



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-039

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 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 the decision of an impartial hearing officer (IHO) which denied her request for home-based services for the 2017-18 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 in this case began receiving special education and related services through the Committee on Preschool Special Education (CPSE) as a preschool student with a disability during the 2015-16 school year (see Dist. Ex. 1 at pp. 1-2, 16-41).¹ According to the evidence in the hearing record, the student was initially referred for evaluations due to "speech and language

¹ In July 2015, the CPSE conducted a bilingual social history, a home language survey (reporting that both parents spoke to the student primarily in their native language), a bilingual psychological evaluation, an observation of the student at a developmental center, and a bilingual speech-language evaluation—all of which were summarized in a preschool student evaluation summary report (see Dist. Ex. 1 at pp. 23-41). The evidence in the hearing record does not indicate what special education programs or related services the student received, if at all, during the 2015-16 school year (see generally Tr. pp. 1-121; Parent Exs. A-D; Dist. Exs. 1-17; IHO Exs. I-VII).

concerns" (*id.* at p. 27). For the 2016-17 school year, through an IEP developed by the CPSE, the student received 15 hours per week of individual special education itinerant teacher (SEIT) services (three hours per day, five days per week) delivered to the student in his "[s]chool [e]nvironment," which he attended on a full-time basis (i.e., Monday through Friday, 8:00 a.m. to 6:00 p.m.) (*id.* at pp. 4-5, 12; *see* Dist. Ex. 5 at pp. 1, 3).^{2, 3}

On March 27, 2017, a CSE convened and developed an IEP for the 2017-18 school year (kindergarten) to be implemented beginning on September 5, 2017 (*see* Dist. Ex. 8 at pp. 1, 15; *see generally* Dist. Exs. 2-7).⁴ Finding the student eligible to receive special education and related services as a student with a speech or language impairment, the March 2017 CSE recommended a 12:1 special class placement for instruction in English language arts (ELA), mathematics, social studies, and science at a non-specialized district public school (*see* Dist. Ex. 8 at pp. 1, 11, 14).⁵ The March 2017 CSE also recommended related services, consisting of one 30-minute session per week of counseling in a small group and two 30-minute sessions per week of speech-language

² Although the CPSE also recommended that the student receive one 30-minute session per week of speech-language therapy in a small group during the 2016-17 school year, the evidence in the hearing record reveals that the student did not begin receiving this related service until shortly before the March 2017 CSE meeting (*see* Dist. Exs. 1 at p. 12; 3 at p. 1; 8 at p. 2).

³ On February 6, 2017, the district conducted a classroom observation of the student (*see* Dist. Ex. 4 at p. 1). At that time, the student's classroom consisted of a total of 16 students, 1 teacher, and 1 "teacher assistant" (*id.*). Although the observation report noted that the student received SEIT services at school, it does not appear—based upon a review of the report—that the student's SEIT was present during the observation, as the report only reflected interactions between the student and his peers, his teacher, or his teacher assistant (*id.* at pp. 1-2). According to the report, the student's teacher indicated that the student would "benefit from an integrated classroom setting next academic year" in kindergarten, he still needed to receive speech-language therapy services, and he would not "do well in a general/regular education classroom setting because 'he need[ed] someone with him' and still need[ed] extra academic support" (*id.* at p. 2).

⁴ In preparation for a CSE meeting to determine whether the student continued to need special education services as a kindergarten (school-age) student, the district completed a social history update in the parent's native language on January 23, 2017 (*see* Dist. Ex. 3 at p. 1; *see also* Dist. Exs. 1 at p. 30; 2). The January 2017 social history update noted that, at that time, the parent received copies of the "Procedural Safeguards Notice and a Family's Guide to Special Education for School [A]ged Children" in her "native language" (Dist. Ex. 3 at p. 2). The social history update noted that the parent "fel[t] that [the student's] SEIT service ha[d] helped him progress greatly in school" and had been a "huge benefit for the student in terms of his learning and even his speech/language development" (*id.* at p. 1). The parent reported that the student knew his "colors, numbers, and shapes"; he enjoyed mathematics, but not writing and might need "extra assistance with regards to writing"; and the student would "remain seated on the classroom carpet/area rug" but, at times, would not remained seated in his chair (*id.*). The student did not, however, "exhibit any major behavioral/emotional difficulties in school" and was "reported to 'listen' and be respectful in school" (*id.*). In addition, the parent reported that while the student was "supposed to receive speech/language therapy," he received only one therapy session during the school year because a speech-language provider left and was not replaced (*id.*). According to the parent, if the student had received his speech-language therapy, he "would be more advanced in terms of his speech/language abilities and his academics" (*id.*). As of January 2017, the student had been attending his then-current school setting for "approximately one and a half years" (*id.*).

⁵ The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

therapy in a small group (id. at p. 11). The March 2017 CSE created annual goals to address the student's needs in the areas of language arts (ELA), writing, mathematics, speech-language, and counseling (id. at pp. 7-10). Finally, the March 2017 CSE recommended strategies to address the student's management needs: "small group instruction using simple directions with repetition as needed"; encouraging the student to use "words to label and request"; providing "[m]odels" as needed; speech-language therapy services; and providing the student with "repetition, prompting, rephrasing, gestures, and visual cues to help keep on task throughout the day" (id. at p. 5).^{6, 7}

On May 17, 2017, a CPSE convened and developed an IEP for the student to be implemented for the remainder of the 2016-17 school year and during summer 2017 (see Parent Ex. C at pp. 1, 3, 22).⁸ Remaining eligible as a preschool student with a disability, the May 2017 CPSE recommended 15 hours per week of SEIT services and two 30-minute sessions per week of speech-language therapy in a small group (all services to be delivered to the student at a "childcare location selected by the parents") (id. at pp. 1, 21-22; see also Dist. Ex. 11 at pp. 25-26).⁹

Beginning in September 2017, the student attended the 12:1 special class placement recommended in the March 2017 IEP at a district public school (see Tr. pp. 1, 5-6; see generally Dist. Exs. 13-17).

