of speech-language and social development, and that it would be "unfair and detrimental to him," to place him in a classroom where he would have difficulty understanding his peers. The parent maintains that "it is utterly false to say that [the student's] expressive and receptive languages [we]re commensurate with the four students" in Classroom S, and that the student's placement in that classroom for the 2016-17 school year would not be appropriate.<sup>9</sup> As explained more fully below, a review of the evidence in the hearing record supports the IHO's conclusion that the student was appropriately functionally grouped in Classroom S.

Initially, it is well settled that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement" (Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]). The IDEA provides that parents are entitled to participate in the decision-making process regarding the "educational placement" of the student (20 U.S.C. § 1414[e]), which the Second Circuit has interpreted to mean "the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see Luo v. Baldwin Union Free Sch. Dist., 2017 WL 391991 [2d Cir. Jan. 27, 2017]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; R.E., 694 F.3d at 191-92). The United States Education Department has explained that a school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]; see Letter to Veazy, 37 IDELR 10 [OSEP 2001] [stating that "the assignment of a particular school or classroom may be an administrative determination, provided that determination is consistent with the placement team's decision"]). Moreover, the "IDEA affords the parents no right to participate in the selection of [their] child's classmates" (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*11 [S.D.N.Y. Feb. 20, 2013]).

With regard to the parent's argument that the student would not be appropriately grouped with the other students in Classroom S, State regulations require that for instructional purposes, students in special classes must be grouped with students having similar individual needs (8 NYCRR 200.1[uu], [ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 126). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students with respect to their

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<sup>9</sup> At the outset of this discussion, the hearing record contains substantial evidence establishing the ongoing collaboration throughout the student's enrollment in the district between the student's teachers, related service providers, administrative staff, and parents (Dist. Exs. 7; 8; 11; 14; 18; 22; 32; 40; 44). Moreover, a review of the CSE meeting minutes included in the hearing record establish the district's commitment to consider the parent's and the teachers' concerns when recommending and developing the student's program (id.).

"levels of academic or educational achievement and learning characteristics"; "levels of social development"; "levels of physical development"; and "the management needs of the students in the classroom" (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of individual students should be considered to ensure each student the opportunity to benefit, although neither may be the sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, while the management needs of students grouped together may vary, the modifications, adaptations, and other resources needed by any student may not "consistently detract from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][3][iv]; see 8 NYCRR 200.1[ww][3][ii] ["the instruction required to meet the individual needs of any one student in the group shall not consistently detract from the instruction provided other students in the group"]).

While the adequacy of the evaluative information and the present levels of performance as described in the September 20, 2016 IEP is not in dispute in this matter, a brief discussion of the student's skills and needs is relevant to the determination of whether the student would be suitably grouped for instructional purposes in Classroom S (see Dist. Ex. 1 at p. 2). Measures of the student's cognitive ability yielded scores in the moderately delayed range of intellectual functioning (Dist. Ex. 5 at pp. 8, 16; see Dist. Ex. 39 at p. 9). The September 20, 2016 IEP indicated that the student's disability adversely affected his receptive, expressive, and pragmatic language skills, which negatively affected his ability to effectively communicate with his peers, teachers, and school staff in all environments (Dist. Ex. 43 at p. 3). Specifically, the student exhibited difficulty producing four or five word sentences, responding to basic "Wh" questions, explaining how an object is used, and retelling stories (id. at pp. 3-4). The IEP indicated that although the student needed to work on formulating grammatically correct sentences at a "more complex level," he appeared to enjoy interacting with other students (id. at p. 3.). With respect to receptive language skills, according to the IEP the student followed one-step directions but struggled to complete two-step directions without maximum prompting, make inferences, and identify and demonstrate understanding of pronouns, quantitative concepts, complex sentences, time/sequence concepts, and story sequences (id.).

Academically, the September 20, 2016 IEP reflected that while the student could decode, his disability adversely affected his skill at comprehending information, which was well below grade level (Dist. Ex. 43 at p. 4). Although the September 20, 2016 IEP indicated that the student could decode in the classroom, he could not state the meaning of vocabulary words, identify characters, state what had happened in the text, or answer literal or figurative questions (id.). In addition, the IEP noted that the student struggled to retell what had happened in anything he had read, and often used character names from a question but then stated something unrelated to the topic (id.). The IEP indicated that standardized measures of reading comprehension placed the student's reading comprehension skills at or below the 1st percentile, and the CSE chairperson estimated that the student was at a kindergarten level for reading (id. at pp. 2, 4; Tr. p. 50).

