The University of the State of New York

The State Education Department
State Review Officer
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No. 17-103

Application of a STUDENT WITH A DISABILITY, by the 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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which 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 and that the relief requested by the parent was moot. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such

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

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

III. Facts and Procedural History

The student's early developmental history was notable for speech-language and motor delays (Dist. Ex. 5 at p. 4). As an infant, he was evaluated through the early intervention program (EIP) and found eligible for physical therapy (PT) and "speech/feeding therapy" (Dist. Ex. 5 at p. 4).). Due to ongoing concerns regarding the student's communication development and behavior he subsequently underwent a psychological evaluation which reportedly resulted in a diagnosis of autism spectrum disorder (ASD) (id.).[1] Following the evaluation, the student began receiving "intensive behavioral therapy" in addition to speech/feeding therapy and PT services until he transitioned to the committee on preschool special education (CPSE) in September 2014 (id.).

[1] The student also has an extensive medical history including diagnoses of asthma, a sensory processing disorder, a speech sound disorder, and features of attention deficit hyperactivity disorder (ADHD); furthermore, the student "underwent a tonsillectomy and adenoidectomy to help with his speech production and feeding," and had "ear tubes" (Dist. Ex. 5 at pp. 2, 5).

During the 2015-16 school year the student attended a full-day preschool program and received 15 hours per week of special education itinerant teacher services (commonly referred to in the record as "SEIT" services), speech-language therapy for three 30-minute sessions per week, occupational therapy (OT) for two 30-minute sessions per week, and PT for two 30-minute sessions per week (Dist. Exs. 3 at p. 1; 5 at pp. 1-2, 4; 12 at pp. 2-3; 13 at p. 1).[2] In February 2016, the student's mother sought a multidisciplinary evaluation of the student in order that he receive a full psychiatric evaluation as well as updated IQ, language and autism diagnostic testing (Dist. Ex. 5 at p. 2). The evaluation yielded diagnoses of an ASD, separation anxiety disorder, and "Rule Out" attention deficit hyperactivity disorder (ADHD), combined type (Dist. Ex. 5 at pp. 2, 13). On March 24, 2016 the CSE met to develop the student's IEP for the 2016-2017 school year (kindergarten) (Dist. Ex. 2; see Dist. Ex. 5 at p. 2). The March 2016 CSE found the student eligible for special education as a student with an other health impairment (OHI) and recommended that he receive integrated co-teaching (ICT) services in math, English language arts (ELA), social studies, sciences, music and art and related services of one 45-minute session of OT per week in a group, one 30-minute session of PT per week in a group, and five 45-minute sessions of speech-language therapy per week in a group (Dist. Exs. 2 at pp. 9-10; 11 at pp. 1-2).[3] In a prior written

[2] In an annual progress report dated September 14, 2015, the student's SEIT provider indicated that the student was receiving all of his related services except physical therapy (Dist. Ex. 13 at p. 1). A social history conducted six months later indicated that the student was supposed to receive physical therapy but that he did not have a provider (Dist. Ex. 3 at p. 1).

[3] The minutes from the March 2016 CSE meeting indicated that student's parents disagreed over which disability category should be used to find the student eligible for special education and that the CSE recommended he "tentatively" be classified as having an OHI (Dist. Ex. 15 at p. 2). The CSE meeting minutes further noted that the student's mother would revisit the topic of classification as she believed that the student should have an autism classification documented, while the student's father disagreed with such a classification (Dist. Ex. 15 at p. 2). Subsequently, prior written notices dated May 31, 2016, June 10, 2016 and June 28, 2016 identified the student as having an educational disability of autism and included additional recommendations of adapted physical education and extended school year services (Dist. Exs. 6 at p. 1; 7 at p. 1; 10 at p. 1). With exception to the student's classification, these amendments were also noted in a district events log and included in the March 2016 IEP (see Dist. Exs. 2 at pp. 1-17; 4 at p. 1). Neither the parent nor the district raise claims regarding the student's eligibility for special education or the particular classification category. Moreover, 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. v S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [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" in an IEP "will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). In other words, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

notice, the district indicated that the student was recommended for the "Nest" program (Dist. Ex. 10 at pp. 1-2).[4]

Because the student had not yet transitioned to a school-age program at the time of the March 2016 CSE meeting, the CPSE convened on May 26, 2016 and found the student eligible for extended school year (ESY) services for summer 2016 as a preschool student with a disability (Parent Ex. C at pp. 1, 13). The CPSE recommended that the student receive 15 hours per week of SEIT services in a small group (3:1) setting, two 30-minute sessions of OT, two 30-minute sessions of PT, and three 30-minute sessions of speech-language therapy (id.).

During the 2016-17 school year the student attended the ASD Nest program recommended by the CSE (Tr. pp. 71-72, 152-55).

A. Due Process Complaint Notice

By due process complaint notice dated August 15, 2016, the parent, with assistance through a parent advocate, alleged that the district did not offer the student a FAPE for the 2016-17 school year (Parent Ex. A at pp. 2-4). The parent claimed the " the IEP for the 2016-17 school year [did not] accurately address [the student's] organization, study skills, social skills, social language, transition, anxiety and coping skills" and that the annual goals needed "to be amended accordingly" (id. at p. 4). While it is unclear if the parent intended to make a claim, the parent noted that the district "denied [special education teacher support services] at home to work on [the student's] appropriate arousal level (self-regulation) needed to attend and maintain focus of a given activity, increase visual perceptual skills, understand questions and phrases and sentences, social skills and eye contact" (id. at pp. 2-3). The parent also noted the student started receiving SEIT services in July 2016 and "require[d] continued support at home and in community and need[ed] to continue the current frequency of 15 hours of home services" (id. at pp. 3, 4). For relief, the parent requested 15 hours of special education teacher support services (SETSS) in the home (id. at p. 5).

On September 27, 2016 the parent submitted an amended due process complaint notice (Dist. Ex. 1). The only difference between the September 27, 2016 and the August 15, 2016 due process complaint notices was that the parent decreased the home-based SETSS requested from 15 hours to 6 hours and sought an "enhanced rate" for the SETSS (compare Parent Ex. A at p. 5, with Dist. Ex. 1 at p. 5).