A. Due Process Complaint Notice

By due process complaint notice dated September 7, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (see Parent Ex. A at pp. 1-2, 4). More specifically, the parent alleged that she did not receive a copy of the "procedural safeguards," the district failed to provide her with a copy of the student's IEP translated into her native language, and the March 2017 CSE meeting did not include

⁶ An attendance page for the March 2017 CSE meeting identified one individual as the student's then-current "General Education Teacher" and another individual as the student's then-current "SEIT" from his preschool setting, both of whom attended the meeting via telephone (see Dist. Ex. 8 at p. 18; see also Dist. Exs. 3 at p. 1; 5 at p. 1).

⁷ In a prior written notice dated April 1, 2017—sent to the parent in both English and in her native language—the district summarized the special education program recommended for the student at the March 2017 CSE meeting (see generally Dist. Ex. 9). The district also provided the parent with meeting notices in both English and her native language (see generally Dist. Exs. 6-7). In a prior written notice (school location letter) dated May 5, 2017, the district summarized the special education program recommended by the March 2017 CSE and identified the particular public school site where the IEP would be implemented (see Dist. Ex. 10 at pp. 1-2).

⁸ As a preschool student with a disability, the student was entitled to continue to receive special education and related services under the CPSE through summer 2017 (Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

⁹ Although it is unclear from the evidence in the hearing record where, or if, the student received the SEIT or speech-language therapy services during summer 2017 (see generally Tr. pp. 1-121; Parent Exs. A-D; Dist. Exs. 1-17; IHO Exs. I-VII), it appears that the student may have attended "daycare" but received the SEIT services at home notwithstanding that the May 2017 CPSE recommended the delivery of those services to the student at a "childcare location selected by the parents" (compare Tr. pp. 4-16, and Parent Ex. D, with Parent Ex. C at pp. 1, 21-22).

an interpreter (id. at p. 2). Next, the parent "disagree[d]" with the 12:1 special class placement recommended for the student's participation in ELA, mathematics, social studies, and science "without an individualized reading program" (id.).

With respect to related services, the parent alleged that the student required "at least" one additional session per week of individual speech-language therapy (Parent Ex. A at p. 3). The parent further alleged that the CSE denied her requests for 15 hours per week of home-based special education teacher support services (SETSS), one additional session per week of individual speech-language therapy, and independent educational evaluations (IEEs) in the areas of speech-language and occupational therapy (OT) (id.).

Next, the parent alleged that the annual goals in the March 2017 IEP were "deficient," and failed to address all of the student's reading needs (Parent Ex. A at pp. 2-3). The parent also alleged that the annual goal for mathematics was "broad and not specific" to the student's needs (id. at p. 3). In addition, the parent asserted that the March 2017 IEP failed to include annual goals to address the student's activities of daily living (ADL) skills, such as hand washing (id.). Next, the parent described the student's sensory issues with food and when eating (id.). The parent also indicated that the student needed "visual schedules to assist with transitions," and he demonstrated a "weak grasp" and could not "color within the lines and spatial awareness" (id.). Finally, the parent noted that the student could not "follow through on an assignment," he had "poor fine motor," he did not "take risks academically," and he needed "redirection" to stay on task (id.).

As a proposed resolution, the parent repeated some of the assertions already set forth in the due process complaint notice (compare Parent Ex. A at p. 4, with Parent Ex. A at pp. 2-3). In addition, the parent requested the following as relief: a daily, 30-minute individualized reading program at school; a bilingual, neuropsychological IEE for the district's failure to evaluate the student for "[k]indergarten"; IEEs in the areas of speech-language (with auditory processing) and OT; an additional 30-minute session per week of individual speech-language therapy; 15 hours per week of individual, home-based SETSS at an "enhanced rate"; copies of all documents from the student's March 2017 CSE meeting; and 40 hours of speech-language therapy services as compensatory educational services (id. at pp. 4-5).

In an amended due process complaint notice dated September 9, 2017, the parent requested 15 hours per week of individual SEIT services as the student's pendency (stay put) services (see Parent Ex. B at pp. 1-2).

B. Impartial Hearing Officer Decision

On September 12, 2017, the parties proceeded to an impartial hearing, which concluded on January 23, 2018, after five days of proceedings (see Tr. pp. 1-121).^{10, 11} By decision dated February 15, 2018, an IHO found that the district offered the student a FAPE and denied the parent's requested relief, consisting of 15 hours per week of individual, home-based SETSS (see IHO Decision at pp. 4-11).¹² The IHO noted that the hearing record failed to include "any evidence" of the district's alleged failures with regard to the March 2017 IEP (id. at p. 10). In addition, the IHO found that the parent failed to present any evidence "indicating any specific areas of special education need that was not being addressed in the current school program" such that the student required 15 hours per week of individual, home-based SETSS (id.). The IHO also found no support in the hearing record for the parent's contention that the student would "regress" in reading without home-based SETSS to provide "reinforcement" in the area of reading (id.). Significantly, the IHO indicated that the parent acknowledged the student's progress at school and that he was "on grade level" (id.). Based upon the foregoing, the IHO denied the parent's request for 15 hours per week of individual, home-based SETSS as relief (id.). Pursuant to the parties' agreement at the impartial hearing; however, the IHO ordered the district to provide the student with the following: 32 30-minute sessions of OT to be delivered to the student at school by December 31, 2018; 80 30-minute sessions of speech-language therapy to be delivered to the student at school or outside school through the issuance of related services authorizations (RSAs)

¹⁰ In an interim order dated September 22, 2017, the IHO directed the district to provide the student with the following as pendency services: 15 hours per week of individual SEIT services (see IHO Ex. III at pp. 1, 3, 6).

