The University of the State of New York

The State Education Department
State Review Officer
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No. 18-092

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:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Jason H. Sterne, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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)[1] appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition at the Staten Island Academy (SIA) 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.

[1] The student's father is the parent named in the request for review; accordingly, references to "the parent" in this decision are to the father.

§§ 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 was initially found eligible to receive special education and related services through a Committee on Preschool Special Education (CPSE) as a preschool student with a disability (see Parent Ex. B at pp. 3-4). The student attended SIA—a nonpublic school—for preschool (2014-15 and 2015-16 school years), and kindergarten (2016-17 school year) (id. at pp.

5-7, 9; see generally Parent Exs. J-P; S; U).[2, 3] While attending kindergarten at SIA during the 2016-17 school year, the parent filed a due process complaint notice in October 2016 (see Parent Ex. B at pp. 3, 5-9).[4] The parent primarily alleged that the district failed to offer the student a free appropriate public education (FAPE) because the district created an individualized education services program (IESP) for the student rather than an IEP (id. at p. 3).[5]

On April 5, 2017, the parents executed an enrollment contract with SIA for the student's attendance during the 2017-18 school year for first grade (see Parent Ex. AA at pp. 1-2).

In a form letter dated May 11, 2017, the district sent the parent a "Parent Notice of Intent/Parentally Placed for [the student]" (Dist. Ex. 6). The letter advised that if the parent had placed the student in a "non-public school at [his] expense" and wanted the student to "continue receiving special education services at that school," the parent must execute the form and return it to the CSE office "no later than June 1, 2017" (id.). In a handwritten notation on the form, the parent identified SIA as the nonpublic school the student attended and executed the document on May 21, 2017 (id.).

On June 2 and June 27, 2017, the parent attended impartial hearing dates related to the October 2016 due process complaint notice (see Parent Ex. B at p. 2).[6]

On June 28, 2017, a CSE convened to conduct the student's annual review and developed an IESP for the 2017-18 school year (first grade) (see Dist. Ex. 1 at p. 1). Finding that the student remained eligible to receive special education and related services as a student with autism, the June 2017 CSE recommended three sessions per week of direct special education teacher support services (SETSS), together with the following related services to meet the student's needs: two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, one 30-minute session per week of individual

[2] The Commissioner of Education has not approved SIA as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). During preschool at SIA, the student received special education itinerant teacher (SEIT) services and related services (see Parent Ex. B at pp. 3-9).

[3] On or about June 3, 2016, the parent executed an enrollment contract with SIA for the student's attendance for the 2016-17 school year (kindergarten) (see Parent Ex. B at p. 4).

[4] During kindergarten at SIA, the student received related services and the services of a paraprofessional provided by the district (id. at p. 3).

[5] When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an IESP under the State's so-called "dual enrollment statute" (see Educ. Law §3602-c).

[6] With respect to the parent's October 2016 due process complaint notice, it appears that the IHO (IHO 1) held a prehearing conference in December 2016, but the parties did not appear at any further impartial hearing dates between the prehearing conference and the next impartial hearing date held on June 2, 2017 (see Parent Ex. B at pp. 2-3). Therefore, the parent executed the "Parent Notice of Intent/Parentally Placed" form letter—or notice of intention to parentally place the student—in May 2017 while still engaged in a previous impartial hearing regarding the 2016-17 school year and while represented by the same attorney representing the parent in the current administrative proceedings for the 2017-18 school year (compare Dist. Ex. 6, with Parent Ex. B at pp. 1-2).

occupational therapy (OT), one 30-minute session per week of OT in a small group, one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a small group, and two 50-minute sessions per year of parent counseling and training services in a small group (id. at pp. 9-10).[7] In addition, the June 2017 CSE recommended the services of a full-time, individual paraprofessional to address the student's "[h]ealth" and "[s]afety awareness" needs (id. at p. 10). The June 2017 CSE also created annual goals targeting the student's needs to be addressed through related services of OT, counseling, and speech-language therapy, as well as addressing the student's needs in the areas of English language arts (ELA) and mathematics (id. at pp. 5-9). Finally, the June 2017 IEP indicated in the "Placement Recommendation" designation that the student was "Parentally Placed in a Non-Public School" (id. at p. 12).

In a prior written notice dated June 29, 2017, the district summarized the special education services recommended for the student for the 2017-18 school year, which included recommendations for a 12-month school year program and a placement at a district "[s]pecialized [s]chool" (Dist. Ex. 5 at p. 1).[8]

On July 11, 2017, the parent attended the final impartial hearing date held with respect to the October 2016 due process complaint notice (see Parent Ex. B at p. 2).

By letter dated August 16, 2017, the student's mother notified the district that the student would attend SIA for the 2017-18 school year at district expense beginning on September 6, 2017 (see Parent Ex. Q). In the letter, the student's mother expressed disagreement with the district's "recommendation for programming and placement" for the 2017-18 school year and noted it was not appropriate to meet the student's needs (id.).

On August 18, 2017, the parent and the district submitted closing briefs to IHO 1 presiding over the impartial hearing concerning the October 2016 due process complaint notice (see Parent Ex. B at p. 3). In a decision dated September 20, 2017, IHO 1 found that, for the 2016-17 school year, the district failed to offer the student a FAPE because the parents did not file a "written request"—pursuant to the State dual enrollment statute (see Educ. Law § 3602-c)—seeking an IESP (id. at pp. 12-14). In reaching this conclusion, IHO 1 relied upon the testimony of the student's mother, which indicated that an IESP had not been requested in "writing or otherwise," and upon section 3602-c of the Education law (id. at pp. 13-14).