On January 30, 2017 the parent submitted a second amended due process complaint notice (Parent Ex. E). The parent claimed that the March 2016 IEP did not include annual goals to address "attention, organization, study skills, social skills, handwriting, starting and continuing a task, prompting, positive praise, distractibility, and self-regulation with the special education teacher" (id. at p. 2-3, 5). The parent further noted his disagreement with "the special education program and services without annual goals in the classroom with the special education teacher" (id. at p. 3). The parent also maintained that the March 2016 IEP failed to include accommodations or modifications related to attention, prompting, transition, visual and auditory prompts, and

[4] The CSE chairperson described the Nest program as similar to "an ICT, because…there's a population of gen[eral] ed[ucation] students in there" but also confirmed that the program "specifically addresse[d] students with autism" (Tr. pp. 147-48). The student's special education teacher reported that the Nest program was a "micro-inclusion classroom" which at the time of the hearing was comprised of 11 students including four students with high-functioning autism (Tr. p. 154).

preferential seating with minimal distractions (id. at p. 5). The parent claimed the student "need[ed] to continue the current frequency of 6 hours of home services" (id. at p. 4). For relief, the parent requested six hours of SETSS in the home and requested "some or at least one" annual goal for written expression (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on September 19, 2016, which concluded on March 13, 2017, after four days of proceedings (Tr. pp. 1-231).[5, 6] In a decision dated October 11, 2017, the IHO found that the parent request for after-school SETSS as relief for the 2016-17 school year was moot as the student had already received SETSS through pendency (stay-put), and there was no additional relief that the IHO could award (IHO Decision at p. 10). Additionally, the IHO found that even if the matter was not moot, the student did not require SETSS during the 2016-17 school year because his needs were already being met in the ASD Nest program and that the student was making progress during the school year (id.).[7] The IHO also found that the annual goals in the March 2016 IEP were "reasonably related to the student's educational needs" and that while the goals were scheduled to be implemented by the student's related services providers, this fact alone was insufficient to render the March 2016 IEP inappropriate (id. at p. 11). The IHO also noted that during the hearing that the parent asserted the district did not provide adequate parent counseling and training; however, the IHO found that this claim was outside the scope of the hearing as it was not raised in any of the parent's due process complaint notices (id. at p. 11).

IV. Appeal for State-Level Review

Through his advocate, the parent appeals, asserting that the March 2016 IEP was deficient and that home services are needed to support the IEP. The parent claims that the March 2016 IEP lacks goals "for the classroom," organization or study skills, and monitoring the student's progress. The parent also claims that the student was learning strategies and techniques "with his management needs," but that there were no annual goals to address them in the classroom. Next, the parent claims that the IHO failed to consider the speech-language pathologist's testimony that she used a five-point scale to assist the student "in appraising the size of the problems," and that the parent had never been trained on the five-point scale which "is part of the [ASD] NEST program." For relief, the parent requests six hours of SETSS "to continue to work on the 5-point scale in the NEST Program" and annual goals directed at organization, study skills, and social language.

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[5] Two IHO's recused themselves over the course of the proceedings (IHO 1 and IHO 2, respectively), and the current IHO was appointed to write the decision after the hearing had concluded, but he contacted both parties and held a conference call on April 13, 2017 (see Tr. pp. 1, 10, 232-48).

[6] In an interim decision on pendency dated November 2, 2016, IHO 2 ordered the district to provide the student with six hours of SETSS per week in the home to "supplement the student's NEST program" (Interim Decision at p. 3).

[7] Throughout the hearing record the parties and the IHO referred to the ASD Nest program as both an acronym (the "ICT/NEST program") and as the Nest program (IHO Decision at pp. 4, 10; see Tr. pp. 6, 58, 71; Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 14; 10 at p. 2). For purposes of this decision, I will refer to the program as the "ASD Nest program."

In an answer, the district denies the parent's allegations and requests an order affirming the IHO's decision in its entirety. The district asserts that it provided the student with a FAPE for the 2016-17 school year.

In a reply, which the parent refers to as an "Answer to a Cross-Appeal,"[8] the parent does not address the allegations raised in the district's answer, but merely reasserts and clarifies claims raised in the request for review.[9] The parent also attacks the March 23, 2017 IEP that was included with the district's in regard to the IHO's mootness finding, but the adequacy of the student's March 2017 IEP was not before the IHO and it is not currently before me. Additionally, the parent indicates that SETSS services rather than SEIT services are being requested.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck

[8] The district submitted an answer, but did not cross-appeal the IHO's decision (see Answer).

[9] The purpose of a reply is to address "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6 [a]). However, the parent's reply does not address any such issues; in addition, any new claims raised or additional information provided in the reply that was not included in the request for review will not now be considered.

Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

[10] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Turning first to the parent's contentions on appeal that the IHO failed to consider the speech-language pathologist's testimony about a five-point scale and that the parent had never been trained on the five-point scale, it appears that the parent's advocate raised this first in a post hearing brief, claiming that the parent never received training with use of the five-point scale (Parent Post-Hr'g B. at p. 1). It is well settled that a party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Upon review of the hearing record, I note that the district did not agree to an expansion of the scope of the impartial hearing to include these issues and the parents did not attempt to amend the due process complaint notice to include these claims. Accordingly, as these issues are raised for the first time on appeal, they are outside the scope of the impartial hearing and will not be considered (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 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. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). Even upon generously interpreting the parent's claims in the request for review to mean that the district failed to provide the related service of parent counseling and training in the student's IEP, a review of the parent's original and amended due process complaint notices show that he did not raise any claims related to parent counseling and training or the five-point scale therein (see Parent Exs. A; E; Dist. Ex. 1).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the opposing party, through the questioning of its witnesses, "open[ed] the door" under the holding of M.H., 685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-

84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). The court in M.H. found that where a school district submits evidence or elicits testimony about issues that are outside the scope of the parent's due process complaint notice in order to show that the student was provided with a FAPE, the district opens the door for the plaintiff to contest the newly raised issues (see M.H., 685 F.3d at 250-51). When addressing the issue of whether the student required home-based SETSS, during the impartial hearing, the district asked its witness, a speech-language pathologist, if the student required any specific supports outside of school for speech and language services (Tr. pp. 82-83). The speech-language pathologist responded that the student "benefit[ed] from the use of a five-point scale and consistent language and terminology" (Tr. pp. 82-83). The IHO inquired as to whether the student would benefit from the use of a five-point scale after school and the speech-language pathologist confirmed that the student would benefit from using the five-point scale at home, as it would allow for the use of terminology that was consistent with that being used in school, and it would support generalization of skills (Tr. pp. 103-04). The district subsequently asked the speech-language pathologist whether the five-point scale could be used by the parent or only by a professional and the speech-language pathologist confirmed that the scale could be used by the parent (Tr. p. 104).