¹¹ On September 22, 2017, the student was seen by a physician at a developmental behavioral pediatricians' office (see Dist. Ex. 12 at p. 2). According to a letter from the physician, the student was "evaluated . . . for developmental concerns" and additional testing would be conducted, including a psychological evaluation, a speech-language evaluation, and the "ADOS" (id.). Although not explained in the letter, "ADOS" is typically used as an abbreviation for the Autism Diagnostic Observation Schedule (see, e.g., Application of the Bd. of Educ., Appeal No. 17-081; Application of a Student with a Disability, Appeal No. 12-162). In her September 2017 letter, the physician recommended an OT evaluation of the student "at the school for fine motor delays and sensory issues" (Dist. Ex. 12 at p. 2). The September 2017 letter also included a handwritten notation, indicating that the parent was "writing [a] letter" for reevaluation, which it appears that the parent did via letter dated September 26, 2017 (id. at pp. 1-2). During the impartial hearing, the district conducted an OT evaluation of the student in October 2017 and a speech-language evaluation of the student in November 2017 (see generally Dist. Exs. 13-15).

¹² The IHO noted in the decision that "[m]any issues were resolved during [the] hearing, leaving at issue translation and interpretation services and home SEIT services at an enhanced rate" (IHO Decision at p. 3). Namely, the district agreed to provide the parent with the following requested relief: an interpreter at "IEP meetings if requested" and translation of the student's IEP into the parent's native language "if so ordered" by the IHO; compensatory educational services consisting of 32 30-minute sessions of OT at school and 80 30-minute sessions of speech-language therapy at school or at home; a neuropsychological IEE (conducted while the impartial hearing proceeded); IEEs in the areas of speech-language and OT; and additional speech-language therapy (addressed through compensatory educational services) (IHO Decision at pp. 3-4, 10-11; see Tr. pp. 30-31, 33, 40-42, 49-51, 91-97; see generally Dist. Exs. 13-15). In addition, at the impartial hearing the parent withdrew the request for an individualized reading program for the student (compare Parent Ex. A at p. 4, with Tr. p. 92).

to be used by June 30, 2019; and a copy of the March 2017 IEP translated into the parent's native language (*id.* at pp. 3-4, 10-11).

IV. Appeal for State-Level Review

Through her advocate, the parent appeals and asserts that she "feels FAPE" was not offered for the 2017-18 school year and "disagree[s]" with the IHO's decision denying her request for 15 hours per week of home-based SETSS.¹³ The parent "disagrees with the IHO that no evidence was presented to support SETSS at home." As relief, the parent requests an award of 15 hours per week of home-based SETSS so the student can "work on his academic and executive goals."

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Thereafter, the district argues to dismiss the parent's request for review for failing to comply with various regulations governing practice before the Office of State Review.

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

¹³ The parent's lay advocate—who was sternly cautioned with respect to his failure to comply with practice regulations in a recent SRO decision (*see* Application of a Student with a Disability, Appeal No. 17-103)—is again reminded and cautioned that State regulations require a petitioning party—after personally serving the request for review upon an opposing party—to file the request for review with the Office of State Review "within two days after service of the request for review is complete" (8 NYCRR 279.4 [a], [e]). Moreover, as the same lay advocate was cautioned previously, State regulation prohibits filing by facsimile or electronic mail (*see* 8 NYCRR 279.4[e]). Yet again in this case, the parent's lay advocate personally served the district with the request for review on March 23, 2018 (*see* Parent Aff. of Service), and then attempted to file the request for review with the Office of State Review by facsimile on April 8 and April 10, 2018—weeks past the deadline established by State regulation. In addition—and, again, as the parent advocate was advised in the previous SRO decision—the advocate failed to comply with the form requirements for numbering the pages of the request for review (*see* Application of a Student with a Disability, Appeal No. 17-103; 8 NYCRR 279.8[a][3]; *see generally* Req. for Rev.). Having been suitably cautioned on more than one occasion of these violations, this particular lay advocate's continued failure to comply with these practice regulations is not excusable and, if not corrected in future requests for review filed by the advocate, may result in the rejection of those pleadings.

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 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]).¹⁴

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—Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with the form requirements for pleadings (8 NYCRR 279.8[c][2]-[3]). Specifically, the district asserts that the request for review fails to "include a clear and concise statement of the grounds for reversal or modification; [it] does not identify precise rulings, failures to rule, or refusals to rule presented for review; and [the request for review] does not include proper citations or identification to the relevant page numbers or exhibits in the record."

State regulations require that a request for review "shall clearly specify the reasons for challenging the [IHO'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 by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Form requirements necessitate, in part, that all pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]).