A. Due Process Complaint Notice

By due process complaint notice dated November 3, 2017, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year (see Parent Ex. A at pp. 1-

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

[8] On cross-examination at the impartial hearing, the district school psychologist who attended the June 2017 CSE meeting testified that the recommendation noted in the prior written notice—i.e., for a specialized school—"must have been a mistake" because the CSE "never recommended a specialized school" (Tr. pp. 29-31; see Dist. Ex. 5 at p. 1; compare Dist. Ex. 1 at p. 12, with Dist. Ex. 5 at p. 1).

2).[9] More specifically, the parent alleged that the June 2017 CSE improperly developed an IESP—instead of an IEP—for the 2017-18 school year, and the parent did not request an IESP "in writing" pursuant to the State dual enrollment statute (id. at p. 2). The parent asserted that the failure to offer the student an IEP, absent a written request for an IESP, constituted a failure to offer the student a FAPE (id.). Alternatively, the parent contended that even if the IESP was deemed a "substitute" for an IEP, the IESP failed to include "any special class setting or academic supports," which deprived the student of "educational opportunity" (id.). The parent further contended that given the student's "documented poor safety awareness," the IESP failed to include a recommendation for special education transportation services (id.). Next, the parent asserted that the June 2017 CSE was not properly composed because the CSE failed to include a special education teacher and a regular education teacher of the student (id. at p. 3). Finally, the parent asserted that the annual goals and short-term objectives in the IESP were "vague, immeasurable, and meaningless" (id. at pp. 3-4). The parent also alleged that the annual goals lacked "concrete baselines" and did not "provide specific, quantifiable outcomes" (id. at p. 4). Additionally, the parent contended that the annual goals did not address all of the student's needs and failed to include "adequate information" about the student's progress to "allow the parent meaningful participation in the IEP development process" (id.).

Next, the parent asserted that SIA was an appropriate unilateral placement and that the student made progress at SIA as a "preschooler and kindergartner" (Parent Ex. A at pp. 4-5). As relief for the district's failure to offer the student a FAPE for the 2017-18 school year, the parent requested an order directing the district to reimburse—or to directly pay—for the costs of the student's tuition and related costs (including transportation) at SIA (id. at p. 5).

B. Impartial Hearing Officer Decision

On November 22, 2017, the parties proceeded to an impartial hearing, which concluded on May 24, 2018, after five days of proceedings (see Tr. pp. 1-180).[10] In a decision dated June 22, 2018, the IHO (IHO 2) concluded that the district offered the student a FAPE for the 2017-18

[9] If disputes occur between parents and school districts related to IESPs, State law provides that "[r]eview of the recommendation of the [CSE] may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions governing dual enrollment programing is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (Educ. Law § 4404[1]; see 20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

[10] In an interim order dated December 4, 2017, IHO 2 found that SIA constituted the student's pendency (stay-put) placement and directed the district to fund—or reimburse the parent for—the costs of the student's tuition expenses at SIA retroactive to the date of the due process complaint notice, November 3, 2017, and continuing through the final resolution of these proceedings (see Interim IHO Decision at p. 2). In light of IHO 2's pendency order, it appears that the parent received the relief requested in the due process complaint notice—namely, tuition reimbursement or direct payment of the costs of the student's tuition and related expenses at SIA for the 2017-18 school year—except for the limited period of time between September 6, 2017 and November 3, 2017 (compare Interim IHO Decision at p. 2, with Parent Ex. A at p. 5, and Parent Ex. Q).

school year and denied the parent's request for reimbursement, or direct payment, of the student's tuition costs for his attendance at SIA (see IHO Decision at pp. 9-14).

In reaching the conclusion on FAPE, IHO 2 analyzed the question of whether the district was obligated to develop an IEP—as opposed to an IESP—as a threshold matter related to the overarching issue of whether the district offered the student a FAPE for the 2017-18 school year (see IHO Decision at pp. 9-12).[11] Ultimately, IHO 2 determined that regardless of "conflicting" testimonial evidence in the hearing record concerning whether or not the parent advised the June 2017 CSE that the student would attend SIA for the 2017-18 school year, the hearing record definitely included a "signed request for services" and the parent "did in fact submit a request in writing" to the district for IESP services (id. at pp. 11-12). IHO 2 also indicated that although the parent explained why the form letter had been signed, the hearing record failed to contain any evidence of any "written communication to the [district] that this was an error and misunderstanding or any request to retract the form" (id. at p. 12). In addition, IHO 2 indicated that the parent never requested an "IEP after the meeting nor did the parents raise the issue in their ten day notice" (id.). Consequently, IHO 2 found that the district's development of an IESP, as opposed to an IEP, for the 2017-18 school year did not "in and of itself deny a FAPE" to the student (id.).

Next, IHO 2 turned to the parent's claim that the June 2017 CSE failed to recommend special transportation services in light of the student's "poor safety concerns" (IHO Decision at p. 12). Based upon the testimony presented "from SIA," IHO 2 found that "safety was not of a concern this year" (id.). With regard to whether the June 2017 CSE included the "required members," IHO 2 indicated that a special education teacher—who was also a related service provider—attended the meeting, the CSE had "progress reports and evaluations," and SIA staff did not attend the meeting because SIA was closed at the time of the CSE meeting (id.). Based upon these facts, IHO 2 concluded that the June 2017 CSE was properly composed (id.). Next, IHO 2 examined the parent's contention that the annual goals in the June 2017 IESP were not "sufficient" (id.). On this point, IHO 2 first indicated that the evidence in the hearing record reflected that the parent participated in the creation of the annual goals at the CSE meeting, and no objections were made at the meeting with regard to the annual goals (id.). Next, IHO 2 indicated that, based upon testimonial evidence, the CSE created the annual goals based upon the student's "functioning and progress reports" (id.). Finally, IHO 2 noted that the June 2017 IESP included "three pages" of annual goals that included a "criteria to measure" progress, a "method of how to measure progress, and a schedule" to measure progress (id.). As a result, IHO 2 concluded that the annual goals in the June 2017 IESP were "sufficient" (id.).