Next, the IHO asked whether the parent had been trained on the five-point scale; the speech-language pathologist initially testified in the affirmative, noting that parent training was provided through the ASD Nest program and the parent had attended a workshop where the staff reviewed general strategies (Tr. pp. 105-06). However, the speech-language pathologist later acknowledged that she did not "know for a fact" if the parent had received specific training on the five-point scale and use of consistent language (Tr. pp. 105-06). Based on the hearing transcript, it appears that the IHO, not the district, briefly elicited testimony related to parent counseling and training because the speech language pathologist stated that the student "benefitted" from the use of a five-point scale" after school; the district, on the other hand, was focused on whether the student required a therapist to offer additional speech-language services in the home. The IHO has a responsibility to ensure that there is an adequate record upon which to render findings and permit meaningful review, and therefore has a responsibility to exercise his or her authority to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3[vii]). In light of the facts above, it appears that the subject matter arose during the impartial hearing at the behest of the IHO as a part of routine questioning developing general background information related to the parent's request for home-based speech-language services for the student, but it cannot be said that the district opened the door to the parent's allegations now appearing in the request for review regarding the 5-point scale and a possible claim for parent counseling and training (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Therefore, there is no reason to disturb the IHO's determination that the parent's claims with regard to parent counseling and training were not sufficiently raised in the due process complaint notices and allegations of error regarding the 5-point scale and the lack of parent counseling and training that have been alleged on appeal must be dismissed (IHO Decision at p. 11, fn. 7).

2. Compliance with Regulations

The practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.8[c][2]). In the request for review, the party seeking review shall "clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief

should be granted" (8 NYCRR 279.4[a]). Moreover, the practice regulations require "citations to the record on appeal, and identification to the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and…the exhibit page number" (8 NYCRR 279.8 [c][3]). The parent advocate, assisting the petitioning parent in this case, failed to clearly identify the findings, conclusions or orders to which exceptions are being taken or a failure of the IHO to render a determination on a particular issue (see Req. for Rev. at pp. 1-3). While the request for review notes that the parent had "disagree[d] with the IHO," there is no reference to which of the IHO's specific fact findings or legal conclusions with which the parent disagrees (id. at p. 3). The parent advocate also failed to comply with the form requirements for numbering the pages of the request for review (8 NYCRR 279.8[a][3]; see Req. for Rev.).

State regulations also require that a party that is seeking review shall "personally serve…a request for review upon the opposing party (respondent) within 40 days after the date of the" impartial hearing officer's decision, and the petitioner shall file the request for review "within two days after service of the request for review is complete" (8 NYCRR 279.4 [a], [e]). Moreover, filing by facsimile or electronic mail is not permitted (8 NYCRR 279.4[e]). In this case, the parent originally attempted to file the request for review with the Office of State Review by facsimile, and after the parent advocate was directed to file properly, it took the parent advocate weeks to file the request for review with the Office of State Review after service on the district. Going forward, I remind the parent, and the parent's advocate in particular, that to comply with the practice regulations.

The parent also failed to formulate a clear and concise statement of the issues for which he appeals the IHO's decision. As noted above, the IHO first determined that the parent's claims with respect to relief for the 2016-17 school year were moot as the student already received six hours of SETSS services per week throughout the 2016-17 school year (IHO Decision at pp. 9-10). The request for review does not indicate whether the parent agrees or disagrees with the IHO's mootness determination. The parent merely contends that six hours of SETSS should continue, without specifying a time period.

Next, the IHO found that even if the issues were not moot, the student was provided with a FAPE for the 2016-17 school year because the goals in the March 2016 IEP were appropriate and the student did not otherwise require SETSS (id. at pp. 10-11). On appeal, the parent only generally asserts his disagreement with the IHO decision and requests that six hours of SETSS continue. Additionally, without addressing any particular findings made by the IHO in his decision, the parent generally states that the IHO failed to consider the testimony of a speech-language pathologist and later concludes that the "IEP is deficient and home services are needed…to support the IEP." Based upon the IHO's determination, and in consideration of the parent's filing, there are at least four competing interpretations that I could draw from the parent's request for review:

- First, it could be that the parent is contending that the IHO erred by failing to find that the district denied the student a FAPE because the CSE did not set forth six hours of home-based SETSS per week on the student's March 2016 IEP.

- Second, the parent may instead be claiming on appeal that the IHO failed to conclude that the annual goals on the March 2016 IEP were inappropriate and denied the student a FAPE and, as relief, the student should be provided

with six hours of SETSS per week for the 2016-17 school year to remediate the use of allegedly inappropriate goals.

- Third, the parent could be asserting some combination of the first two possible arguments.

- Fourth, the parent may not dispute the portion of the IHO's decision finding that the case is moot with respect to relief for the 2016-17 school year but may nevertheless be seeking six hours of SETSS for the 2017-18 school year and beyond for an indeterminate amount of time because of an alleged denial of a FAPE related to the 2016-17 school year.

It is not the responsibility of the SRO to rummage through a party's pleadings and the entire hearing record to determine what the party may or may not be asserting is appealable error on the part of the IHO. In assisting the parent by filing the request for review, the lay advocate took on the responsibility to comply with the practice regulations and failed to do so. Additionally, the lay advocate has been cautioned in prior cases by the Office of State Review regarding his failure to adhere to the pleading requirements in Part 279. My patience has worn thin and if the lay advocate's pattern of noncompliance continues, outright dismissal of future nonconforming pleadings by an SRO without a decision on the merits may result. With respect to each issue that was before the IHO, an appealing party has the responsibility to identify which of the IHO's specific findings of fact and legal determinations should be reversed, and then explain why each issue should be reversed with specific reference to the evidence in the hearing record that supports that conclusion. General statements of disagreement with the outcome reached by an IHO fail to satisfy this requirement. While pro se parents are customarily given a greater degree of latitude, I expect a lay advocate assisting a parent to exhibit in written filings a better understanding of the particular issues that an IHO ruled upon in reaching a final determination to grant or deny relief.