With regard to mathematics, the September 20, 2016 IEP indicated that the student struggled with grade level mathematical skills within a small group setting (Dist. Ex. 43 at p. 4). In addition, the September 20, 2016 IEP revealed that the student could not "apply any meaning to rote mathematical processes and skills and though he might be able to add, subtract, multiply and divide, those skills [did] not hold meaning outside of basic computation" (id.). The CSE chairperson explained that while the student was strong in math calculation, those skills did not

carry over into comprehension, math problem solving, word problems, or understanding integers, fractions, and algebraic equations (Tr. p. 54).

With respect to writing, the September 20, 2016 IEP indicated that the student spelled grade-level spelling words phonetically but he required repeated discussion and exposure for the words to gain meaning and be used in multiple contexts (Dist. Ex. 43 at p. 4). Additionally, the September 2016 IEP indicated the student was unable to write for meaning, had significant difficulty responding in writing to questions on quizzes and tests, or writing in complete sentences related to the topic using proper punctuation (*id.*). Additionally, the September 20, 2016 IEP indicated that the student exhibited needs related to fine and gross motor skills, bilateral coordination, visual-motor skills, and spatial/body awareness skills (*id.* at p. 7).

Lastly, with respect to the student's social/emotional needs, the September 20, 2016 IEP characterized the student as "kind, friendly, and polite to his teachers and peers"; however, it further noted that the student became frustrated in larger groups, unstructured settings, and throughout all aspects of the academic day (Dist. Ex. 43 at p. 6). According to the September 20, 2016 IEP, when frustrated, the student might raise his voice to staff, flap his hands, become involved in repetitive behavior (i.e., pulling his hair, thrusting his neck out while opening his mouth and blinking his eyes) and become disruptive (*id.*). Although the student greeted his teachers and staff, the IEP revealed that this might happen at inappropriate times or multiple times in a row (*id.*). Furthermore, the September 20, 2016 IEP indicated that the student struggled to engage reciprocally with his peers in a number of settings, including one-to-one conversation, while playing board games, during group work, and during recess (*id.*). The IEP also noted that the student frequently looked to his peers to see that he was properly following along, and that he frequently sought adult reassurance that he was doing what he was supposed to be doing (*id.*).

With respect to management needs, the September 20, 2016 CSE recommended "a highly specialized program with material presented at his instructional level" (Dist. Ex. 43 at p. 7). Per the September 20, 2016 IEP, the student benefitted from speech-language therapy, OT, school counseling, parent counseling and training, program modifications and test accommodations to support his educational day (*id.*). The IEP also indicated the student should be provided with access to study materials and/or study guides prior to test/quizzes, and word banks during assessments (*id.*). The September 20, 2016 IEP further noted that the student learned best with instructional approaches that incorporated procedural, non-verbal, visual, hands-on learning with multiple repetitions of the material presented (*id.* at p. 5). Further, the IEP recommended that the academic content be presented using multiple modalities with information broken down, repeated exposures to the material, and the elimination of non-essential content (*id.*). The September 20, 2016 IEP also indicated the student needed a slower pacing of learning, content presented in smaller components at his level of understanding, and less content offered at once (*id.*). The IEP noted that the student benefitted from frequent checks for understanding, recommended that instructions be simplified and paired with visual prompts, and indicated that due to the student's difficulty with attention, material should be presented over short periods of time with direct cues and verbal prompts to gain attention (*id.*). To support these needs, the IEP provided for supplementary aids and services/program modifications/accommodations including refocusing and redirection including frequent verbal and visual prompts; checks for understanding, particularly when the student was given multi-step directions; special seating arrangements consisting of easy access to adult support; and study guide outlines of key concepts and graphic

organizers to prepare for tests and quizzes (id. at p. 13). In addition, the IEP included a number of testing accommodations, including that all tests and quizzes be administered individually in a separate location with minimal distractions (id. at pp. 14-15).

In this particular instance, the September 20, 2016 CSE recommended implementation of the student's IEP for all core instruction in Classroom S, which the special education teacher of the class described as a 12:1+1 "life skills classroom" that at the time of his testimony was comprised of four full-time students ages 11-14 years old, the student for science and social studies, and staff including himself, a teaching assistant, and a teacher aide shared by two of the students in the class (Tr. pp. 88-91, 98; Dist. Ex. 44 at p. 5).<sup>10</sup> The hearing record indicates that Classroom S contained students with academic abilities that varied between the kindergarten and third grade level, and that the instruction pertained to "authentic learning purposes," such that all of the learning that took place in Classroom S had a purpose outside of the school setting (see Tr. pp. 56-57, 89-91). The special education teacher provided instruction in life skills relating to safety issues, and taught all the content areas, including integrating reading, mathematics, science, social studies, and writing (Tr. pp. 91-92, 111-12). The students in the classroom participated in the general education setting for assemblies, music, art, lunch (with fifth or sixth grade classes), and engaged in outings to such locations as the library and grocery store to provide mainstreaming and community-based opportunities (Tr. pp. 93-94, 112-13).

