The University of the State of New York

The State Education Department
State Review Officer
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No. 18-131

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, 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) appeals from a decision of an impartial hearing officer (IHO) which denied her request for tutoring services. The district cross-appeals from those portions of the IHO's decision which found that the district denied the student a free appropriate public education (FAPE) and awarded the student assistive technology. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has attended the Summit School (Summit), a State-approved nonpublic school, since September 2014 (Parent Ex. L at p. 1). The student received 1:1 tutoring to develop reading and writing skills from EBL Coaching from February 2, 2016 to March 27, 2018 (Parent Ex. AA at p. 1).

A CSE convened on May 16, 2017, to develop the student's IEP for the 2017-18 school year (Parent Ex. F at pp. 1, 17).[1] Having determined that the student remained eligible for special education as a student with an other health impairment, the CSE recommended that the student attend a 12:1+1 special class in a "non-specialized" school for academic classes, including English language arts (ELA) (ten periods per week), mathematics (five periods per week), social studies (five periods per week), and sciences (five periods per week) (id. at pp. 1, 11-13). In addition, the CSE recommended that the student receive: one 30-minute session per week of individual counseling; one 30-minute session per week of group counseling; one 30-minute session per week of group occupational therapy (OT); and two 30-minute sessions per week of group speech-language therapy (id. at p. 12). The IEP included approximately 20 annual goals to address the student's needs (id. at pp. 6-11). Further, with respect to assistive technology devices and/or services, the May 2017 CSE recommended an FM unit and a laptop computer with software and accessories to assist the student during core classes and throughout the day (id. at pp. 12-13). Additionally, the CSE recommended strategies to address the student's management needs including, among others: explicit reading intervention and supports; markers and masks to help with tracking and reading; audio books; preferential seating; frequent checks for understanding; breaks and on-task focusing prompts; and manipulatives when solving math problems (id. at p. 5). The May 2017 IEP also included several testing accommodations for the student, such as a separate location or room, extended time, breaks, use of assistive technology, and revised test format (id. at p. 14).

By prior written notice dated June 19, 2017, the district summarized the recommendations set forth in the May 2017 IEP (Parent Ex. J at pp. 1-2). Additionally, by school location letter dated June 19, 2017, the district identified the particular public school site to which the district assigned the student to attend for the 2017-18 school year (id. at p. 4).

By letter to the district dated August 22, 2017, the parent stated her disagreement with the "inappropriate educational placement recommended for the [student] in the [district]" and provided notice of her intent to unilaterally place the student at Summit for the 2017-18 school year and seek the costs of tuition, tutoring, related services, transportation, and other expenses from the district (Parent Ex. O at pp. 1-2). The parent specified that the IEP for the 2017-18 school year failed to "address [the student's] many challenges, offer[ed] an inappropriate program in the [district] setting and d[id] not take into consideration all of the current evaluative data and other reports" (id. at p. 1).

On September 7, 2017, the student began attending Summit for the 2017-18 school year (Parent Ex. X).[2]

[1] The hearing record contains two similar copies of the student's May 2017 IEP as exhibits (compare Parent Ex. F, with Dist. Ex. 2). For purposes of this decision, the parent's exhibit is cited.

[2] The hearing record includes a tuition agreement executed by the parent on November 22, 2017, which pertained to the student's enrollment at Summit for the 2017-18 school year (Parent Ex. Y).

A. Due Process Complaint Notice

By due process complaint notice dated November 1, 2017, the parent alleged that the district failed to develop and offer the student an appropriate IEP for the 2017-18 school year (Parent Ex. A at p. 1). The parent claimed that the May 2017 CSE recommended a 12:1+1 "program" without considering current evaluative information or pertinent information offered by the student's providers at Summit (id. at p. 2). The parent argued that the May 2017 CSE's recommendation of a 12:1+1 special class in a community school had been previously determined to be inappropriate and that the May 2017 CSE offered no discussion of the rationale for its recommendation (id.). The parent further alleged that the CSE's recommendation was predetermined, no consensus was reached by the CSE members, the CSE did not consider the full range of the student's special and unique needs, the CSE refused to discuss a deferment for consideration of a nonpublic school, and that the CSE did not discuss the student's least restrictive environment (LRE) (id. at pp. 2, 3). The parent also contended that the May 2017 CSE failed to discuss appropriate annual goals and that, overall, the parent was denied meaningful participation in the development of the student's IEP (id. at pp. 2-3). Additionally, the parent claimed that, given the student's diagnoses and needs, the district could not provide a FAPE to the student (id. at p. 2). Overall, the parent alleged that the May 2017 IEP was "not reasonably calculated to confer educational benefit upon [the student] in the [district] selected program" and that the IEP was not appropriate and not the student's LRE (id.). The parent further complained that the student's mandated laptop provided by the district did not work during the 2017-18 school year and that the district had not done anything to remedy the situation (id. at p. 3).