In addition to the annual goals noted above, IHO 2 noted that the June 2017 IESP included "management needs, present levels of performance and individual needs" (IHO Decision at p. 13). IHO 2 also explained that when she questioned the student's mother at the impartial hearing about "want[ing] more hours," she indicated that "three hours per week of SETSS were insufficient" (id.). At the time of the impartial hearing—and as reflected in the evidence in the hearing record—the district was providing the student with SETSS, a "paraprofessional and related services" while

[11] IHO 1 also analyzed the question of whether the district was obligated to develop an IEP—as opposed to an IESP—as a threshold matter related to whether the district offered the student a FAPE for the 2016-17 school year (compare Parent Ex. B at pp. 12-15, with IHO Decision at pp. 9-12).

attending SIA for the 2017-18 school year, and one witness from SIA testified about the "importance of the supports provided by the [district]" (id.). In comparison to the district's services provided to the student, IHO 2 found that SIA "only provide[d] [the student] with approximately a half hour a day of extra services after school and not on an individual basis" (id.). Given these facts, IHO 2 concluded that the "services offered by the IESP were appropriate" and the IESP "offered a FAPE" to the student (id.).

Having determined that the district sustained its burden to demonstrate that it offered the student a FAPE for the 2017-18 school year, IHO 2 nevertheless addressed whether SIA was appropriate for the student (see IHO Decision at p. 13). IHO 2 found that SIA offered the student a "small student to teacher ratio that allow[ed] him to receive individual attention" (id.). In addition, IHO 2 found the SIA program was "geared towards children with high IQ's [sic] who need[ed] support," which was provided through a "resource program" (id.). Finally, IHO 2 noted that the student made progress at SIA and "no longer ha[d] behavior issues or safety issues" and the student was "now able to focus on academics" (id.). Therefore, IHO 2 concluded that SIA was appropriate (id.).

With regard to equitable considerations, IHO 2 determined that, contrary to the district's assertion, the parent's execution of an enrollment contract with SIA prior to the June 2017 CSE meeting did not, "in and of itself," bar the parent from relief (IHO Decision at p. 13). Similarly, IHO 2 concluded that the hearing record failed to contain any other evidence that would otherwise bar the parent from obtaining tuition reimbursement as relief in this matter (id.). However, having found that the district offered the student a FAPE for the 2017-18 school year, IHO 2 denied the parent's request for relief in its entirety (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parent appeals, arguing that IHO 2 erred in finding that district's offer of an IESP—as opposed to an IEP—satisfied its obligation to offer the student a FAPE for the 2017-18 school year. Next, the parent asserts that IHO 2 erred in finding that the June 2017 CSE was properly composed. The parent further asserts that IHO 2 erred in allowing the district to enter a document into evidence at the impartial hearing that was not disclosed prior to the impartial hearing, which deprived the parent of due process. Finally, the parent argues that IHO 2 failed to address the district's "overly restrictive placement" offer disclosed in a June 2017 prior written notice.[12]

[12] To the extent that the parent does not appeal IHO 2's findings that the student did not require special transportation services for any alleged safety concerns, and that the annual goals and the special education and related services recommended in the June 2017 IESP—that is, three sessions per week of direct SETSS, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, one 30-minute session per week of individual OT, one 30-minute session per week of OT in a small group, one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a small group, and two 50-minute sessions per year of parent counseling and training services in a small group—were appropriate to meet the student's needs and offered the student a FAPE (see IHO Decision at pp. 12-13), these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]), regardless of whether the district was required to offer such services through an IESP or an IEP.

In an answer, the district responds to the parent's allegations and generally argues to uphold IHO 2's decision with one modification.

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 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]).[13]

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 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).

[13] 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 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. Conduct of the Impartial Hearing

The parent alleges that IHO 2 erred by entering documentary evidence into the hearing record over parent counsel's objection that the district did not disclose the evidence prior to the impartial hearing, which the parent alleges denied him due process and violated State regulation. In addition, the parent contends that IHO 2 improperly relied upon this documentary evidence in the decision.

While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), each party has the right to "prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][2], [3]).

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

As previously noted, the impartial hearing in this matter occurred over five nonconsecutive dates (see generally Tr. pp. 1-180). On the first two days, neither party presented any testimonial or documentary evidence (see Tr. pp. 1-10). However, on day three—which took place on February 12, 2018—the district presented one witness to testify, and submitted five documents to be entered into evidence in the hearing record (see Tr. pp. 11-35; see generally Dist. Exs. 1-5). Before IHO 2 entered the district's exhibits into the hearing record, IHO 2 asked the parent's attorney if he had any objection to the proffered evidence; in response, the parent's attorney noted "for the record" that the district had not disclosed the documents until the previous morning (Tr. pp. 14-15). But the parent's attorney further noted that because "it [was] short and [he] did have a chance to look at them, [he] w[ould] not object" (Tr. p. 15). As a result, IHO 2 entered the district's exhibits into the hearing record as evidence, and the district presented its witness (see Tr. pp. 15-32). Prior to concluding for that day, the parent requested an extension to the compliance date, with the district joining in on the requested extension, and the parties scheduled the next impartial hearing date for April 13, 2018 (see Tr. pp. 32-33).