More specifically, State regulation requires that a request for review shall set forth:

- (1) the specific relief sought in the underlying action or proceeding;
- (2) 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, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
- (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript,

¹⁴ 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).

exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). While a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-103; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

In addition to being cautioned about the growing pattern of late and improperly filed pleadings as already noted, the parent advocate was also cautioned by a previous SRO about his failure to comply with the very same practice regulations now raised by the district in this appeal, and more significantly, about the ultimate consequence for a continued failure to comply with practice regulations: to wit, "outright dismissal of future nonconforming pleadings by an SRO without a decision on the merits" (Application of a Student with a Disability, Appeal No. 17-103; cf. Answer at pp. 9-10). In the previous appeal, the SRO noted that the parent advocate failed to clearly identify the findings, conclusions or orders to which exceptions were being taken or a failure of the IHO to render a determination on a particular issue (see Application of a Student with a Disability, Appeal No. 17-103). The SRO explained that "[w]hile the request for review note[d] that the parent had 'disagree[d] with the IHO,' there [was] no reference to which of the IHO's specific fact findings or legal conclusions with which the parent disagree[d]" (*id.*). Thereafter, the SRO explicitly set forth the degree of understanding expected of a lay advocate when taking on the responsibilities of assisting parents throughout the administrative hearing

process and on appeal, and provided additional instructions to guide this particular advocate in the drafting of future appeals (*id.*).¹⁵

Though provided with such guidance, the request for review presented in this appeal shows little, if any, improvement in the parent advocate's ability to comply with the practice regulations. In this case, however, the noncompliance may result, in part, from the IHO's decision itself, which did not contain findings on the issues raised by parent in the due process complaint notice but which, instead, focused solely on the limited relief that remained outstanding and whether or not the parent was entitled to such relief (*compare* Parent Ex. A at pp. 1-3, *with* IHO Decision at pp. 9-10). For example, while the IHO concluded that the district offered the student a FAPE, the IHO did not base this conclusion on the findings related to the specific issues raised about the annual goals in the IEP or the appropriateness of the recommended 12:1 special class placement (*see* IHO Decision at pp. 6-10 [setting forth legal standard and moving directly into the relief sought by the parent]). Rather, the IHO made broad statements indicating that witness testimony did not include "any evidence of [the district's] failure" within the March 2017 IEP (*id.* at p. 10). Having concluded that the district offered the student a FAPE, the IHO then turned to the parent's request for 15 hours per week of home-based SETSS (*id.*); but if the district offered the student a FAPE, then it is altogether unclear why the IHO addressed the parent's request for relief when no remedy would be available in light of his finding that the district offered the student a FAPE for the 2017-18 school year. Nevertheless, the IHO appeared to analyze the parent's entitlement to this relief based upon whether the student required the 15 hours per week of home-based SETSS—ultimately finding that the hearing record did not contain any evidence "indicating any specific area of special education need that was not being addressed in the current school program" (*id.*). Thus, the IHO's handling of the issues raised by the parent in the due process complaint notice in the decision lends itself to an interpretation that the IHO treated the parent's request for relief as both a claim that the March 2017 IEP was substantively inappropriate because it failed to include a recommendation for home-based SETSS, and as relief for the alleged failure to offer the student a FAPE (*id.*).

In light of the confusing nature of the IHO's decision, some discretion may be warranted even though the parent advocate 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 generally* Req. for Rev.). Here, the request for review indicates that the parent "feels FAPE for the 2017/2018 school year was not offered," she "disagree[s] with the IHO's decision denying SETSS at home," and she "disagrees with the IHO that no evidence was presented to support SETSS at home," but the parent's advocate does not—as the district argues—include any "legal analysis or allegations as to why or how the IHO's ruling [that the district offered the student a FAPE] was improper or should be overturned" (*id.*; Answer at pp. 9-10). Notably, the parent advocate does not challenge the IHO's failure to reach determinations on the issues raised in the due process complaint notice—i.e., the annual goals and the appropriateness of the 12:1 special

¹⁵ The decision in Application of a Student with a Disability, Appeal No. 17-103 was issued on March 15, 2018—approximately five days before the parent's advocate (improperly) executed the request for review, dated March 20, 2018, in this matter (*compare* Application of a Student with a Disability, Appeal No. 17-103, *with* Req. for Rev.). To be clear, the parent's request for review survives an outright dismissal without a review of the merits of the case for two reasons: one, the parent advocate may not have received a copy of Application of a Student with a Disability, Appeal No. 17-103 alerting him to the potential consequences of his continued noncompliance with the practice regulations; and two, the lack of clarity of the IHO's decision.

class placement—which, based upon State regulation, are now deemed abandoned and will not be reviewed by the undersigned SRO (see 8 NYCRR 279.8[c][4]; compare Parent Ex. A at pp. 1-3, with IHO Decision at pp. 6-10, and Req. for Rev. ¶¶ 1-6). The advocate's failure to appeal the IHO's failure to rule on these issues has the unfortunate consequence, however, of further obfuscating the issue(s) to be reviewed by an SRO.

Next, and similar to the request for review in the previous appeal, the parent advocate failed to formulate a clear and concise statement of the issues for which he appealed the IHO's decision (see Application of a Student with a Disability, Appeal No. 17-103). In the current appeal, the parent only generally asserts her disagreement with the IHO's decision "denying SETSS at home," and requests "15 hours of SETSS 1:1 to work on [the student's] academic and executive goals." The parent also expresses disagreement with the IHO "that no evidence was presented to support SETSS at home." To support this allegation, the parent generally points to her own testimony as the evidence to support home-based SETSS. Based upon the IHO's determination, and in consideration of the parent's filing, the most likely interpretation to be drawn from the parent's request for review is that the parent contends that the IHO erred in finding that the district offered the student a FAPE for the 2017-18 school year because the IHO failed to consider, or ignored, the parent's testimonial evidence that the student required 15 hours per week of individual, home-based SETSS to receive a FAPE and, as relief, the student should be provided with 15 hours per week of individual, home-based SETSS to remediate the district's failure to offer the student a FAPE for the 2017-18 school year. Accordingly, the remainder of this decision will address this as the issue presented—and the relief requested—on appeal.