The parent requested an interim order on pendency designating Summit as the student's pendency placement (Parent Ex. A at pp. 1, 3). For relief, the parent requested the full costs of the student's tuition at Summit for the 2017-18 school year (id. at p. 3). The parent also sought "[a]n award of special education tutoring employing Orton-Gillingham methodology at the enhanced rate," as well as "[a]n award of assistive technology with appropriate software," Fast ForWord software, and assistive technology training for the student and the parent (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on November 28, 2017, which concluded on September 12, 2018, after six days of proceedings, including a hearing date devoted to determining the student's pendency placement (Tr. pp. 1-301). The IHO issued an interim order on pendency, dated November 28, 2017, finding that the student's pendency placement was at Summit based upon an unappealed IHO decision dated May 12, 2016 (Nov. 28, 2017 Interim IHO Decision at p. 2).[3]

In a decision dated October 15, 2018, the IHO found that the district failed to offer the student a FAPE for the 2017-18 school year (IHO Decision at p. 15). However, the IHO did not find that deficiencies in the May 2017 IEP as alleged by the parent amounted to a denial of a FAPE

[3] On September 15, 2018, the IHO was appointed to hear the parent's claims related to the 2018-19 school year (Sept. 26, 2018 Interim IHO Decision at p. 2). Following consideration of the factors set forth in State regulation, the IHO determined that the parent's due process complaint notice concerning the 2018-19 school year should not be consolidated with the claims related to the 2017-18 school year (id. at pp. 2-3).

(id.). Specifically, as to the parent's claims about the May 2017 CSE's failure to consider certain evaluative information, the IHO found that, while the educational update and the central auditory processing evaluation "should have been included in the IEP, . . . their absence did not amount to a denial of FAPE (id.). In so finding, the IHO noted that, while the parent considered a report completed by a private psychologist to be a neuropsychological evaluation, the report was entitled "educational update" and did not include any cognitive testing or diagnoses (id.). The IHO also noted the absence of any current academic testing from Summit (id.). Moreover, the IHO credited the testimony of the district's school psychologist, who served as the district representative at the May 2017 CSE meeting, that the November 2014 central auditory processing evaluation was reviewed at prior CSE meetings for the student and resulted in a recommendation for an FM unit (id.). Next, the IHO discounted the parent's argument that a 12:1+1 classroom was too restrictive, noting that Summit was more restrictive, and also found that statements made by the parent and the student's grandmother regarding 12:1+1 special classes in public schools were baseless (id.). The IHO also credited the district's school psychologist's testimony that a 12:1+1 special class in a community school could have met the student's needs in the LRE and that the May 2017 CSE's recommendation was appropriate (id.).

Notwithstanding her determinations regarding the appropriateness of the May 2017 IEP, the IHO went on to find that the district failed to offer evidence at the impartial hearing concerning the particular public school site to which the district assigned the student to attend for the 2017-18 school year (IHO Decision at pp. 15-16). The IHO found that the district had planned to present a witness to testify about the assigned public school site but ultimately rested its case without presenting the witness (id. at p. 16). Without evidence regarding the assigned public school site, the IHO found that "the district could not sustain its burden that it provided an appropriate education for [the student]" (id.). For that reason, the IHO determined that the district failed to provide a FAPE to the student (id.).