In this case, I have decided, as a matter within my discretion, to allow this State-level review to proceed (while at the same time issuing the cautionary directive above to the lay advocate) based on the most likely challenges to the IHO's decision that the parent intended to bring. Accordingly, the remainder of this decision addresses the first three bullet points described above, because while the fourth perhaps represents a desirable outcome for the parent, it is unsustainable when viewed in the context of this case.[11] Nevertheless, as will be discussed below, since the evidence in the hearing record shows that the district offered the student a FAPE for the 2016-17 school year, there is no reason to address whether six hours of SETSS per week as relief is appropriate.

3. Mootness

The parent does not appeal from the IHO's determination that the case before him was rendered moot (IHO Decision at p. 10). That determination by the IHO was his primary and dispositive finding in the case and it has become final and binding upon the parties as it is

[11] If the parent is simply seeking to require the student to continue SETSS into the 2017-18 school year and beyond, that is a matter that the parent must bring before the CSE in the IEP review process called for by the IDEA. IDEA due process proceedings are not the forum for establishing the services that the student should receive in the first instance.

unappealed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Consequently, the parent's appeal must be dismissed on this basis.

Assuming, for the sake of argument that the parent had challenged the IHO's mootness determination, the parent may have had some success appealing that aspect of his decision; however, the IHO's alternative findings, which are discussed in the next section, would nevertheless be upheld. In this case, I note that the IHO's finding of mootness is attractive where most or all of the services the parent requested as relief were provided during the 2016-17 school year by virtue of pendency. However, one of the exceptions to the mootness doctrine provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1987]; Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84-85 [2d Cir. 2005]; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1040 [5th Cir. 1989]). The "capable of repetition, yet evading review" exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; see also L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 102 [2d Cir. Jan. 19, 2017]). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *13-14 [E.D.N.Y. Oct. 30, 2008] [identifying that the recurrence of the challenged conduct in a subsequent IEP satisfies the capable of repetition but evading review exception to the mootness doctrine]; see also Toth v. New York City Dep't of Educ., 2018 WL 258793, at * 2 [2d Cir. Jan. 2, 2018]).

The parent continues to contend on appeal that the student requires six hours per week of home-based SETSS. Upon a preliminary review of the hearing record in light of the IHO's mootness finding, I directed the district to file a copy of the student's 2017-18 IEP as additional evidence, which shows that the CSE did not recommend SETSS for the student in the current school year (Answer Ex. 1). Although, it is not clear what relief may be afforded the parent if it is determined that the March 2016 IEP should have included a recommendation for SETSS at home, as the student received the service during the 2016-17 school year and IEPs are to be reviewed at least annually and revised to reflect the student's progress and anticipated needs (20 U.S.C. §1414[d][4][A]); the parent's claims related to the district's provision of SETSS for the 2016-17 school should not have been dismissed as moot because the exception to the mootness doctrine applies to the facts of this case (see Toth, 2018 WL 258793, at * 2 [2d Cir. Jan. 2, 2018][a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]).

B. March 2016 IEP

1. Annual Goals

Although the IHO dismissed the case as moot as described above, he issued alternative findings. In the request for review, the parent does not engage with the IHO's reasoning for upholding the appropriateness of the student's goals. Instead, the parent repeats two points with respect to the adequacy of the annual goals from his amended due process complaint notice, namely that there were no annual goals in the March 2016 IEP related to organization or study skills and the IEP lacked goals for a teacher to "monitor his progress" (compare Parent Ex. E at pp. 3-4 with Req for Rev. ¶ 1). Although not explicitly stated in his challenges in the due process complaint notice, on appeal the parent also notes in the request for review that the student was learning strategies and techniques "with his management needs," but contends that the IEP lacked goals to address the student's management needs in the classroom, which appears to be a variation of the parent's argument that there were no goals on the March 2016 IEP for the teacher in the ICT class to implement with the student.[12] A review of the hearing record shows that the IHO was correct in determining that the annual goals provided within the March 2016 IEP did not deny the student a FAPE.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The present levels of performance (PLEPs) in the March 2016 IEP are not in dispute in this case; however, they provide a description of the student's academic performance, functional performance, learning characteristics, relationships with peers and motor development and they reflected the student's strengths and weaknesses and identified his needs (Dist. Ex. 2 at pp. 1-3).[13] Accordingly, a brief discussion of them is helpful in providing context before reaching the disputed issue, the appropriateness of the annual goals.

According to the March 2016 IEP, the student was attending preschool at the time of the CSE meeting and the results of the latest standardized testing showed that the student's overall cognitive abilities were in the average range with inconsistent scores among the domains measured (Dist. Ex. 2 at p. 1). Specifically, the student's verbal abilities were in the high average range and spatial abilities in the average range, while his non-verbal reasoning abilities were in the borderline

[12] The parent identified the supports and accommodations the student required to address his management needs, but asserted no claims with respect to inadequate identification of management needs in the March 2016 IEP.

[13] The school psychologist testified that, at the CSE meeting, the SEIT indicated that the student had "made a lot of progress and had all the pre-readiness skills needed to go into kindergarten" (Tr. p. 144).

range (id.). With respect to readiness skills, the IEP indicated that the student was able to recognize capital and lower-case letters, as well as his name (in writing); identify shapes and colors; count and recognize numbers 1-20 and identify quantities, as well as more and less; match opposites; and show an understanding of positional words (id.). In addition, he was able to sort objects by color and shape but not category (id.). According to the IEP, the student was still learning letter sounds and how to count to twenty using one-to-one correspondence (id.). Although the student attended to stories, he had difficulty gaining information from them and often needed cues to answer "wh' questions (id.). The student was learning to sequence events in a story and tell a story so that the details and sequence made sense (id.). According to the IEP, by teacher report the student was able to attend to theme-based lessons and carry out an activity with minimal cues after modeling (id.).