When the parties returned for the fourth day of the impartial hearing on April 13, 2018, IHO 2 initiated the proceedings by noting that she would briefly address appearances but "put everything over until the first witness [was] done" because the parent's witness had a time issue" (Tr. pp. 36, 40). Thereafter, the parent submitted approximately 24 documents to be entered into the hearing record as evidence (see Tr. pp. 58-68; see generally Parent Exs. A; F-X; AA-CC). The district then requested to submit one additional document into the hearing record as evidence: to wit, the "Parent Notice of Intent/Parentally Placed" the student, dated May 11, 2017 (Tr. p. 68).[14] The parent's attorney objected, noting that the document was "disclosed to [him] and offered into evidence about . . . , an hour ago [by the district's attorney] in the hallway" (Tr. pp. 68-69).[15] In addition, the parent's attorney indicated that the district had already presented its case, but further admitted having "waived the five day" rule notwithstanding that the district had only disclosed its evidence to the parent "less than 24 hours before th[at] hearing date" (Tr. p. 69). The parent's attorney then stated that it was "unfair to the [p]arent" to "chang[e] the scope of the hearing at the last minute," and objected to the submission of the district's evidence as "sandbagging" the parent at this juncture with the proffered evidence (Tr. pp. 69-70). The district's attorney explained that the document "manifest[ed] a clear intent to place" the student at SIA, and further noted that he sent the same document to the parent's attorney "back in December, so this [was not] an entirely shocking turn of events" (Tr. p. 71).

After briefly discussing the evidentiary issue with the parties, IHO 2 entered the district's document into evidence "under the parent's objection," but indicated that its entry as evidence did not mean that IHO 2 would "give it any weight" (Tr. pp. 70-75; see generally Dist. Ex. 6).[16] IHO 2 also indicated that, per the parent's request, the parent would "[a]bsolutely" have the opportunity to address the issue in a "written closing" brief, and at the conclusion of the testimony for that day, IHO 2 scheduled the submission of closing briefs to coincide with the closing date for the impartial hearing on May 11, 2018 (Tr. pp. 74, 171-73; see generally Parent Ex. DD).

In the closing brief to IHO 2, the parent asserted in a footnote that the district failed to disclose the "notice form . . . at all prior to the final day of hearing and [it] should be excluded under the five-day rule" (Parent Ex. DD at pp. 11-12 n.1). Other than this assertion, however, the parent's closing brief to IHO 2 explained why the parent signed the notice form and asserted the

[14] The parent executed the notice of intention to parentally place the student on May 21, 2017 (Dist. Ex. 6).

[15] For the first three impartial hearing dates, three different district representatives—who were not attorneys—appeared on behalf of the district (compare Tr. pp. 1, 7, 11, with Tr. p. 36).

[16] As part of the discussion, IHO 2 suggested that the parent's attorney could review the document with the parent, who IHO 2 presumed would be testifying at the impartial hearing (see Tr. pp. 73-74). The parent's attorney stated that whether the parent testified depended on whether the district submitted the document as evidence (see Tr. p. 74). The impartial hearing continued with the parent's case, which thereafter included the testimony of another witness from SIA, the parent's attorney delivering an opening statement, and finally, the testimony of the student's mother (see Tr. pp. 77-171). In the opening statement, the parent's attorney explained that the parent signed the notice of intention to parentally place the student at SIA—referring to the district's newly submitted evidence—because the parent was "told they had to sign [it] if they were going to get any kind of support services while [the student was] at the private school" (Tr. pp. 123-25). The student's mother also addressed the district's evidence in her testimony (see Tr. pp. 148-50, 154-56). After the April 2018 impartial hearing date, the parties met with IHO 2 for the final day of the impartial hearing, held on May 24, 2018 (see Tr. pp. 175-80).

parent's reasoning as to why it should not be used as evidence that the parent did not want a public school placement (see Parent Ex. DD at pp. 11-12).

In the decision, IHO 2 addressed the evidentiary issue in a footnote (see IHO Decision at p. 3 n.1). IHO 2 explained her rationale for admitting the district's evidence, noting that although the parent objected its admission, the document was "known to the parents because it had been signed by them," the document squarely pertained to "one of the main issues in the case," and the "parents had not yet begun their case" (id.). IHO 2 also explained that, "[a]fter weighing both sides," she determined the "evidence should be admitted" and the parent "agreed to go forward but requested to do a closing in writing in order to address the evidence" (id. at pp. 3-4 n.1). The district joined in that request, and thus, IHO 2 granted the parties' joint request (id.).

On appeal, the parent reasserts, verbatim, the same argument made to IHO 2 in the closing brief as a basis to conclude that IHO 2 erred in admitting the district's document into evidence (compare Req. for Rev. ¶¶ 40-41, and Parent Mem. of Law at pp. 9-10 & n.1, with Parent Ex. DD at pp. 11-12 & n.1). The district contends that IHO 2's broad discretion in the conduct of an impartial hearing allowed IHO 2 to admit evidence not disclosed in conformity with State regulation.[17] In addition, the district essentially argues that the parent suffered no prejudice by the late disclosure because the parent signed the document and knew about the evidence in question, and the parent's attorney—despite protestations about its untimely disclosure at the April 2018 impartial hearing date—had actually received the document from the district in December 2017.