Turning to the appropriateness of the parent's unilateral placement, the IHO determined that the parent met her burden of demonstrating that Summit was appropriate (IHO Decision at p. 16). The IHO noted that Summit was a State-approved school specifically authorized to work with students with special education needs like the student (id.). While the IHO indicated that she was "disturbed by the lack of any actual data on the [student's] academic performance in the bare bones reports submitted by [Summit]," she found that the documentary and testimonial evidence set forth sufficient credible information about the strategies utilized at Summit to address the students' needs and about the student's progress (id. at pp. 16-17). Considering the parent's request for tutoring "as a[n] [alleged] necessary adjunct to the [student's] placement at Summit," the IHO nevertheless determined that, given the ELA and reading instruction and speech-language therapy provided at the school, Summit was an appropriate unilateral placement even without use of the Orton-Gillingham methodology (id. at p. 17). With regard to equitable considerations, the IHO found that there was nothing in the hearing record that would warrant a denial or reduction of an award of tuition funding (id. at p. 18). Based on the foregoing, the IHO ordered the district to fund the costs of the student's attendance at Summit for the 2017-18 school year (id. at p. 19).

The IHO next addressed the parent's request for tutoring (IHO Decision at p. 18). The IHO first noted that the parent did not allege that the May 2017 IEP recommended inadequate reading instruction or that Summit was insufficient for the student without the tutoring services (id.). The IHO further noted that, while the tutor, who provided services to the student through March 2018,

cited the student's "'tremendous progress,'" she provided no specific information as to the student's performance level, the results of any assessment, or evidence of the student's progress achieved as a result of the tutoring (id.). The IHO credited the parent's testimony that tutoring was "an extra accommodation that helped," but noted that the parent's statement that tutoring significantly helped the student with reading, spelling, and vocabulary at Summit "was without any foundation in the record" (id.). Accordingly, the IHO determined that the evidence did not support an award for the costs of tutoring services (id.).

Lastly, the IHO found that the May 2017 IEP recommended a laptop and software and that the district's school psychologist indicated that the district had no objection to the parent's request that the district provide the assistive technology to the student at Summit (IHO Decision at p. 18). The IHO credited testimony that the student would benefit from Fast ForWord and Earobics software (id. at pp. 18-19). Thus, the IHO ordered the district to provide an updated laptop and appropriate software including Fast ForWord and Earobics, along with ten sessions of assistive technology training for the parent and student consistent with the parent's request (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals the IHO's denial of her request for tutoring.[4] The parent alleges in her request for review that the IHO appropriately found that the district denied the student a FAPE for the 2017-18 school year and that the parent's unilateral placement of the student at Summit was appropriate; however, the parent contends that the IHO erred by determining that the student was not entitled to tutoring services at district expense. The parent argues that the IHO incorrectly found that the parent could not claim that Summit was an appropriate unilateral placement if the student required additional tutoring. The parent further alleges that the IHO mischaracterized her argument and that deficiencies in the May 2017 IEP form the basis of the request for tutoring support. The parent also argues that a district witness provided evidence that the student's

[4] The parent's appeal pleading was denominated a "Petition" and the parent's submissions included additional procedural nonconformities. The regulations governing practice before the Office of State Review were amended over two years ago (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26) to, among other things, align with federal terminology and change the name of the pleading to initiate a review from "petition" to "request for review" (8 NYCRR 279.4[a]; see 34 CFR 300.515[b]). Counsel for the parent has previously been alerted to this particular nonconformance in pleadings submitted on her clients' behalf, among others (Application of a Student with a Disability, Appeal No. 18-079; see Application of a Student with a Disability, Appeal No. 18-055). In addition, the parent served a notice of intention to seek review upon the district; however, while the caption of the notice of intention to seek review correctly identified the student who is the subject of this proceeding, a different student was incorrectly named in the body of the notice. Further, the notice of intention to seek review was not accompanied by the case information statement required by State regulation (8 NYCRR 279.2[e]). In addition, the notice of request for review accompanying the parent's pleading (denominated a "Notice of Petition") does not comply with 8 NYCRR 279.3, but instead contains the notice required under State regulation prior to January 1, 20170. As counsel for the parent appears regularly in this forum, she should ensure that she reviews Part 279, as amended and effective January 1, 2017, and conforms her practice accordingly, as, while a singular failure to comply with practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after repeated failures to comply with the practice requirements (see 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). For purposes of this decision, the parent's pleading will be referred to as a request for review.

disabilities and evaluative information were not appropriately considered at the CSE meeting. The parent therefore contends that the IHO erred by finding that no evidence existed in the hearing record to establish the district's failure to develop an appropriate IEP to address the student's learning needs with "SETTS."