B. Home-Based SETSS

As noted, the parent points to examples of her own testimony in support of her assertion that she presented testimonial evidence at the impartial hearing to support the request for 15 hours per week of individual, home-based SETSS for the student. More specifically, the parent notes that she testified that SETSS "would be good" for the student, and her testimony reflected that the student requires SETSS to "provide assistance at home with processing." The parent also notes that she testified about the "current SETSS provider" and how that provider assists the student to "process all information that he receives at school." The parent further indicates that she testified about the student's need for SETSS to provide support for "comprehension" and "reinforcement at home" because the student's IEP did not include an annual goal to address comprehension skills, and to prevent regression. Finally, the parent asserts that the home-based SETSS is required to provide the "1:1 setting for predicting what happens next in a story," as referenced in the student's IEP.

In response, the district argues that the 12:1 special class placement—together with the related services, management needs, and annual goals—addressed the student's identified needs and offered the student a FAPE, such that home-based SETSS was not required. In addition, the district contends that the CPSE never recommended home-based SEIT services for the student and

that the March 2017 CSE considered, and rejected, SETSS as a service for the student because the student's needs could not be adequately addressed in that setting.¹⁶

In this instance, although the sufficiency of the present levels of performance and individual needs section of the March 2017 IEP are not at issue, a review thereof facilitates the discussion of the issue to be resolved—namely, whether the student required 15 hours per week of individual, home-based SETSS in order to make progress appropriate in light of his circumstances and thus, to receive a FAPE.

According to the evidence in the hearing record, the March 2017 CSE relied upon the following to develop the student's March 2017 IEP: an August 2015 bilingual speech-language evaluation (August 2015 speech-language evaluation), a January 2017 social history update, a February 2017 classroom observation report, and a February 2017 SEIT quarterly progress report (February 2017 SEIT report), as well as input from the parents, the student's then-current preschool teacher, and the student's then-current SEIT (see Tr. pp. 64-73; Dist. Exs. 1 at pp. 37-41; 3-5; 8 at pp. 1-2, 18).¹⁷ At the impartial hearing, the district bilingual school psychologist (school psychologist) who attended the March 2017 CSE meeting testified that she also obtained information about the student's "behaviors and academic progress" based upon an "interview with the teacher for the preschool evaluation scale," and she incorporated that information into the IEP (Tr. pp. 59-61, 65-66; see Dist. Ex. 8 at p. 4). She also testified that she specifically identified the source of the information used to develop portions of the March 2017 IEP within the IEP itself (see Tr. pp. 72-73; see, e.g., Dist. Ex. 8 at pp. 1-2).

With respect to the present levels of performance and individual needs, the March 2017 CSE relied upon the February 2017 SEIT report and the August 2015 speech-language evaluation to describe the student's academic achievement, functional performance and learning characteristics (compare Dist. Ex. 8 at pp. 1-3, with Dist. Ex. 1 at p. 41, and Dist. Ex. 5 at pp. 1-2). Consistent with the February 2017 SEIT report, the March 2017 CSE described, verbatim, the student's "cognitive skills domain," noting that he exhibited a "poor attention span" and had "difficulties staying on task and focusing" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). The March 2017 CSE also noted that when the student became "restless," he tapped his "fingers and/or pencil/crayon on the table" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). At that time, the student could "match, label and identify colors, shapes, letters and numbers" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). In addition, the student could "match three pairs of objects that ha[d] the same function" and he was "working on understanding [the concepts] of 'more' or 'less' and 'same' or 'different'" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). The March 2017 CSE also indicated in the IEP that the student could "sort groups of objects in more than one way," he could "name and identify all body parts," and he could "print his own name without a model" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). In addition, the student

¹⁶ Although not directly at issue in this case, I note that the content or delivery of the home-based SETTS sought by the parent is not defined or described in the request for review and, also, it is unclear from the request for review, or the hearing record, whether there is any functional difference between the home-based SEIT services provided to the student pursuant to pendency and the home-based SETSS sought as relief by the parent on appeal.

¹⁷ The March 2017 CSE had copies of the student's evaluative information available for review (see Tr. pp. 59-61, 65-73; Dist. Exs. 1 at pp. 37-41; 3-5).

could "build a pyramid of six blocks" and "turn pages in a book and follow all age appropriate stories" (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 8 at p. 1). However, the March 2017 CSE noted that the student could not "predict what happen[ed] next in a story, unless [the] story [was] read in a 1:1 setting" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). The student also demonstrated "difficulties identifying 'first,' 'second,' [and] 'last'" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). With respect to mathematics, the March 2017 CSE indicated in the IEP that the student could "rote count and count using one to one correspondence," as well as "discriminate 10 objects when asked to do so" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1). At that time, the student was "starting to understand the concept of '[z]ero'" (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 8 at p. 1).

Turning to the area of language skills—and consistent with the February 2017 SEIT report—the March 2017 CSE described, verbatim, the student's "communication skills domain" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at pp. 1-2). At that time, the student could "point [to] and label [20] or more common objects," as well as "point to [10] or more common objects described by their use" and "point to [6] body parts" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). However, while the student understood the concepts of "'big' and 'little,'" the student had "difficulties understanding at least three possessives (mine, yours)" and exhibited "difficulties responding to 'who' and 'whose' questions" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). The March 2017 CSE also indicated in the IEP that the student "tend[ed] to repeat what others . . . request[ed] of him (echolalia)" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). In addition, the student could not "follow directions about placing one item 'beside' and 'under' another" and exhibited "difficulties answering comprehension questions when told a short story" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). The student could, however, "indicate 'yes' or 'no' in response to questions" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). Next, the March 2017 CSE indicated that the student could "name eight or more pictures of familiar objects," and had difficulty "communicating in sentences" but, "with SEIT support, he [could] use sentences of 3 words" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). Additionally, while the student could not "describe what he [was] doing when asked by [a] teacher," he could "give his full name on request" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). At that time, the student could not "use facial expressions and body language to demonstrate at least five emotions" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 1). The student was "working on his articulation and utilizing various word combinations (noun + verb + adjective)" and "learning to follow 2 [to] 3 step related commands and follow commands with descriptive and with spatial relations" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at pp. 1-2). Finally, the March 2017 IEP reflected that the student "constantly repeat[ed] portions of videos, books or songs at inappropriate times," and the "SEIT ha[d] to redirect him back to task" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 2).