In regard to the student's activities of daily living, the IEP indicated that the student's skills appeared to be "within expected levels" and the student was able to independently use the bathroom, feed himself and wash up (Dist. Ex. 2 at p. 1). The student continued to require some assistance with fasteners, which the IEP noted was typical for the student's age (id.). The IEP indicated that the student's adaptive skills were developing and that given set routines the student could transition from one activity to another (id.). However, the IEP also indicated that the student's attention span was "below expected levels" and he could be easily distracted (id.). According to the PLEPs, the student worked best when given visual and auditory cues as well as teacher directed instruction with prompts and modeling (id.). The student also benefitted from redirection and being seating directly across from or adjacent to the teacher in a section of the classroom where distractions were minimal to minimize external stimuli (id. at pp. 1-2).

With respect to the student's speech-language development, the March 2016 IEP indicated that the student could speak using "clear and understandable speech" and was able to use full sentences; however, when answering questions, the student often "need[ed] prompting," and had difficulty answering 'wh' questions related to books (Dist. Ex. 2 at p. 2). The student was able to state his wants and needs at school and was able to answer 'wh' questions related to daily activities (id.). The IEP noted that during conversation the student inconsistently used past and present tense verbs, had difficulty making predictions and retelling a story, and was learning to follow multi-step directions (id.). Overall, the student worked best when he was provided with "visual cues, modeling and prompts to answer questions and follow more than one-step directions" (id.).

The IEP indicated that, according to the student's teachers and providers, the student had made significant growth in terms of social/emotional development (Dist. Ex. 2 at p. 2). More specifically, the IEP noted that the student had previously exhibited anxiety and emotional delays in school but that more recently he had been able to transition "nicely" and follow routines with minimal prompts (id.). The IEP described the student as a "sweet boy who could relate well to his peers," had started to initiate play and interact with other students appropriately (with fading prompts), and could engage in conversations with some adult prompting (id.). The IEP also noted that the student required prompting for new tasks and although he demonstrated improved eye contact he tended to turn his head "opposite the person who [wa]s speaking to him when answering questions" (id.). According to the IEP, the student occasionally exhibited "low frustration tolerance and anxiety when feeling overwhelmed or frustrated" and although his anxiety had decreased, he cried at times during morning drop off (id.). The IEP indicated that the student required positive reinforcements and verbal praise, as well as "modeling of appropriate coping skills when overwhelmed or frustrated" (id.).

In terms of the student's physical development, the IEP indicated that the student exhibited weaknesses in fine motor and gross motor abilities (Dist. Ex. 2at p. 3). According to the IEP, with respect to gross motor skills the student presented with a "wobbly gait, trip[ped] easily and at times walk[ed] into objects and people" (id.). With respect to fine motor skills, the IEP stated that the student required continued support "with visual perceptual tasks such as coloring pictures within the lines….[and] fitting puzzle pieces together" (id.).

With this background in mind and turning to the disputed issue, the March 2016 CSE developed seven annual goals for the student (Dist. Ex. 2 at pp. 4-9). The IEP identified one goal with a "PT" moniker, three goals with a "SPEECH" moniker, and three goals with an "OT" moniker (id. at pp. 5-8). The goal labeled PT targeted the student's ability to "walk in the hallways at the pace of his peers without tripping or falling" (id. at p. 5). The goals labeled "SPEECH" targeted the student's ability to formulate grammatically correct sentences and maintain appropriate tense, improve his ability to "recall and comprehend a sequence of three events presented orally and with visual cues from a short story," and follow two and three-step directions with fading prompts (id. at pp. 6-7). The goals labeled "OT" targeted the student's ability to cut a curvy line with decreasing prompts, use a mature grasp for writing/coloring activities with minimal cues, and improve "his attention span [as] evidenced by attending to the duration of a given task with fading prompts" (id. at pp. 7-8).

At the impartial hearing the parent expanded on his concern with the annual goals. During the March 2017 session of the impartial hearing, the parent testified that he was concerned about the student's short attention span and need for prompting; need for additional help with writing; need for assistance to make sure that he fully understood instructions in the classroom setting and throughout the day; peer interactions, social skills and coping skills; and his ability to remain on task (Tr. pp. 196, 199). The parent indicated that he was not in agreement with the student's IEP because it "did not go into specifics in terms of the goals that were needed for helping [the student] overcome" the issues the parent described (Tr. p. 197). The parent explained that he felt the student should have classroom goals, worked on by the special education teacher, because by having these goals "we'll see whether or not he's meeting those benchmarks clearly…and then, see if they should be amended" (Tr. p. 199). The parent opined that the student should have goals for prompting, social interactions, coping skills, and writing (Tr. p. 201).

To address the student's attending difficulties and need for prompting, which were areas of concern for the parent, the IEP detailed the student's need for small group instruction where he could engage in hands-on activities and receive modeling and repetition of new information and concepts; preferential seating with minimal distractions; and redirection as needed (Dist. Ex. 2 at p. 3). The IEP included a goal that targeted the student's need to improve his attention span and although it was labeled as an "OT" goal, the IEP indicated that the student's progress would be measured by the "teacher/provider" (Dist. Ex. 2 at p. 8).

During the impartial hearing, the school psychologist confirmed in testimony that the student had behavioral concerns in that he had a short attention span and the need for "a lot of redirection" (Tr. p. 130). She indicated that the March 2016 CSE had discussed the student's attending difficulties and recommended supports in the management needs section of the IEP (see Tr. pp. 130-31). The school psychologist conceded during the impartial hearing that the student should have an annual goal for attention (Tr. pp. 135); however, under cross-examination, the parent also acknowledged that a special education teacher of the student would examine the management needs section of the March 2016 IEP wherein the student's attending difficulties were

noted, as well as his need for preferential seating and support to increase his attention span (Tr. pp. 202, 205).

I note that the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). Overall, as to any claims that the March 2016 IEP was inappropriate because it failed to include goals for organization or study skills, it is unclear why, at the time the IEP was drafted, the student would require annual goals to address these areas since neither organization nor study skills were identified by the CSE as deficiencies in the PLEPs and, as noted above the parent did not raise any claims that the IEP mischaracterized or did not clearly identify the student's areas of need. Accordingly, there is no reason to disturb the IHO's determination due to a deficiency in the March 2016 IEP goals in relation to organization or study skills.