In an answer with cross-appeal, the district generally responds to the parent's claims with admissions and denials. Specifically, the district argues that the IHO correctly denied the parent's request for tutoring as an "unwarranted 'extra accommodation.'" The district further contends that, to the extent the parent's request for tutoring for the student was a request for compensatory education, such an award was not warranted because the student was not denied a FAPE. The district also alleges that the requested tutoring was for the purpose of maximizing the student's educational potential, which is not required by the IDEA. In its cross-appeal, the district asserts that the IHO improperly found a denial of a FAPE based on her finding that the district did not present any evidence in support of the appropriateness of the assigned public school site. The district alleges that the IHO erred in this finding because the parent did not raise any claims in her due process complaint notice regarding the appropriateness of the assigned public school site and that the district did not open the door or otherwise agree to expand the scope of the hearing to include such additional claims. The district asserts that the IHO specifically found that the parent's claims relative to the May 2017 IEP were unsupported by the hearing record and that the May 2017 IEP was appropriate and offered the student a FAPE. The district further contends that, since the parent's appeal is limited to the IHO's denial of her request for tutoring services, the IHO's finding that the May 2017 IEP was appropriate and offered the student a FAPE is not appealed and is, therefore, final and binding on the parties. Moreover, the district alleges that the parent's sole disagreement with the May 2017 IEP pertained to the CSE's discussion about the student's needs and the 12:1+1 special classroom ratio and that, contrary to this allegation, the hearing record showed the parent's participation in the development of the student's IEP. The district also claims that the IHO's award of assistive technology was not supported by the hearing record. The district specifically alleges that the IHO's award of a laptop and Fast ForWord and Earobics software was excessive, beyond the scope of the parent's requested relief, and unsupported by the recommendations set forth in a 2014 central auditory processing evaluation. In the alternative, the district requests the opportunity to conduct its own assistive technology evaluation to determine what software would be appropriate for the student.

In an answer to the cross-appeal,[5] the parent argues that allegations in her due process complaint notice that the recommended "program/placement" in a 12:1+1 special class in a district community school was not appropriate were sufficient to raise issues about the assigned public school site. The parent further argues that a specific claim about the assigned public school site was not required to provide notice to the district. The parent contends that the district should have anticipated the parent's objections and, instead, chose not to present any evidence. Additionally, the parent alleges that the failure of the district to offer any evidence that identification of an assigned public school placement was communicated to the parent prior to the start of the school

[5] The parent resubmitted the first page of her answer to the district's cross-appeal in order to amend the caption of the pleading to reflect the correct appeal number. It appears that, in addition to correcting the appeal number, a hard return in the first paragraph of the answer to the cross-appeal (which was likely an inadvertent key stroke) was removed; however, as a result the first page to the answer to the cross-appeal now contains text that is duplicative of text set forth on page two of the answer to the cross-appeal.

year or "that said program/placement was appropriate" supports a finding that the district denied the student a FAPE. The parent does not respond to the district's position that the IHO's findings about the May 2017 IEP are final and binding but reiterates many of the allegations from her due process complaint notice pertaining to the May 2017 CSE's consideration of evaluative data, the discussions/consensus at the CSE meeting, appropriateness of the student's IEP in light of the student's diagnoses, and appropriateness of the recommendation for a 12:1+1 special class in a community school.[6] With respect to assistive technology, the parent appears to agree with the district to the extent that the parent did not request Earobics software and states that the parent would not object to an award of Fast ForWord software. However, the parent objects to the district's request to conduct its own assistive technology evaluation. Finally, the parent sets forth a response in further support of her request for tutoring services for the student.

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

[6] Although the district did not cross-appeal from the IHO's determination that Summit was an appropriate unilateral placement, the parent includes argument in her answer and cross-appeal in support of the IHO's finding on this point.

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]).[7]

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

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

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

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

VI. Discussion

A. Scope of the Impartial Hearing

The first issue to be addressed is the parties' dispute about whether the parent sufficiently raised claims about the particular public school site to which the district assigned the student to attend for the 2017-18 school year in her due process complaint notice and, therefore, whether the IHO erred in determining that the student was denied a FAPE because the district did not present a witness to discuss the assigned public school site.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing 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 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59[2d Cir. June 18, 2014]).