Upon review, while the evidence in the hearing record reveals that the district did not disclose the May 2017 notice of intention to parentally place the student by providing a copy to parent's counsel, consistent with the five-day rule, prior to the start of the impartial hearing and that the parent objected to its admission into the hearing record, the evidence also reveals that the parent had the opportunity to not only address the additional evidence in her testimony at the impartial hearing (see Tr. pp. 148-50, 154-56), but that IHO 2 allowed the parties to address the issue in closing briefs at the conclusion of the impartial hearing (see Parent Ex. DD at pp. 11-12 & n.1). Having had these opportunities, and noting that IHO 2 weighed factors concerning the evidence—including that the parent had signed the document and thus knew of its existence and that the document was related to a main issue in the proceeding—there is no basis upon which to conclude that IHO 2 erred in entering the district exhibit into the hearing record as evidence or in thereafter, relying upon it in part to reach a final conclusion on the issue of FAPE. Overall, an independent review of the hearing record demonstrates that the parent had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-180).

[17] Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

2. Scope of Review

Next, a determination must be made regarding which claims are properly before me on appeal. The parent asserts that IHO 2 failed to rule on the issue of whether the district's "overly restrictive placement offer"—a "[s]pecialized school"—in the June 2017 prior written notice resulted in a failure to offer the student a FAPE. In response, the district argues that the parent never raised this issue in the due process complaint notice as an issue to be resolved at the impartial hearing, and thus, it is beyond the scope of review. The district also contends that the district school psychologist who attended the June 2017 CSE and who testified at the impartial hearing "explicitly stated" that the prior written notice contained a "mistake in that it stated the [district] purportedly recommended a specialized school" for the student. Additionally, the district asserts that it never offered a "program" to the student for the 2017-18 school year as he was parentally placed.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing, or for the first time on appeal, that were not raised in its 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 original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Here, the parent did not allege in the due process complaint notice that the district's "overly restrictive placement offer"—a "[s]pecialized school"—in the June 2017 prior written notice resulted in a failure to offer the student a FAPE (Parent Ex. A at pp. 1-5). Moreover, I find that the parent's due process complaint notice cannot reasonably be read—even when read with the most liberal standards of notice pleading—to include this as an issue in dispute, especially when the due process complaint notice did not mention the June 2017 prior written notice or the restrictiveness of any alleged placement (id.). In addition, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parent did not attempt to amend the due process complaint notice to include this issue. Rather, the hearing record reveals that the parent first questioned the district school psychologist about the June 2017 prior written notice during cross-examination, and she testified that the notation for a "placement in a [district] specialized school . . . must have been a mistake, because [the CSE] never recommended a specialized school" (Tr. pp. 19, 25, 30-31). The hearing record also reveals that the district's attorney, at the April 2018 impartial hearing date, specifically noted that this was an issue "outside the scope of the due process complaint" notice (Tr. pp. 69-70).

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or seek to include this issue in an amended due process complaint notice, the issue is not properly subject to review. Consequently, the allegation that the district's "overly restrictive placement offer"—a "[s]pecialized school"—in the June 2017 prior

written notice resulted in a failure to offer the student a FAPE raised now, for the first time by the parent on appeal, is outside the scope of my review, and therefore, this allegation 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]).[18]

B. CSE Process—June 2017 CSE Composition

The parent argues that IHO 2 erred in finding that the June 2017 CSE was properly composed, as the special education teacher in attendance at the meeting was not a teacher of the student and a general education teacher did not attend the meeting. The parent contends that the failure to include the proper CSE members significantly impeded the parent's ability to participate in the decision-making process and deprived the student of educational opportunity by recommending a "patently inappropriate setting" in a specialized school (Parent Mem. of Law at p. 12).[19] In particular, the parent asserts that the failure to include the proper CSE members denied the parent the ability to "ask questions" about the student's needs for the 2017-18 school year. In response, the district argues that the parent had the opportunity to participate, the student's speech-language provider was accessed via telephone during the meeting, and even if the June 2017 CSE was not properly composed, the absence of SIA teachers did not result in any substantive harm.

The IDEA requires a CSE to include, among others, one special education teacher of the student or, where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see also 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]).[20] In addition, the IDEA also requires a CSE to include not less than one regular

[18] To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

[19] As previously noted, this particular allegation lacks merit because the hearing record revealed that any reference to a specialized school in the June 2017 prior written notice was a mistake (see Tr. pp. 19, 25, 30-31; see also Parent Ex. A at pp. 1-5).

[20] The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46,670 [Aug. 14, 2006]). This language in the Official Analysis of Comments does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 15-055; Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]).[21, 22] As previously noted, however, under the IDEA an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Upon review, while it is undisputed from the evidence in the hearing record that a regular education teacher did not attend the June 2017 CSE meeting, it is not altogether clear that a special education teacher or provider of the student failed to attend the meeting (see Dist. Ex. 1 at pp. 12-13). According to the attendance page in the June 2017 IESP, a district special education teacher, a district school psychologist (who also acted as the district representative), and both of the student's parents attended the meeting (id.). At the impartial hearing, the district school psychologist testified that the special education teacher attending the June 2017 CSE meeting had not evaluated the student, the special education teacher did not currently "teach in a classroom," and the special education teacher had not met the student prior to the meeting (Tr. pp. 25-27). The school psychologist also testified that although no one from the student's then-current school—SIA—attended the June 2017 CSE meeting, the meeting had originally been scheduled to include SIA's participation in May 2017 when SIA was still in "session" (Tr. pp. 27-28; see Tr. p. 144). However, the student's parents could not participate in the CSE meeting scheduled for May 2017, so the CSE meeting was rescheduled for June 27, 2017, as it was the "only day" the parents could attend (Tr. p. 28). The June 27, 2017 CSE meeting had to be rescheduled again, however, until "June 28th" because of "some prior arrangement" and, according to the school psychologist's testimony, SIA could not participate in the meeting because the school was "closed" and "not in session" on that date (id.).[23]