As noted above, the student was able to label and identify letters but had difficulty answering comprehension questions in response to a short story and was unable to predict what happened next in a story unless it was read in a 1:1 setting. To develop the student's reading skills, the March 2017 CSE recommend ELA annual goals that targeted the student's ability to associate specific letters with sounds and to blend the letter sounds to fluently read "CVC" words in controlled text (Dist. Ex. 8 at p. 7). An additional ELA annual goal targeted the student's ability to identify words in an expanded sentence that tell who, what, where, when, why and how (id.). The March 2017 CSE did not identify any weaknesses in the student's mathematics readiness skills, but rather indicated that the student was able to rote count, as well as count using one-to-one

correspondence. Still, the CSE recommended an annual goal that targeted the student's ability to perform calculations using the appropriate operation (addition/subtraction) with single digit numbers (id. at p. 8).

Based upon the August 2015 speech-language evaluation, the March 2017 CSE noted in the IEP that the student exhibited "moderate to severe receptive and expressive language delays of approximately 12 . . . months" (compare Dist. Ex. 1 at p. 41, with Dist. Ex. 8 at p. 2).¹⁸ The March 2017 CSE indicated in the IEP that the student's "delays were most evident in his difficulties consistently using complex basic sentences, using age expected morphological markers, depressed sentence length and sentence diversity, difficulties using language for age expected communicative functions and poor intelligibility due to many developmental phonological errors" (compare Dist. Ex. 1 at p. 41, with Dist. Ex. 8 at p. 2). As reported in the August 2015 speech-language evaluation, the March 2017 CSE indicated that the student's "performance during this evaluation was negatively affected by his limited attention and concentration skills as he required constant reminders and repetition to remain on task" (compare Dist. Ex. 1 at p. 41, with Dist. Ex. 8 at p. 2).¹⁹

In response to the student's moderate to severe language delays, including his difficulty understanding possessives, responding to questions, and describing what he was doing, the March 2017 CSE recommended annual goals related to the student's ability to correctly answer "wh"

¹⁸ According to the August 2015 speech-language evaluation, the student exhibited "moderate to severe receptive and expressive language delays of approximately 12 or more months for his chronological age level" (Dist. Ex. 1 at p. 41 [emphasis added]). At the time of the speech-language evaluation, the student was "3.3" years old; at the time of the March 2017 CSE meeting, the student was approximately one month from his fifth birthday (id. at p. 1; Dist. Ex. 8 at p. 1). The speech-language evaluation report also noted that, at that time, the student demonstrated "higher receptive and expressive language skills in [his native language]" (Dist. Ex. 1 at p. 38).

¹⁹ Within this same section of the March 2017 IEP, the CSE described the student's activities of daily living (ADL) skills ("adaptive skills domain") as noted in the February 2017 SEIT report; his strengths, preferences, and interests; and the academic, developmental and functional needs of the student, including consideration of student needs that were a concern to the parent (see Dist. Exs. 5 at pp. 2-3; 8 at pp. 2-3). Notably, the March 2017 IEP reflected that while the student could "read books at an estimated first grade level, he c[ould not] answer basic questions about the text posed by the teacher" (id. at p. 3).

questions; use personal pronouns, common verbs and common adjectives; and to use language to request information, request an action, and provide information (Dist. Ex. 8 at pp. 8-9).²⁰

With regard to the present levels of performance and individual needs in the area of social development ("personal/social skills domain"), the March 2017 CSE—as derived nearly verbatim from the February 2017 SEIT report—described the student as "very sweet and loving," and who "trie[d] to interact with other children when he [was] outside but in the classroom he play[ed] alongside children [and] hardly interact[ed] with them" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). At that time, the student had "difficulties using his imagination," and demonstrated "limited play skills" with an inability to engage in "pretend play" (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 8 at p. 4). The student could "say 'please' and 'thank you' when reminded," and he demonstrated the ability to "sing familiar songs with verbal cues and SEIT prompting" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). The student "inconsistently" used the word "'NO' to refuse instead of using [a] physical response" and had "difficulty expressing himself when upset" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). The March 2017 CSE also noted that the student could "ask for assistance when having difficulties by saying [a] teacher's name and pointing" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). However, the student demonstrated difficulty "responding to classroom limits set by an adult, [and] he like[d] to walk around the classroom" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). At that time, the March 2017 CSE noted that the student could not "transition between activities as he require[d] reminders, prompts, and redirection to clean up toys when play time [was] over" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). The student could "choose alternative activities when unable to satisfy immediate needs but limit[ed] himself to books and cars" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). In addition, the student required "prompting and redirection to attend to a 10-minute group lesson" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). According to the March 2017 IEP, the student could "spontaneously greet [a] familiar person by hugging" and "engage in simple group games, turn taking and working in [a] small group with redirection" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 4). Finally, the March 2017 CSE noted that the student could "understand classroom rules" and was "working on appropriate self-control behaviors" (compare Dist. Ex. 5 at