Contrary to the parent's concerns that the student would not be appropriately functionally grouped in Classroom S, a review of the hearing record supports the district's assertion that the student's functional levels and needs were similar to those of the other students in the class. The September 20, 2016 CSE subcommittee determined that the student "qualified" to participate in the New York State Alternate Assessment program, as did all the students in Classroom S (Tr. pp. 56, 116-17; Dist. Ex. 43 at p. 15). Regarding ELA, the hearing record reveals that Classroom S contained students reading at a kindergarten to second grade level, and the special education teacher of Classroom S opined that the student's listening and reading comprehension skills were "at the same level" of his other students (Tr. p. 102; see Tr. pp. 50-51).<sup>11</sup> The CSE chairperson further opined that the student's annual goals that addressed his reading needs were "very appropriate" for Classroom S, and she also noted that the student's annual goals contained corresponding short-term objectives, consistent with the New York State Alternate Assessment (Tr. p. 67). She also testified that the student's reading goals "w[ere] exactly what" students in Classroom S were working on, and the special education teacher of Classroom S testified that one of the student's reading goals was "aligned" with what the students in his class were working on, and the student's annual goals with respect to writing were "very similar" to those for the other students in his class (Tr. pp. 67-68, 109-10).

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<sup>10</sup> To the extent the parent asserts the special education teacher was "motivated to move [the student] to his class for his own career advancement," and implies the teacher's testimony was not credible as a result, nothing in the hearing record provides any support for this proposition.

<sup>11</sup> The special education teacher of Classroom S testified that since the beginning of the 2016-17 school year he had provided instruction to the student in science and social studies on an individual basis, which involved reading comprehension, listening comprehension, and understanding vocabulary (Tr. pp. 98-101; see Dist. Ex. 40 at p. 1).

Regarding functional grouping in math, the CSE chairperson testified that in Classroom S, the students were working on a kindergarten through third grade level, and that "their math needs were individualized to where they [we]re" (Tr. p. 53). The student's then-current special education teacher for math estimated the student's skills to be at a second grade level equivalent, and the special education teacher in Classroom S testified that one of the student's math goals was "very similar" to what the other students in his class were working toward (Tr. pp. 110, 128-29, 131).

Regarding similarity of social/emotional needs, the September 20, 2016 CSE meeting minutes indicated that the CSE subcommittee described Classroom S as "socially appropriate as to where [the student] is right now," and indicated that it would offer the student an opportunity to interact with others (Dist. Ex. 44 at p. 4). Specifically, in Classroom S, the student would be grouped with two students who exhibited similar needs, and the CSE chairperson opined that the student could work well with those students "in that social pragmatic piece of the give and take of conversation, of eye contact, [and] questioning each other" (Tr. p. 63). She further testified that two students in Classroom S with "higher speech and language capabilities" than the student would model appropriate conversations, turn taking, and eye contact (Tr. p. 59). Additionally, the student's then-current 12:1+1 special class math and ELA teacher—who testified she knew the students in Classroom S—opined that the students in Classroom S exhibited more socially appropriate behavior than the student (Tr. pp. 148-49). Although the special education teacher of Classroom S testified that the student lacked "a lot" of the social skills that students in Classroom S exhibited, he acknowledged that at times the student greeted or responded to a greeting from a Classroom S peer (Tr. pp. 104-06). Lastly, as with the student, the hearing record shows that Classroom S did not contain any students with significant management needs at the time of the impartial hearing (Tr. pp. 59-60, 122; District Ex. 43 at p. 7).

Notwithstanding the parent's claim that it was "utterly false to say" that the student's language skills were similar to those of the students enrolled in Classroom S, the special education teacher of that class testified that the student's expressive and receptive language needs were "similar" to those of his students (Tr. p. 103). Likewise, he opined that the student's language skills were "somewhere in the middle" in relation to the other students enrolled in Classroom S (Tr. p. 121). The hearing record further indicates that students in Classroom S were required to use language to get their needs met and to use appropriate sentences, skills similar to those in the annual goals set forth in the student's September 20, 2016 IEP (compare Tr. p. 60, with Dist. Ex. 43 at pp. 10-11). Similar to the students in Classroom S, the hearing record shows that the student's communication needs included the need to improve his use of spontaneous language, ability to ask and respond to direct questions, and pragmatic language skills (compare Tr. pp. 60-61, 110, with Dist. Exs. 26 at pp. 1-2; 39 at p. 11, 43 at pp. 3, 10-11).