A review of the district school psychologist's testimony and the attendance page of the June 2017 IESP leads to the conclusion that, other than the district special education teacher, the June 2017 CSE did not include a special education teacher or provider of the student (see Tr. pp. 25-28;

However, it is altogether unclear what relevance, if any, this aspirational guidance has under circumstances where parents indicate they intend to continue a student's enrollment in a nonpublic school of their choice, opt not to enroll a student in a district public school, and where the document developed—an IESP—was not intended for implementation in a public school placement.

[21] The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; see 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d][1]-[2]).

[22] The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA, namely a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 3602-c; 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]).

[23] On June 27, 2017, the parents attended the ongoing impartial hearing related to the October 2016 due process complaint notice (see Parent Ex. B at p. 2).

Dist. Ex. 1 at pp. 12-13). However, the student's mother also testified at the impartial hearing about the June 2017 CSE meeting, noting that the CSE had the student's "speech therapist" on the phone and "a lot of our conversation" dealt with the annual goals that the "speech therapist was supposed to have" (Tr. p. 160). Thus, based upon the mother's own testimony, it appears that, for at least a portion of the CSE meeting, the CSE did include the participation of one of the student's special education providers and weighs against a conclusion that the June 2017 CSE was not properly composed due to the alleged absence of a special education provider of the student.

Even assuming for the sake of argument that the mother's testimony failed to carry the day on this issue, the evidence in the hearing record otherwise weighs against finding that the failure to conduct the June 2017 CSE meeting with a properly composed CSE—as a procedural inadequacy—significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or caused a deprivation of educational benefits to the student, and rose to the level of a failure to offer the student a FAPE, as alleged by the parent (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Here, the evidence in the hearing record reveals that the June 2017 relied upon "teacher reports and progress reports," as well as a previously completed evaluation of the student, to make recommendations, to develop the present levels of performance in the June 2017 IESP, to create the annual goals, and to develop strategies to address the student's management needs (Tr. pp. 20-22; see generally Dist. Exs. 2-4). Notably, the hearing record includes copies of the student's related services' progress reports completed prior to the June 2017 CSE meeting in the areas of counseling, speech-language therapy, and OT (see generally Dist. Exs. 2-4).[24] A review of the progress reports demonstrates that each provider included a description of the student's present levels of performance, as well as recommended annual goals for the upcoming school year (see Dist. Exs. 2 at pp. 1-2; 3 at pp. 1-6; 4 at pp. 1-3).[25]

At the impartial hearing, the district school psychologist testified that, based upon the parent indicating at the June 2017 CSE meeting that the student would attend SIA, the CSE recommended SETSS to help the student "access the general education" and further recommended related services, as well as the services of a full-time individual paraprofessional and parent counseling and training services (Tr. pp. 22-23). The school psychologist also testified that the CSE explained to the parent the difference between the student receiving services through an IESP

[24] Courts have generally been reluctant to find a denial of FAPE based on the composition of the CSE where the CSE had sufficient information to accurately identify the student's needs (see A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 (2d Cir. Aug. 16, 2010); K.C. v New York City Dep't of Educ., 2015 WL 1808602, at *8 (S.D.N.Y. Apr. 9, 2015) (finding no denial of a FAPE based on the absence of a special education teacher of the student where the CSE had before it written input from the private school); S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 (S.D.N.Y. Dec. 8, 2011) (finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student's] educational and therapeutic needs").

[25] To be clear, the parent never asserted in the due process complaint notice that the present levels of performance in the June 2017 IESP were inaccurate or failed to adequately describe the student's areas of strengths or needs (see generally Parent Ex. A). In addition, the parent has not appealed IHO 2's determination that the annual goals created by the June 2017 CSE were appropriate to meet the student's needs (compare Req. for Rev., with IHO Decision at p. 12).

and an IEP, and that the CSE explained the difference in light of the parent stating that the student would attend SIA (see Tr. pp. 23-25).

In addition to the foregoing, the evidence in the hearing record does not support the parent's contention that the alleged improperly composed CSE prevented the parent from asking questions about the student's needs related to the 2017-18 school year (see generally Tr. pp. 1-180; Parent Exs. A-B; F-X; AA-DD), and the parent does not point to any evidence in the hearing record to support this allegation (see Req. for Rev. ¶¶ 40-41; Parent Mem. of Law at p. 12). Instead, the evidence reveals that the parent participated at the CSE and was not denied the opportunity to ask questions. For example, the student's mother testified that she expressed her desire for a public school placement for the student at the June 2017 CSE meeting, and she further testified that—in response to this statement—the CSE "recommended the speech and the OT, and then we talked about some of [the student's] challenges" and that "being in [first] grade would be different than kindergarten" (Tr. p. 161). The student's mother also testified that the CSE "did talk a little bit about SETSS" and she understood that the June 2017 CSE would recommend SETSS (id.). Upon questioning from IHO 2, however, the student's mother testified that initially, the CSE did not "offer" SETSS; but because she felt the student "would need this," the CSE recommended SETSS at a "minimal" level (Tr. pp. 164-65; see Dist. Ex. 1 at pp. 2-4 [noting parent's concerns in the IESP]).[26] Moreover, the student's mother testified that the June 2017 CSE "talked about the different services" that would benefit the student, such as speech-language therapy (Tr. pp. 165-66).