²⁰ The evidence in the hearing record revealed that the student, pursuant to his March 2017 IEP, received speech-language therapy during the 2017-18 school year (see Dist. Ex. 16 at p. 1). Although not available to the March 2017 CSE, a December 2017 speech-language therapy progress note revealed that the student's therapy focused on "increasing comprehension of age expected concepts and structured activities by answering /wh/ questions" (id.). According to the progress report, the student "demonstrated strong skills recognizing basic concepts expected of a kindergarten child" and "immediately showed that he c[ould] identify letters, sounds, and produce nouns associated with the alphabet" (id.). As therapy "moved on [to] the recognition of sight words" the student "showed amazing skills in identifying over 200 words expected of not only a kindergarten child, but a first and second grade student" (id.). In addition, the progress report noted that the student "immediately showed an amazing ability to decode and therefore, read stories with ease"; however, the student "started showing the deficit when asked /wh/ questions having to do with the stories read" and, consistent with his annual goals, the student "showed an unusual inability to answer reading comprehension questions" (id.). According to the progress report, the student demonstrated difficulty answering "literal and inferential questions" and an "inability to make logical connections between text and questions" (id.). On reading assessments, the student "had trouble using prior knowledge and experiences to show comprehension of stories read," and he had difficulty "identifying the main idea or theme to the stories read" (id.).

p. 2, with Dist. Ex. 8 at p. 4).²¹ To improve the student's social development and interaction with peers, the March 2017 CSE recommended an annual goal that addressed the student's ability to independently engage in, and maintain, play in a group setting while remaining on topic (see Dist. Ex. 8 at p. 9).

In the area of physical development, the March 2017 CSE reported the student's fine motor and gross motor skills as reflected, verbatim, in the February 2017 SEIT report (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). With regard to fine motor skills, the March 2017 IEP reflected that the student could "use his thumb and index finger to pick up small objects," but he had difficulty "tracing lines that [were] horizontal and vertical and lines that curve and zigzag" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). At that time, the student could "write his name but ha[d] [no] spatial awareness" and could not "write on a line or within a designated space" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). The student also did not display "hand dominance" and he held a "crayon and pencil with an immature grasp" and could not "color within a form" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). In addition, the student was given reminders to "use hands to hold [the] paper in place when drawing" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). The March 2017 IEP also reflected that the student could "cut with scissors by making several snips" and he could "copy a cross" and "paste or glue neatly" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). However, the student had "difficulties imitating shapes such as [a] triangle and square, but [could do so] with SEIT support" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5).

With regard to gross motor skills, the March 2017 CSE noted that the student could "squat during play," but exhibited difficulty "ascending and descending stairs with good foot placement" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). At that time, the student could not "hop on one foot, stand on one foot, and jump forward" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). The student could, however, "easily roll" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). The March 2017 CSE also noted that the student could not "throw a ball overhand with relative accuracy" or "catch," but he could "bounce a ball" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). The student could "walk swinging arms and legs freely in a cross pattern" and "walk forward heel to toe without losing balance" (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 8 at p. 5). Finally, the March 2017 CSE reflected in the IEP that the student "tip toe[d] when he walk[ed]" (compare Dist. Ex. 5 at p. 4, with Dist. Ex. 8 at p. 5).²²

After developing the present levels of performance, the March 2017 CSE addressed the student's management needs by recommending the following strategies: "small group instruction using simple directions with repetition as needed"; encouraging the student to use "words to label and request"; providing "[m]odels" as needed; speech-language therapy services; and providing

²¹ Within this same section of the March 2017 IEP, the CSE described the student's strengths; and the social development needs of the student, including consideration of student needs that were a concern to the parent (see Dist. Ex. 8 at p. 4).

²² Within this same section of the March 2017 IEP, the CSE described the student's strengths; and the physical development needs of the student, including consideration of student needs that were a concern to the parent (see Dist. Ex. 8 at p. 5).

the student with "repetition, prompting, rephrasing, gestures, and visual cues to help keep on task throughout the day" (Dist. Ex. 8 at p. 5).

At the impartial hearing, the school psychologist testified that, based upon the February 2017 SEIT report, the March 2017 CSE learned that the student presented with a "poor attention span, difficulty staying on task and focusing, which [was] a big piece of [the student's] profile" (Tr. pp. 66-68; see generally Dist. Ex. 5). She further testified that while the February 2017 SEIT report indicated that the student had "language issues" and "language deficits," the student was "pretty much on gra[de] level in a lot of areas" (Tr. p. 68, 77; see generally Dist. Ex. 5). Based upon the February 2017 classroom observation report, the March 2017 CSE learned that the student was "easily distracted," but "cooperative"; he "play[ed] in a parallel way with his peers"; he required redirection; and he did not "engage much with his peers" (Tr. p. 69; see generally Dist. Ex. 4). In addition, the school psychologist testified that the classroom observation report provided the March 2017 CSE with information about the student's "poor frustration tolerance," as well as his ability to "be calmed down," and the student's "[p]oor transition skills" (Tr. p. 69; see generally Dist. Ex. 4). According to the school psychologist, the classroom observation report also provided the CSE with information about the student's ability to "recognize his written name at least by letters of the alphabet," and his ability to "recite the alphabet" and demonstrate "one-to-one correspondence" (Tr. pp. 69-70; see generally Dist. Ex. 4).