To the extent that the parent's statements in the request for review can be interpreted as a challenge to the IHO's decision due to a lack of measurability of the annual goals in the March 2016 IEP in order to "monitor" the student's progress, the March 2016 IEP specifies in each annual goal the criteria by which the student's success toward achieving the goal was to be measured (e.g., two times a day, 80% accuracy, four out of five trials), the procedures that would be utilized to evaluate the student's success (e.g., recorded observation, performance assessment, verbal explanation), and how frequently the student's progress toward meeting the goal would be measured (e.g., one time per month, one time per quarter) (Dist. Ex. 2 at pp. 4-9). There is no basis to conclude that the IHO erred in by failing to find that the goals in the March 2016 IEP were not sufficiently measurable.

Next, to the extent that the parent's statements in the request for review can be interpreted as a challenge to the IHO's decision due to the lack of annual goals for the special education teacher in the ICT classroom (i.e. annual goals provided in the student's classroom to address the strategies and techniques learned as part of his management needs), the parent's argument fails because it proceeds from a false premise that goals in an IEP must be drafted for each teacher or provider of the student. State guidance with respect to IEP development is clear that the goals in an IEP are not to be directed at a particular teacher or provider.

> "8. Can a district add a subheading to the Measurable Annual Goals section of the IEP in order to indicate the particular service type that the goal pertains to? (Added 4/11)
>
> Goals are developed for the student, not the service provider. However, if a district wants to group annual goals by the need area (e.g., speech and language) they may do so. However, the form may not be modified to insert service type. The program and service recommendations to assist the student to meet the goals are documented in the next section of the IEP, not under the goals section.

("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Requirements" Question 8 at pp. 22-23, Office of Special Educ. Mem. [Apr. 2011], available at

http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf [emphasis added]). Thus an IEP is not supposed to assign goals to a particular provider or teacher.

The false premise is bolstered by one special education teacher, the student's home-based SETSS teacher who testified at the impartial hearing, and it does not help matters that the district violated the State's guidance by placing the labels OT, PT, and SPEECH, on goals in the IEP, in contravention of the language above. The SETSS teacher, who was providing pendency services to the student after the due process hearing commenced, testified that the student should have annual goals in the classroom because "annual goals [are] written into the IEP for the educators to track his progress" (Tr. p. 220). The CSE chairperson acknowledged that she was unaware if the CSE developed annual goals for the special education teacher in the classroom (Tr. p. 135). However, she began to align her statements with the policy when she testified that although annual goals were not necessarily created for the special education teacher, some of the student's annual goals could "overlap with things that can happen within the classroom" (Tr. pp. 137, 144-45). Moreover, in the text of the March 2016 IEP itself, all of the annual goals except one identify that the party responsible for measuring the student's progress as the "Teacher/Provider" (Dist. Ex. 2 at pp. 5-8), which conflicts with the parent's assertions that the special education teacher in the ICT class would not have annual goals to implement. [14] Finally, even if there were no annual goals for which an ICT teacher could provide support for the student, as noted by the parent himself, the student's management needs in the March 2016 IEP identify that the student requires small group instruction, preferential seating with minimal distractions, support to increase his attention span, and visual and auditory prompts, as well as redirection, and while not specifically placed in the format of annual goals, these strategies would have be employed by an ICT classroom teacher (id. at p. 3), a service listed on the IEP.

Thus, while the district failed to provided annual goals in all areas of the student's need, the evidence in the hearing record leads to the overall conclusion that the annual goals in the March 2016 IEP aligned with and targeted the student's needs identified in the present levels of performance, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013];

[14] Although it cannot be used to support a finding that the CSE's design of the IEP was appropriate, with regard to the State policy that IEP goals should not be drafted for individual providers, there is also detailed testimony in the hearing record that the special education teacher had actually worked with the student on these goals during the 2016-17 school year. The speech-language pathologist explained that one of the student's teachers attended speech-language therapy sessions and was directly involved in facilitating and carrying over in the classroom what had been "worked on in the sessions" (Tr. p. 75). The speech-language pathologist further stated that the student benefitted from supports such as verbal highlighting, declarative language, and visual cues, and that these supports were also implemented in the classroom (Tr. p. 88). Additionally, the speech-language pathologist explained that a strategy she used called the "five-point scale", which helped the student appraise the size of problems, was also used in the classroom (Tr. p. 76). The hearing record reveals that the student's classroom teacher met and collaborated with the student's service providers regarding the student's progress and needs (Tr. pp. 74-75, 83, 158-60). The special education teacher also stated that among the skills she worked on with the student during the 2016-2017 school year were the annual goals of improving his attention for independent writing tasks, his formation of his letters, and his ability to recall and comprehend a sequence of three events presented orally (Tr. pp. 169-70, 173, 177-78, 191, 193; see Dist. Ex. 2 at p. 8). The actions of this special education teacher provide a clear demonstration of the State policy in action.

D.B., 966 F. Supp. 2d at 334-35). Thus, the IHO's determination that the annual goals contained in the student's March 2016 IEP were appropriate is supported by the hearing record.

2. SETSS

a. Definition of SETSS

Turning next to the IHO's determination that the student did not require SETSS and the parent's disagreement(s) with the IHO, the hearing record does not support any argument that the student should have been offered home-based SETTS in the IEP and/or that home-based SETSS would be appropriate relief due to alleged defects with the annual goals.

Upon examining the evidence in the hearing record and the notation of the parent's concerns in the IEP, it is clear that the parent was concerned with the support that the student would be given with respect to his deficits in attention. For the 2016-17 school year, it is less clear why the parent was of the opinion that support must come in the form of 1:1 instruction with a special education teacher.

One distinct possibility that aligns with the available information in the hearing record is that the parent was reluctant to discontinue the SEIT services that the student received previously and began looking for what he believed was either an identical or the next closest service. The hearing record is muddled on that point, as at times the relief sought is referred to by witnesses and the lay advocate as SEIT and at other times is identified SETSS (see, e.g. Tr. pp. 56, 58-59, 176, 197-98; 221).[15] While the student was attending preschool, during summer 2016, the evidence shows that the student received 15 hours of 1:1 SEIT services in the home (see Parent Ex. D).