Therefore, based upon the weight of the evidence in the hearing record, while the June 2017 CSE may not have been properly composed, constituting a procedural error, I am not persuaded by the evidence that it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits resulting in a failure to offer the student a FAPE for the 2017-18 school year. Consequently, the parent's arguments must be dismissed.

C. District's Obligation to Offer the Student a FAPE

On this point, the parent argues that IHO 2 erred in finding that the district's offer of an IESP—as opposed to an IEP—satisfied its obligation to offer the student a FAPE for the 2017-18 school year. In support of this assertion, the parent argues that an IESP created pursuant to section 3602-c does not confer FAPE and cannot be implemented in a public school setting. In response, the district initially contends that although a parent's intent to enroll a student in a nonpublic school does "not negate the district's obligation to offer FAPE," the parent "'objectively manifested'" an intent to place the student at SIA and to request an "IESP, never an IEP," which constitutes an equitable consideration weighing against any award of tuition reimbursement.

As the district acknowledges it was required to offer a FAPE to each student with a disability who resides in the district and requires special education (Answer ¶14), and further

[26] Other than testifying in response to IHO 2's questions at the impartial hearing about SETSS, the parent never asserted in the due process complaint notice that the frequency or duration of the SETSS recommended in the June 2017 IESP were insufficient or inappropriate to meet the student's needs (see generally Parent Ex. A).

concedes that the IHO erred in conflating the provision of FAPE with the provision of equitable services pursuant to an IESP (Answer ¶16),[27] the parties appear to agree that an IESP, the operative document for providing equitable services under section 3602-c, was not designed as a document to confer a FAPE and accordingly, the district was required to develop an IEP to offer the student a FAPE (see Req. for Rev. ¶ 38; Parent Mem. of Law at pp. 6-10; Answer ¶¶ 14-16). Additionally, although courts have been challenged to find a consistent course for addressing factually similar situations, where an eligible student was receiving publicly funded special education services at a nonpublic school and the district of residence did not develop an IEP, in this instance both parties cite primarily to E.T. v. Board of Education of Pine Bush Central School District, 2012 WL 5936537 (S.D.N.Y. Nov. 26, 2012) to support their respective positions.[28, 29] In E.T., after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (E.T., 2012 WL 5936537,

[27] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the [IDEA] 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

[28] The Second Circuit has noted that "[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]; but see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of- residence's obligations do not simply end because a child has been privately placed elsewhere"]). The Court did not specifically address the situation presented here, where the nonpublic school the student attended was located within the district, and it appears that under that circumstance the district may not be relieved from the obligation to develop an IEP. The Court also did not reach the issue of whether or how the parent's actions might have impacted on equitable considerations.

[29] At least one district court in New York has looked at a similar factual pattern as relevant to assessing the second factor of a claim for tuition reimbursement, i.e., whether the services selected by the parents were appropriate (M.C. v. Lake George Cent. Sch. Dist., 2012 WL 3886159, at *6 [N.D.N.Y. Sept. 6, 2012] [finding a nonpublic school inappropriate because to the extent the student's special education needs were addressed at the nonpublic school, they were addressed through services provided by the district pursuant to an IESP]; see also K.S. v. New York City Dep't of Educ., 2012 WL 4017795, at *8-*9 [S.D.N.Y. Aug. 8, 2012] [services provided by a district should not be considered in determining the appropriateness of a unilateral placement]; but see F.O. v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 522-23 [S.D.N.Y. 2013] [district's provision of a 1:1 paraprofessional at private school negated the need for the private school to provide one and did not render the private school inappropriate]). However, as the IHO determined that SIA was an appropriate placement for the student for the 2017-18 school year, and the district has not appealed from that determination, the IHO's determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]) and the question as to whether the provision of services pursuant to an IESP should factor into a determination of the appropriateness of the services selected by the parent is not further addressed.

at *16).[30] Based on the above, on appeal, equitable considerations constitute the pivotal factor in determining whether the parent is entitled to an award of tuition reimbursement and as explained more fully below, in this matter, equitable considerations weigh against the parent's request for relief.[31]

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]).

The Second Circuit has held that even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L., 744 F.3d at 840). In finding that equitable factors weighed in favor of the parents, the Second Circuit paid particular attention to the fact that in that case the parents "requested that the District evaluate C.L. under the IDEA and develop an IEP for him" (id.).

In this matter, it is undisputed that the parent signed a notice of intent to parentally place the student at SIA—a nonpublic school located within the student's district of residence—

[30] Given the district's position on appeal, the district's failure to offer an IEP—as opposed to an IESP—in this instance resulted in a failure to offer the student a FAPE; however, it bears noting that because the parent did not challenge any of IHO 2's findings regarding the appropriateness of the recommendations included in the June 2017 IESP, it is reasonable to infer that if the district had created an IEP with the same recommendations, there would be no basis to conclude that the IEP substantively denied the student a FAPE for the 2017-18 school year. The district's failure to make those recommendations in an IEP—as opposed to an IESP—could have been easily rectified if the parent requested placement in a public school.