In reaching the decision to recommend a 12:1 special class placement for the student, the school psychologist testified that "a lot of discussion" occurred at the March 2017 CSE indicating that the student was not "ready" for a "less restrictive program" and he needed the 12:1 special class because of "certain deficits with the attention, [and] with regard to the fact that he wasn't using his word[s] for purpose" (Tr. p. 75). According to the school psychologist, the CSE also discussed the student's behaviors, such as "echolalia or talking about different things, like TV program or books that he had read and just kind of blurting them out and talking about them" (*id.*). She testified that, ultimately, the March 2017 CSE reached a "consensus that he would benefit from . . . a self-contained class only because he would need more individualized attention" (Tr. p. 76; see Tr. p. 82 [noting that the student would be "better suited for a 12:1 class because he would get more attention"]). In addition to the 12:1 special class placement, the school psychologist testified that the CSE recommended the management needs to further address the student's "inattention" and "distractibility" (Tr. pp. 76-77; see Dist. Ex. 8 at p. 5).

At the impartial hearing, the school psychologist also testified that while the student demonstrated "grade level" skills at the time of the March 2017 CSE meeting—and "reading higher than any other student"—the student's issues with the "sensory, with the inattention, the distractibility, with the echolalia" weighed more heavily in the decision to recommend a "self-contained class" for the student (Tr. pp. 77-78). The school psychologist also testified that the "parents were agreeable" to the CSE's decision to recommend a 12:1 special class placement with speech-language therapy and counseling services (Tr. p. 79). She did not recall any conversation at the March 2017 CSE meeting about the student previously receiving SEIT services in his preschool setting, nor did she recall the parents asking for "SETSS" or "tutoring"—or "any other additional services—in addition to the "small class program" at the meeting (Tr. pp. 79-80; see Tr. p. 83).

Contrary to the school psychologist's testimony, however, the parent testified at the impartial hearing that she "request[ed] home services" at the March 2017 CSE meeting (Tr. pp. 98-99). The parent also testified that, at the time of the March 2017 CSE meeting, she had concerns about the student's "problem in regard[ing] to processing, words and information, comprehension, [and] the tendency that he ha[d] to become frustrated" (Tr. p. 98). She also had concerns about the student's difficulty "transition[ing] from one topic to another" (id.). The parent described the information offered by the student's then-current "special education teacher," who explained the student's need for "[m]ore speech therapy time" to address "communication problems" (Tr. pp. 99-100).

At the impartial hearing, the parent then described the services the student currently received from his "home provider," noting specifically that the provider was "helping him to process all the information that he receive[d] at school" (Tr. p. 101). The parent further testified that the current provider "guide[d] [the student] through the process of focusing and doing homework" and dealing with "frustration" (id.). Next, the parent testified that, academically, the student was "doing well," but although he was "reading well," he was not "processing what he's reading" (Tr. pp. 101-02). When asked if she believed that the student would "regress" if "home services [were] discontinued," the parent responded "Yes" (Tr. p. 102). The parent explained that this would be true especially in the area of reading comprehension, because the home provider could reinforce what the student read at school in a "one on one session," which allowed the student to be "more concentrated" (id.).

On cross-examination, the parent agreed that—with the special education program, related services, and management needs recommended in the March 2017 IEP—the student was making progress (see Tr. pp. 102-04; see generally Dist. Ex. 8). The parent also testified on cross-examination that when she asked the March 2017 CSE about providing the student with 15 hours per week of SETSS, the CSE responded that "it would be good for him" (Tr. pp. 111-12). The parent also acknowledged that, currently, the student was "on grade level" in reading and mathematics, and that "overall," he was doing well according to his current kindergarten teacher (Tr. pp. 112-15).

In light of the evidence described above, the hearing record does not support a finding that the student required 15 hours per week of individual, home-based SETSS in order to receive a FAPE. Instead—and consistent with the IHO's decision—the evidence in the hearing record reveals that the special education program offered in the March 2017 IEP addressed the student's identified needs such that home-based SETSS was not required (see IHO Decision at p. 10; see generally Dist. Ex. 8). Here, the 12:1 special class placement, together with the related services, annual goals, and management needs, addressed the student's language difficulties, his need for redirection and prompting, and his need for more individualized attention (see Tr. pp. 75-80, 82-83; Dist. Ex. 8 at pp. 1-11).

Turning to the IHO's decision, although the IHO did not recount all of the parent's testimonial evidence with respect to her request for 15 hours per week of individual, home-based SETSS, the IHO did consider portions of the parent's testimony in reaching the decision to deny the parent's request (see IHO Decision at p. 10). However, it must be noted that much of the parent's testimony considered by the IHO in denying the requested relief—as well as the testimony that the parent points to in support of her appeal—reflected the home-based SETSS that the student

was currently receiving under pendency, and therefore, constituted after-the-fact evidence that may not be used to retrospectively evaluate the sufficiency of the program offered by the district (R.E., 694 F.3d at 186-88).²³ However, even assuming for the sake of argument that the parent's testimony was relevant, this evidence speaks, overall, to the parent's desire for the student to receive greater educational benefits through the auspices of special education; and a district is not obligated to pay for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Further, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]). Accordingly, to the extent that the home-based SETSS sought in this case are for the purposes of generalization of skills learned at school and/or the maximization of potential, I am unable to find that this alone is a basis for the provision of such services. Further, and perhaps more importantly, the evidence in the hearing record indicates that the program recommended in the March 2017 IEP (and which the student received during the 2017-18 school year) was sufficient to enable the student to receive educational benefits in light of his circumstances (see Tr. pp. 102-04, 112-15; Dist. Exs. 16-17). Consequently, the student did not require 15 hours per week of individual, home-based SETSS to receive a FAPE and the parent's contentions are dismissed.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2017-18 school year, the parent is not entitled to relief and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 28, 2018**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

²³ Given that the student may have only started receiving home-based SEIT services during summer 2017, it seems likely that the parent—at the time of the March 2017 CSE meeting—would not have had any basis upon which to request 15 hours per week of home-based SETSS for the student.