Next, despite the parent's assertion at the impartial hearing that the student would not have access to sufficient peer modeling if he enrolled in Classroom S, as noted above the parent cannot challenge the grouping in Classroom S on the basis that the other students were not sufficiently high functioning, absent some indication the grouping was not appropriate (see J.L., 2013 WL 625064, at \*11). Furthermore, the evidence in the hearing record does not support a finding that the student received educational benefit from peer exposure to the extent he required model peers in order to be provided with a FAPE (Tr. pp. 62-63, 280; Dist. Ex. 44 at p. 4). Rather, the CSE chairperson testified that the student did not learn language skills from modeling other students

(Tr. p. 84).<sup>12</sup> Similarly, the hearing record shows that the student did not regularly interact with peers in his then-current program (Tr. pp. 132, 142, 157; Dist. Ex. 44 at p. 4). Finally, the independent evaluator who conducted the August 2016 neuropsychological evaluation opined that it was unlikely that the student would absorb language in the classroom from higher functioning peers, if he had not done so already (Tr. p. 273). The September 20, 2016 CSE subcommittee meeting minutes reported that the evaluator indicated that it appeared the gap between the student and his peers was increasing, and "that gap can't be bridged with [the student] simply by being with [peers], so [the student was] being left behind" (Dist. Ex. 44 at p. 4). Accordingly, and because the hearing record indicates the student functioned similarly with respect to language abilities as the students in Classroom S, the record does not support a conclusion that the district failed to offer the student a FAPE by proposing to group him with insufficiently high-functioning students (cf., A.U. v. New York City Dep't of Educ., 2016 WL 4508454, at \*9 [S.D.N.Y. Aug. 25, 2016] [finding a denial of a FAPE where the district proposed to group a student with largely non-verbal peers, which would render the student unable to make progress]). Lastly, notwithstanding the parent's concerns that the student would not receive sufficient peer exposure in Classroom S, the hearing record reveals that students in that classroom have mainstreaming opportunities, namely, during music, art, recess, lunch, and assemblies (Tr. pp. 93-94; Dist. Ex. 44 at p. 5).

Next, regardless of the parent's allegation that it was unfair and detrimental to place the student in a classroom where he would have difficulty understanding four of his peers, the district correctly submits that there is no evidence in the hearing record to support a finding that students in Classroom S exhibited unintelligible speech. Furthermore, although the hearing record reveals that the parent expressed his concerns at the September 20, 2016 CSE subcommittee meeting that the student was "disadvantaged with communication skills," the special education teacher from Classroom S advised the parent that the student would have opportunities to communicate with all adults and with peers when the student pushed out into the general education setting (Dist. Ex. 44 at p. 4). Regarding the parent's concern that the student receive "enriched language" instruction, the September 20, 2016 CSE subcommittee advised the parent that the student's "current set of peers [we]re not providing what [the parent was] looking for" (id.).

In view of the foregoing, the hearing record supports the IHO's determination that the student would have been suitably grouped for instruction in Classroom S. Additionally, despite the parent's claims that the student benefitted from being grouped with higher functioning students, the hearing record reflects that the other students in Classroom S had similar special education needs to the student, such that the student would have been appropriately grouped within the classroom for purposes of receiving specially designed instruction (see E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 435-36 [S.D.N.Y. 2010] [noting that the question is not "whether this was the best possible group of children with whom [the student] could have been placed," but whether the students had similar needs with respect to the provision of special education], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; see also Walczak, 142 F.3d at 133-34; E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at \*6-\*8 [S.D.N.Y. June 10, 2016]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 589-90 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of

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<sup>12</sup> According to the CSE chairperson, "it would be a group effort from the instructors and from the peers to work on social interaction and social pragmatic speech, to work on receptive and expressive language together" (Tr. p. 84). The CSE chairperson added that the student had attended school with his peers since kindergarten and had not picked up language skills to the extent that she had hoped (Tr. pp. 84-85).

City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*24-\*25 [S.D.N.Y. Mar. 15, 2013]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*12 [S.D.N.Y. Sept. 29, 2012]).

## **VII. Conclusion**

In summary, the evidence in the hearing record supports a finding that the IHO properly concluded that the student would be appropriately functionally grouped in Classroom S.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **April 3, 2017**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**