[31] IHO 2 relied upon the same facts as a threshold issue in finding that the district was not required to create an IEP for the student (compare IHO Decision at pp. 11-12, with Answer ¶¶ 14-15). In contrast to the court's holding in E.T., at least two federal district courts have found an objective manifestation of the parent's intention to place the student in a nonpublic school as a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).

consistent with the statutory language of section 3602-c requiring districts to "furnish services to students who are residents of this [S]tate and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]).[32] Although not mentioned specifically in IHO 2's analysis of this issue, it is undisputed that the parent signed a notice of intention to parentally place the student at SIA on May 21, 2017 (see Dist. Ex. 6), also consistent with the State's dual enrollment statute requiring parents of a New York State resident student with a disability who was placed in a nonpublic school and who sought to obtain educational "services" for his or her child to file a request for such services in the district where the nonpublic school was located on or before the first day of June preceding the school year for which the request for services was made (Educ. Law § 3602-c[2]).[33]

At the impartial hearing, the student's mother acknowledged in testimony discussing the form letter with the parent prior to the parent signing it, and that she understood the distinction between an IESP and an IEP (see Tr. pp. 148-49, 154, 166-67; Dist. Ex. 6). In particular, the student's mother testified that she understood that "an IESP would be implemented only in a private school" and that the parents "would have to be paying for the private school for the IESP services to be available" (Tr. pp. 166-67).[34] The student's mother also explained in testimony that the form letter was signed because the parents believed it was necessary in order to "maintain [the student's] services"—namely, the speech-language therapy, counseling, paraprofessional services, and OT services provided pursuant to an IESP—and in May 2017, a CSE had not yet convened for the 2017-18 school year (Tr. pp. 149-50; see Dist. Ex. 6). The student's mother further testified that at the time of the June 28, 2017 CSE meeting, although she may not have specifically requested an "IEP" at the meeting, she did express to the CSE that she was "still open" to a public school placement (Tr. pp. 150-52; see Tr. p. 160).[35] At the impartial hearing, the student's mother reaffirmed her interest in a public school placement for the student (Tr. pp. 165-67).[36]

[32] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)] (Educ. Law § 3602-c[1][a], [d]).

[33] According to the statute, when a district of location receives a parent's written request for services, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).

[34] Given this testimony, it is unclear why the parents did not—after receiving the IESP created as a result of the June 2017 CSE meeting—contact the district to obtain an IEP.

[35] The district school psychologist testified that the parents affirmatively stated at the June 2017 CSE meeting that they intended to place the student at SIA and "[a]ll they want[ed] [were] services for him" (Tr. pp. 22-24).

[36] The student's mother testified that although the enrollment contract for the student's attendance at SIA for the 2017-18 school year was executed on April 5, 2017, prior to the June 2017 CSE meeting, the parents had obtained "insurance" to refund any money expended if they changed their minds (Tr. pp. 148, 158-59).

The district argues that by signing the notice of intent to parentally place the student at SIA in May 2017, the parent objectively manifested the intent to place the student at SIA (see Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15 [M.D. Pa. Sept. 28, 2017]) notwithstanding the explanation for signing the document given by the student's mother at the impartial hearing. And when aligned with the court's holding in E.T., the parent's objectively manifested intent, in this case, weighs heavily in the balance of equitable considerations and bars the parent from receiving tuition reimbursement as relief for the district's failure to offer the student a FAPE.

In addition to the foregoing, the hearing record further reflects that in August 2017 when the parents notified the district of their intention to place the student at SIA at district expense (10-day notice), the parents did not raise the district's failure to provide the student with an IEP, as opposed to an IESP, as a basis for rejecting the program offered in the June 2017 IESP (see Parent Ex. Q; see also Tr. pp. 156-58).[37] Nor did the parents ask for an IEP at that time or at any time thereafter (see Tr. pp. 157-58; Parent Ex. Q). According to the hearing record, the parent was actively engaged in an impartial hearing regarding the 2016-17 school year within which the parent raised the same issue of whether an IESP had been requested for the 2016-17 school year, and the parent received a decision from IHO 1 on this very issue in his favor in September 2016, prior to filing the due process complaint notice in this proceeding (see generally Parent Exs. A-B).

Finally, even if I were to find that a reduction in tuition reimbursement were warranted rather than a complete bar, as noted above, the parent has already received, pursuant to pendency, reimbursement or direct payment of the costs of the student's tuition and related expenses at SIA for the 2017-18 school year—except for the limited period of time between the student's enrollment at SIA on September 6, 2017 and the filing of the due process complaint notice on November 3, 2017 (see Interim IHO Decision at p. 2; Parent Exs. A; Q). Additionally, the district has funded special education and related services for the student during the entire 2017-18 school year pursuant to the June 2017 IESP, including counseling, speech-language therapy, OT, SETSS, and the support of a paraprofessional (Parent Ex. F at pp. 6-7; see Tr. pp. 55-56, 107, 121-22). Accordingly, considering that the parent has already received funding for the cost of the student's special education services from the district pursuant to the IESP and reimbursement or direct funding for the student's attendance at SIA for all but approximately two months of the 2017-18 school year, even a modest reduction in the requested relief based on equitable considerations would result in no further relief awarded to the parent.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district failed to sustain its burden to establish that it offered the student a FAPE in the LRE for the 2017-18 school year, but that equitable considerations do not weigh in favor of the parent's requested relief,

[37] To the extent that the parents indicated in the 10-day notice their intention to place the student at SIA at "district expense" (Parent Ex. Q), this fact, alone does not outweigh the other factors noted when balancing equitable considerations in this matter.

the parent's appeal is dismissed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 1, 2018

STEVEN KROLAK
STATE REVIEW OFFICER