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new

issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The parent's due process complaint notice does not include any allegations related to the particular public school site to which the district assigned the student to attend (see Parent Ex. A). The parent argues that her challenge to the appropriateness of the "program/placement" recommended in the May 2017 IEP was all-encompassing and sufficiently provided notice to the district of a prospective challenge to the assigned public school site. In order to properly consider the parent's position, the state of the law related to distinguishing claims pertaining to an IEP from claims pertaining to an assigned public school site is warranted.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[8] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP

[8] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Reviewing the due process complaint notice in light of the foregoing, the parent did not allege any challenge to the district's capacity to implement the May 2017 IEP (see Parent Ex. A). The parent points to her challenges to the recommendation in the May 2017 IEP for the 12:1+1 special class in a district community school as sufficient to raise challenges to the assigned school; however, the fact that the parent objected to the recommended class ratio and/or the recommendation for a district community school (as opposed to a nonpublic school) are challenges to the IEP (see id. at p. 2). Even assuming that the parent's allegations about the recommended "program" were intended to raise challenges about the assigned public school site, they are impermissibly speculative as there is no indication that the parent had any reason to question the assigned public school's capacity to implement the May 2017 IEP at the time that the parent rejected the IEP and notified the district of her intent to unilaterally place the student at Summit (Parent Ex. O at pp. 1-2; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]). Thus, based on the due process complaint notice in this matter, the IHO improperly determined that the district was required to present evidence related to the public school site to which the student was assigned (see N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]). Moreover, upon review of the hearing record, there is no indication that the district subsequently agreed to add issues related to the student's assigned public school site and the parents did not attempt to amend the due process complaint notice to include such issues.

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M., 2017 WL 607579, at *14; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). In this case, the district stated its intent to call a witness "from the school"; specifically, the assistant principal (Tr. p. 37). Ultimately, it was not possible to call the "school witness" on the intended day due to the length of the prior witness's testimony (Tr. pp. 105-06). The hearing record also reflects that the IHO contemplated the possibility that

the district may not call a "school witness" and provided instructions to the parties to communicate such information in advance of the next hearing date (Tr. p. 106). When the parties reconvened on the next hearing date, a discussion occurred on the record wherein the parties requested an adjournment, which was denied by the IHO (Tr. pp. 111-12). The district indicated that the matter had been "submitted for settlement" and that it was "withdrawing [its] placement witness" and resting its case without conceding any aspect of the parent's case (Tr. p. 112). The hearing record indicates that no district witnesses testified about the issue and, therefore, the district did not open the door to the parent's challenges (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9).

Accordingly, the appropriateness of the assigned public school site is an issue that was raised for the first time by the IHO in her decision and is outside the scope of the impartial hearing (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]]"). The IHO found the parent's attacks on the IEP to be without merit, which should have ended the inquiry in the absence of any permissible challenges to the district's capacity to implement the IEP at the assigned public school site (see Y.F., 659 Fed. App'x at 5-6).

B. Scope of Review

Given that the IHO erred in determining that the district failed to offer the student a FAPE for the 2017-18 school year on the ground that the district did not present a witness to testify about the district's recommended assigned public school site, a determination must be made regarding what other aspects of the IHO's decision are properly heard on appeal. Of significance to the disposition of this matter, the IHO did not find that the parent's allegations regarding deficiencies in the May 2017 IEP amounted to a denial of a FAPE (IHO Decision at p. 15). The district argues that, since the parent did not appeal this portion of the IHO's decision, it is final and binding.

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulations governing practice before the Office of State Review are explicit and require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "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][2], [4]; see also 8 NYCRR 279.4[a], [f]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

In her request for review, the parent did not challenge the IHO's determination that the May 2017 IEP offered a FAPE to the student, which determination was adverse to the parent. The

parent includes one numbered issue in her request for review, alleging that "[t]he IHO erred in the determination that [the student] cannot be awarded tutoring as part of her educational program for the challenged school year at issue."[9] Although the parent was not aggrieved by the IHO's overall determination that the district failed to offer the student a FAPE, State regulations require that the parent appeal discrete adverse determinations (8 NYCRR 279.8[c][2], [4]). Further, the parent was on notice that the district intended to cross-appeal the IHO's FAPE determination by the district's service of a notice of intention to cross-appeal with the required case information statement on November 14, 2018, prior to the parent's service of the request for review on the district. Thus, the parent should have anticipated that, if the district was successful in its cross-appeal, absent an appeal of the IHO's determinations regarding the May 2017 IEP, there would remain no other basis upon which to sustain the IHO's determination that the district failed to offer the student a FAPE.[10]