State law clearly defines SEIT services as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [Educ. Law § 4410(8)]" (Educ. Law § 4410[1][k]; see 8 NYCRR 200.16 [i][3][ii]; see "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. [Oct. 2015]"; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf). In addition, SEIT services "shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16 [i][3][ii] [emphasis added]). It is not uncommon for SEIT services to be provided to preschool children with a disability in the home because, as a purely practical matter, preschool students have not yet reached the age of attendance at public elementary schools and, therefore, the SEIT services are commonly offered by the public agency wherever they can be most practically delivered to the child. That is one the reasons that they are referred to as "itinerant" services. It is also not uncommon for SEIT services to be provided on a 1:1 basis in the home, again as a purely practical matter, because most parents would not be comfortable with the idea of allowing public agencies to enter their homes

[15] Even the special education teacher, whose services are provided by the district in accordance with pendency, suggested in her direct testimony that "SEIT at home" services and "SETSS at home" services are in essence the same thing (see Tr. pp. 217, 221).

and set up group instructional programs involving other disabled children.[16] Thus, to the extent that the parent in this case believes that the student should have continued to receive SEIT services under his school-aged IEP in September of the 2016-17 school year (the March 2016 IEP), it is inconsistent with State regulation and policy for a school district to deliver a service designed exclusively for pre-school students to a school-aged student.[17]

However, the parent does at times request continued SETSS for the student (see, e.g., Req. for Rev. at p. 2).[18] Unlike SEIT services, SETSS is not defined in the State's continuum of special education services (see 8 NYCRR 200.6) and it is not defined at all in the hearing record in this case. As noted above, whether the parent believes that SETSS is similar to or differs substantially from the SEIT services that the student received prior to the start of the 2016-17 school year is unclear from the hearing record. In a case such as this, in which SETSS is the central form of relief sought by the parent, it is bewildering that no one asked any of the witnesses or, more appropriately and efficiently, entered documentary evidence that clearly defines the contours and features of SETSS, whereas it appears in this case that the parent is likely of the belief that the district defines SETSS as 1:1 direct instruction in a student's home by a certified special education teacher.

The conundrum that I face is that I have presided over many cases involving the New York City Department of Education in which the need for SETSS is one of the primary disputed issues, and when asked by a representative or an IHO, the parent's version of SETSS in this case has never been offered by district witnesses or in district documentary evidence that I am aware of. Consequently, in a case such as this, it is critical to develop in the evidentiary record, especially if the finder of fact has any reason to suspect that that the parties are operating with different working definitions of the term SETSS. I have pointed out the shortcoming with impartial hearing records regarding the lack of a uniform definition for SETSS during impartial hearings to the district and IHOs repeatedly and at some length (see Application of a Student with a Disability, Appeal No. 17-034; Application of a Student with a Disability, Appeal No. 16-056; Application of a Student with a Disability, Appeal No. 16-054). The district struggled with the underdeveloped record when it states in its answer that it is "unclear as to whether the Petitioners are differentiating between SEIT and SETSS or whether they are using these terms interchangeably, but the district bears more of the responsibility to develop the record as the party with the burden of production and persuasion at the impartial hearing. In recent decisions issued by the Office of State Review, it has been explained that "an administrative hearing officer cannot take judicial notice of facts attendant to a highly specialized term like SETSS" that is unique to this district and that "the

[16] Sometimes public agencies, parents, and preschool programs work cooperatively to coordinate the delivery of SEIT services in a child's preschool program, but children are not mandated to attend preschool programs in this state, and there is no general mandate that all preschool providers in the state must allow public agencies to deliver special education services in their programs.

[17] As noted above, the parent clarifies in the reply that he is seeking SETSS versus a SEIT; but the reply does nothing to clarify how the parent distinguishes between the two or what he believes SETSS consists of.

[18] It is notable, however, that during the hearing the parent's advocate requested "[s]ix hours of SEIT services at home under pendency" that went uncontested by the district, even though the IHO later awarded "six hours of SETTS [sic] services at home" (Tr. pp. 5-6; Interim Decision at p. 3). Moreover, there are several points during the hearing that neither the district attorney, parent advocate, nor the IHO discriminate between SETSS and SEIT services (see Tr. pp. 56, 59-60, 105, 176, 221).

district . . . should be prepared to develop the evidentiary hearing record regarding the definition of SETSS in all cases in which it bears on disputed issues in the case" (Application of a Student with a Disability, Appeal No. 16-056).[19] In Application of a Student with a Disability, Appeal No. 16-056, the district was directed by the undersigned to submit documentation defining and explaining the exact nature of SETSS, which was described as being created pursuant to the innovative program waiver regulations and consisting of "a flexible hybrid service combining Consultant Teacher and Resource Room Services," as those terms are defined in New York State's continuum of special education services (Application of a Student with a Disability, Appeal No. 16-056).

Not so in this case. I will accept, for purposes of this proceeding what I surmise is the parent's view of SETSS in this case, that is, SETSS is 1:1 direct instruction of the student by a certified special education teacher in the home, essentially a continuation of SEIT services that a preschool with a disability might receive, but for a school-aged student. The district provided no basis in the hearing record to conclude otherwise and I will not take judicial notice of any other definitions that the district has proffered previously in other cases because there is no suggestion in this record that the parent would have any way of knowing a different definition of the service. Accordingly, when the parent refers to SETTS the district must establish that the student did not require 1:1 instruction by a special education teacher in the home in order to receive a FAPE.

b. Need for Home-Based 1:1 Direct Instruction

Turning to whether the district should have offered the student 1:1 home-based instruction to the student on the March 2016 IEP, upon my independent review, the little available evidence in the hearing record does not support such an assertion, and the IHO seemed to reach the same conclusion. The student's SETSS provider during pendency of this proceeding highlighted some of her responsibilities.[20] The SETSS provider testified that she provided educational support services during the 2016-17 school year and that she contacted the family "to provide my services in a SETSS capacity six hours per week at home" (Tr. pp. 217-18). At the time of her testimony in March 2017, the SETSS provider testified that she was working with the student to increase his attention while decreasing his "prompt-dependency" (Tr. p. 218). However, with respect to the school-based programing, the SETSS provider testified that she could not speak to whether the support the student received at school to stay on task was sufficient because she was not in the classroom (Tr. p. 221). Essentially, the SETSS provider offering pendency services had no idea whether the student required 1:1 home based instruction by a special education teacher. However, she opined that six hours of SETSS services per week in the home should continue because the student needed more support and "intensive experience" in working with his prompting and staying on task (Tr. p. 221). The SETSS provider also stated that the student did not have an "integrated level of behavioral control" which would allow him to be more independent in the classroom (Tr. p. 222). These statements suggest to me that the 1:1 direct home-based instruction were beneficial

[19] The term SETSS has appeared in SRO decisions for almost 15 years, but the nuances and contours defining the service in each case have been scant (see, e.g., Application of a Child with a Disability, Appeal No. 03-078).