Nor are the parent's allegations in response to the district's cross-appeal sufficient to raise the issues for consideration on appeal. In her answer to the district's cross-appeal, the parent has not grappled with the district's position regarding the status of the IHO's findings as final and binding. Further, even assuming that the IHO's findings about the May 2017 IEP were not waived by the parent's failure to appeal the adverse determinations in the request for review, the parent did not set forth any argument in the answer to the cross-appeal alleging that the IHO erred by finding that the CSE's recommendations were appropriate or by finding the alleged deficiencies in the May 2017 IEP did not result in a denial of a FAPE to the student. In her answer to the cross-appeal, the parent reiterates arguments set forth in the due process complaint notice; however, the IHO already rejected these arguments and the answer to the cross-appeal fails to explain how the IHO erred in her determinations. It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor

[9] The only statement in the request for review which could arguably be deemed to allege error on the part of the IHO in a determination regarding the May 2017 IEP is the parent's contention, within a numbered paragraph dealing with the "provision of requested tutoring," that "the IHO erred in determining that no evidence existed in the record challenging the [district's] failure to develop an appropriate IEP to address [the student's] learning needs with SETTS [sic] given her disabilities" (Req. for Rev. ¶ 15). However, this statement is not "a clear and concise statement of [an] issue[] presented for review" and is without citation to the IHO's decision (8 NYCRR 279.8[c][2]-[3]). Nor is this "issue numbered and set forth separately" (8 NYCRR 279.8[c][2]). Moreover, upon review of the IHO's decision, there appears to be no determination about special education teacher support services (SETSS) or any other similar finding (see IHO Decision at pp. 4-19).

[10] The 2017 amendments to Part 279 added the requirement that a respondent serve and file a notice of intention to cross-appeal an IHO's decision (8 NYCRR 279.2[d]). This provides notice to a petitioner that a respondent may choose to appeal from other portions of an IHO's decision. As such, a petitioner must be chargeable with the knowledge that he or she may have to defend against a cross-appeal and that, in the event the respondent is successful in a cross-appeal, that an appeal of determinations made by the IHO (or of the IHO's failure to rule on issues) that were unfavorable to the petitioner would be required in order to preserve alternative grounds to sustain the ultimate determination upon which the petitioner prevailed. Accordingly, a petitioner is responsible to review the various aspects of an IHO's decision and any specific points therein that are unfavorable to the petitioner and request review of such findings on appeal.

Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

Based on the foregoing, I agree with the district that neither party appealed the IHO's determination that the May 2017 IEP offered the student a FAPE, and accordingly, it has become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][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"]).[11]

C. Assistive Technology

As a final matter, the district cross-appealed the IHO's award of assistive technology, particularly objecting to the IHO's award of Earobics software since the parent did not request it. There being no denial of a FAPE to the student, there is no basis for an award of compensatory assistive technology services. Nevertheless, the hearing record reflects that the district already agreed to provide the student with a laptop computer, word prediction software, and Fast ForWord software (see Tr. pp. 288, 298; Parent F at pp. 12-13). Further, the parent appears to agree that the district's delivery of the assistive technology sans the Earobics software would be appropriate (Answer to Cr. Appeal ¶ 26). While an award of assistive technology is not warranted as a remedy since there was no denial of a FAPE under the circumstances of this case, it appears that the parties are in agreement as to the district's continued provision of assistive technology to the student.

VII. Conclusion

Based on the foregoing, the IHO erred in her determination that the district failed to offer the student a FAPE for the 2017-18 school year and there is no need to reach the issue of whether the tutoring services were an appropriate element of the student's unilateral placement for the student or otherwise warranted as relief. In light of these determinations, I need not address the parent's remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated October 15, 2018, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the

[11] The district has not cross-appealed the IHO's determination that the parent's unilateral placement was appropriate. This determination is of no consequence to the disposition of this appeal.

2017-18 school year and directed the district to fund the costs of the student's attendance at the Summit School.

Dated: **Albany, New York**
January 30, 2019

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SARAH L. HARRINGTON
STATE REVIEW OFFICER