[20] However, I only use this testimony from the impartial hearing for the specific purpose of attempting to detail how the parent understood SETSS services for the 2016-17 school year when viewed through the parent's experience with the delivery of SETSS services.

for the student, but they do not suggest that the student would not receive a FAPE in the absence of 1:1 home-based instruction by a special education teacher.

The most relevant evidence on this issue comes from the documentary evidence available at the time of the CSE meeting. The March 2016 IEP identified the student as having academic/speech-language difficulties related to sequencing/retelling a story, answering 'wh' questions, following multi-step directions and using appropriate verb tenses (Dist. Ex. 2 at pp. 1-2). At the time the IEP was developed, the student had demonstrated significant growth in his social/emotional development although he continued to have difficulty sustaining attention, occasionally exhibited low frustration tolerance and anxiety when overwhelmed or frustrated, and at times exhibited separation anxiety (Dist. Ex. 2 at pp. 1-2). The student also demonstrated fine and gross motor weaknesses (Dist. Ex. 2 at p. 3). To address these needs the CSE recommended that the student be placed in an ICT class for academic and specials and receive weekly related services consisting of five 45-minute sessions of group speech-language therapy, one 45-minute session of group occupational therapy and one 30-minute session of group physical therapy (Dist. Ex. 2 at pp. 9-10). The CSE developed goals that targeted the student's ability to walk without falling in the school environment, use appropriate verb tense in oral communication, recall and orally present a sequence, follow multi-step directions, cut paper, use a mature grasp and improve his attention span (Dist. Ex. 2 at pp. 5-8). In addition, the March 2016 IEP included numerous recommendations for addressing the student's attending difficulties including small group instruction and the use of hands-on activities, preferential seating, visual and auditory prompts, and redirection (Dist. Ex. 2 at p. 2-3). The IEP also noted that when overwhelmed or frustrated the student and required modeling of appropriate coping skills (Dist. Ex. 2 at p. 2).

The hearing record shows that in January/February 2016 the student's mother sought a private multidisciplinary evaluation that included school and treatment recommendations for the student as he transitioned to kindergarten (Dist. Ex. 5 at p. 2). Among the recommendations offered in the resultant multidisciplinary evaluation report was the suggestion that the student required a small supportive kindergarten classroom environment to help him build academic, language and social skills (Dist. Ex. 5 at p. 5). The evaluators opined that the student would "benefit from an environment that offer[ed] the opportunity to engage with some typically developing peers, while continuing to receive a smaller class size and special education supports including visuals and a social skills curriculum embedded in the daily routine" (Dist. Ex. 5 at p 5). According to the evaluators, the student's family was encouraged to explore the ASD Nest program as it provided "all of the elements of a recommended program for him" (Dist. Ex. 5 at p. 5).[21] Relatedly, the school psychologist testified that in a meeting prior to the March 2016 CSE meeting, the student's mother mentioned that she had applied to the ASD Nest program (Tr. pp. 117-19). The school pscyhologist further testified that the "team" considered the portion of the private multidisciplinary evaluation that encouraged the family to explore the ASD Nest program when making a recommendation for the student (Tr. pp. 122-23).

[21] It addition to the recommendation for placement in a small supportive kindergarten classroom, the private evaluators recommended that the student receive speech-language, occupational and physical therapies along with counseling and behavioral therapy to address the student's separation anxiety (Dist. Ex. 5 at pp. 14-15). The evaluators did not recommend that the student receive SETSS in addition to the ASD Nest program (see Dist. Ex. 5).

As to the March 2016 CSE's recommendation of an ICT classroom, State regulation defines ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulation requires that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). When asked about the student's educational placement in an ICT class, the parent testified that he was in agreement with the educational placement of the student (Tr. p. 198).[22] The CSE noted in the March 2016 IEP that other possible placements, had been considered including a general education class and 12:1+1 and 6:1+1 special classes, but concluded that the student presented with delays such that a general education class alone would not be supportive enough, and that the special classes would be too restrictive in light of the student's "good cognitive and achievement levels as well as fair adaptive skills" (Dist. Ex. 2 at pp. 15-16).

The parent otherwise fails to rebut the documentary evidence in the hearing record that supports the conclusion that March 2016 IEP was appropriate to address the student needs, without 1:1 direct instruction by a special education teacher in the student's home. Moreover, as noted above, the SETSS provider acknowledged that she did not have any contact with anyone at the student's school and did not know how the school was addressing the student's needs with respect to attention and distractibility (Tr. pp. 223-25).

As a final point, I find that the IHO's alternative findings regarding the student's IEP were not all made on a prospective basis consistent with the Second Circuit's holding in R.E. (R.E., 694 F.3d at 188). Information not available to the CSE at the time of the CSE meeting may not be used by a district to rehabilitate a defective IEP, nor may it be used by a parent to invalidate a substantively appropriate IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013][holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. Oct. 2, 2013][refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). In this case, the IHO found that the student did not require SETSS services as the student had made progress in the program offered in the March 2016 IEP during the 2016-17 school year (IHO Decision at p. 10 [emphasis added]), which is impermissibly retrospective. Thus, for the reasons discussed above, while I uphold the outcome of the IHO's alternative determination regarding SETSS, I reach that conclusion based upon the evidence available at the time of the March 2016 CSE meeting.

VII. Conclusion

Having determined that the parent did not appeal the IHO's determination that the case is moot, the parent's appeal of the IHO's decision must be dismissed. Even if the parent had appealed, the evidence in the hearing record, which was poorly developed by both parties, sufficiently supports the IHO's alternative determination that the district offered the student a FAPE for the 2016-17 school year, and there is no need to consider whether an award of compensatory education

[22] During the impartial hearing, the parents' disagreement seemed to focus on his perception of the lack of goals for the ICT teacher (see Tr. p. 199), which was discussed previously.

is necessary in this case. As to any additional claims raised by the parties, I have considered the remaining contentions and decline to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 15, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER