The University of the State of New York

The State Education Department

State Review Officer

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No. 19-114

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

Appearances:

Law Offices of Paul T. Bumbalo, attorney for petitioners, by Paul T. Bumbalo, Esq.

Harris Beach, PLLC, attorneys for respondent, by Jeffrey J. Weiss, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Mandala School (Mandala) for the 2017-18 school year and which denied their request for compensatory educational services for the 2016-17 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered an appropriate educational program to the student for the 2017-18 school year. 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[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 as a student with a speech or language impairment prior to attending kindergarten in the district during the 2012-13 school year (see Tr. pp. 495-96).[1, 2] The student's eligibility category

[1] The student's mother testified at the impartial hearing that the student received special education services through the Early Intervention (EI) program until he turned three years old, and then he received speech-language therapy services "paid for" by the district (Tr. pp. 791-93). The student did not, however, attend "preschool" and the student's mother testified that she "refuse[d] C[ommittee on] P[reschool] S[pecial] E[ducation] services from the district" for the student (Tr. p. 793).

[2] Near the conclusion of kindergarten in May 2013, the district administered the Adaptive Behavior Assessment

changed to autism "at the end of first grade going into second grade" at the district (Tr. pp. 496-97; see, e.g., Parent Ex. 5 at p. 2).[3]

In preparation for developing the student's IEP for the 2015-16 school year (third grade), the district administered the following evaluations to the student in April and May 2015: the Wechsler Individual Achievement Test, Third Edition (WIAT-III), the ABAS-II, the Beery-Visual Motor Integration, the Bruininks-Oseretsky Test of Motor Proficiency 2 (BOT 2), the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5), and the Goldman Fristoe 2 (see Parent Ex. 5 at pp. 1, 3-4).[4] The June 2015 IEP developed for the 2015-16 school year reported the scores the student achieved on the evaluations (id. at pp. 3-4).[5] During the 2015-16 school year, the student—as recommended in the June 2015 IEP—attended a 12-month school year program in an 8:1+1 special class placement, together with related services, for third grade (id. at pp. 1, 10-12; see Parent Ex. 67 at pp. 1-2; see generally Dist. Exs. 64; 106).[6]

On April 22, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (fourth grade) (see Dist. Exs. 55 at pp. 1-2; 56 at p. 1; 57 at p. 1; see also Tr. p. 54).[7] Finding that the student remained eligible for special education and related services as a student with autism, the April 2016 CSE recommended a 12-month school year program in an 8:1+1 special class placement (five hours per day) with the following related services: three 30-minute sessions per week of individual speech-language therapy, two 30-minute

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System-Second Edition (ABAS-II) to the student to evaluate his "adaptive behavior skills to help determine if he [was] eligible for alternative [sic] assessment" (Parent Ex. 25 at p. 1). Adaptive behaviors were described within the report as the "collection of conceptual, social, and practical skills that people have learned so they c[ould] function in their everyday lives" (id.). At that time, all of the student's ABAS-II scores fell within the "Extremely Low" range, except for one score, which fell within the "Borderline" range (id.).

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

[4] Of note, the student's June 2015 IEP for third grade documented the following standard scores (SS) and grade-level equivalents (GE) the student achieved on the WIAT-III: early reading skills: SS, 67 and GE, K.5; word reading: SS, 60 and GE, <1.0 (see Parent Ex. 5 at pp. 1, 3). In addition, on the CELF-5, the student achieved a core language index SS of 59 (0.3 percentile rank) (id. at p. 4).

[5] The June 2015 IEP included a recommendation that the student attend a district middle school (middle school 1) as the location within which to receive the summer services recommended for July and August 2015; the evidence in the hearing record reveals that this was the same middle school that the district ultimately recommended that the student attend to receive the special education program recommended in the August 2017 IEP (compare Parent Ex. 5 at pp. 11-12, with Dist. Ex. 23 at p. 1). The student's mother testified at the impartial hearing that the student, during July and August 2015, received the special education services recommended by the CSE, as well as speech-language therapy at a clinic privately obtained by the parents (see Tr. pp. 498-501; Parent Ex. 5 at pp. 10-11).

[6] As part of the student's program during the 2015-16 school year, the student attended—or pushed-into—a "general education class" for social studies and science (Dist. Ex. 56 at p. 1; see Dist. Ex. 55 at p. 5).

[7] The April 2016 IEP reflected a projected implementation date of May 2016 through May 2017 (see Dist. Ex. 55 at p. 1). In addition, while the April 2016 meeting was conducted by a subcommittee of the CSE—or CSE subcommittee—the meeting and its committee, as well as any subsequent CSE subcommittee meetings held, will be referred to simply as a CSE meeting for ease of reference (see Dist. Ex. 55 at p. 1).

sessions per week of speech-language therapy in a small group, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of OT in a small group, one 30-minute session per week of individual physical therapy (PT), and one 30-minute session per week of PT in a small group (see Dist. Ex. 55 at pp. 10-11).[8] In addition, the April 2016 CSE developed annual goals targeting the student's needs in the areas of reading, writing, mathematics, speech-language, motor skills, and daily living skills (id. at pp. 9-10).

According to the minutes recorded for the April 2016 CSE meeting, the parents expressed concern that the student "still c[ould not] read well, and asked about support from a reading specialist" (Dist. Ex. 56 at p. 2; see Dist. Ex. 54 at p. 1). At that time, "[i]t was decided that the teacher would talk with the reading specialist about [the parents'] concerns, and they would set up a time for the reading specialist, teacher, and [the student's mother] to all meet to figure out the best way to meet his reading needs" (Dist. Ex. 56 at p. 2; see Dist. Ex. 54 at p. 1). The meeting minutes also reflected that the student's special education classroom teacher reported that she was "working on Orton-Gillingham" with the student and that he was "making some progress" (Dist. Ex. 56 at p. 1).[9] The April 2016 IEP reflected that, at that time, the student could "consistently and independently read approximately 100 sight words" (Dist. Ex. 55 at p. 4).

At the impartial hearing, the student's mother testified that she met with the district principal (who had attended the April 2016 CSE meeting) in May 2016 to further address concerns expressed at the meeting (see Tr. pp. 516-18). At the May 2016 meeting, the district principal indicated her intention to "research various reading programs, meet with the team, and get back to [the student's mother] on what reading program or reading approaches to use" with the student (Tr. pp. 518-19). The district principal also showed the student's mother a "curriculum map" for third and fourth grades and how to access that information on the district website (Tr. p. 519). To address the concerns the student's mother expressed about "what was actually being taught in the classroom," the district principal offered to provide her with a "weekly summary" or "weekly updates," and the parent agreed (Tr. pp. 519-20).[10] At the conclusion of the May 2016 meeting, the student's mother also agreed to remain in contact with the district principal throughout the summer (see Tr. p. 520).

At some point thereafter, the district principal contacted the student's mother to inform her that she had met with a "reading specialist and [that] they were looking into two programs called Language! Live and Reading Mastery" and asked the student's mother to "do some research on the internet" to "see what [she] thought" (Tr. pp. 520-21). The district principal reached out to the

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[8] The April 2016 IEP included a recommendation that the student attend a district middle school (middle school 2) as the location within which to receive the summer services recommended for July and August 2016, which differed from the location where the student received his summer services for July and August 2015 (compare Dist. Ex. 55 at p. 11, with Parent Ex. 5 at pp. 11-12).

[9] The April 2016 CSE also discussed that the student met the criteria for "alternate assessments," but the parents disagreed (Dist. Ex. 56 at p. 2; see Dist. Exs. 54 at p. 1; 55 at pp. 11-12 [reflecting in the April 2016 IEP that the student would continue to "participate in the same State and district-wide assessments of student achievement that [were] administered to general education students"]).

[10] The hearing record includes copies of the weekly updates provided to the parents from September 2016 through June 2017 (see generally Dist. Exs. 67-97).

student's mother to discuss those reading programs, as well as to provide the parents with a "tutor list from [the district]" to assist the student (Tr. pp. 521-22; see generally Parent Ex. 95). In discussing the two reading programs, the student's mother thought "they seemed okay," but the district principal told her that the district would not use them because the student "was so low that he couldn't use any of the programs," including those used at the district, such as "System 44" and "Read 180" (Tr. pp. 522-23).

In September 2016, the parents exchanged emails with the district principal, the district reading specialist, and the student's then-current special education classroom teacher that documented the efforts to address the student's reading needs, and the parents noted their appreciation for the district principal's "thoroughness in finding the right reading program" for the student (Parent Ex. 58 at pp. 1-2).[11] At the impartial hearing, the student's mother testified that she met with the district principal, the student's special education classroom teacher, and the district reading specialist on September 20, 2016 (see Tr. pp. 523-25). She further testified that when she "brought up the subject of a reading specialist again," the district said "no," and explained that the student's special education classroom teacher—who was "Orton-Gillingham trained"—would administer that "approach with [the student]" (Tr. pp. 524-25). According to the student's mother, the district explained that a special education teacher "could do reading" and a reading specialist was not needed (Tr. p. 525). In an email dated September 20, 2016 that the parents sent as a follow-up to the meeting, the parents requested a copy of the student's results from the "reading assessment" that had been mentioned at the meeting (Parent Ex. 58 at p. 5). In the same email, the parents asked the district reading specialist for "documentation of how [the district] arrived at Orton-Gillingham as the program of choice" for the student (id.).

On October 14, 2016, a CSE convened for a "[r]equested [r]eview" (Dist. Exs. 50 at p. 1; 51 at p. 1). According to the meeting minutes, the CSE's review focused on the "reading support" for the student, his annual goals in reading, and his progress in reading, as well as the student's inclusion in a general education science class (Dist. Ex. 51 at pp. 1-2). At the meeting, the student's mother—who attended with her own mother and a special education advocate—inquired about "individual reading support from a reading specialist" (id. at p. 1). It was reported that the student's special education classroom teacher was currently "using several other modalities to teach reading" to the student and was "trying to advance his skills" (id.). It was also reported that the special education classroom teacher had the "reading specialist working with her at times to discuss methodology" and perhaps the student's mother would benefit from meeting with the reading specialist to discuss the student's "progress with reading via progress monitoring" (id.). The CSE noted that a "progress monitoring meeting would be scheduled in December to be sure there [was] enough data to show [the student's] progress" (id.). Based upon the discussions held at the meeting, the CSE "updated" the student's present levels of performance in the IEP to "reflect current level[s] of performance shared at the meeting" ("consistently and independently read approximately 115 sight words") and "adjusted" the duration of time the student attended the 8:1+1 special class to "reflect his integration in general education accurately" (from 5 hours per day to 4 hours 15 minutes per day) (id. at p. 2; compare Dist. Ex. 50 at pp. 3, 10, with Dist. Ex. 55 at pp. 1, 4, 10). As a final matter, the CSE removed the student's summer services program "from last year" in the IEP and

[11] The student had the same district special education classroom teacher in third and fourth grades (see Tr. pp. 296, 299-300).

denoted a deferral "to spring for the upcoming summer" (Dist. Ex. 51 at p. 2; see Dist. Exs. 40 at p. 1; 50 at pp. 1, 10).[12]

In spring 2017, planning began for the student's upcoming 2017-18 school year and in a meeting notice dated April 4, 2017, the district invited the parents to attend the student's annual review scheduled for April 20, 2017 (see Dist. Ex. 37 at p. 1). Shortly thereafter in an email sent to the parents on April 7, 2017, the district school psychologist followed-up about the tour of the "program at [middle school 1]" scheduled for April 8, 2017 (Parent Ex. 61 at p. 1).[13] The district school psychologist also shared her thoughts in the same email about addressing the student's "middle school transition in a separate meeting" and focusing on the student's "program/goals" for the remainder of the 2016-17 school year at the upcoming April 20, 2017 CSE meeting (id.). She suggested postponing the "decision making for next year" in order to allow the parents to "have more time" to consider those decisions for the student (id.). The district school psychologist reminded the parents, however, that "[w]e c[ould] still discuss it at the meeting, but we won't need to make any decision about next year formally at this next CSE" and a "separate meeting" could be scheduled for "May or June" (id.). She also indicated that they could "talk about the paperwork for the [functional behavioral assessment (FBA)]" when they met the following day for the tour (id.).[14]

On April 28, 2017, a CSE convened to conduct the student's annual review, and per agreement by the parents, developed an IEP to be implemented from May 1, 2017 through June 23, 2017 (see Dist. Exs. 32 at pp. 1, 10-11; 33 at p. 1; 35 at p. 1).[15] Finding that the student

[12] After the October 2016 CSE meeting, the parents consented to amend the student's IEP without a meeting in December 2016 (removed the student's annual goal for tying his shoe) and in March 2017 (to modify the student's testing accommodations) (see generally Dist. Exs. 36; 38-47). The March 2017 amendment to the student's IEP reflected changes referenced in State guidance issued in November 2016, after the October 2016 CSE meeting (see "Changes in Allowable Testing Accommodations on the Grades 3-8 New York State English Language Arts Assessments," Office of Instructional Support Mem. [Nov. 2016], available at http://www.p12.nysed.gov/specialed/publications/documents/changes-in-allowable-testing-accommodations-grade-3-8-ela.pdf).

[13] Students in the district transitioned to middle school for fifth grade (see Tr. pp. 157-58). At the impartial hearing, the student's mother testified that the tour of middle school 1 was then rescheduled for May 2, 2017, due to her own illness but was then cancelled within one hour of the rescheduled tour date because, in her opinion, the district had received the parents' due process complaint notice (see Tr. pp. 593-95; Parent Ex. 61 at p. 1). By that time, the student's mother had already visited middle school 2 on March 31, 2017 (see Tr. pp. 569-73; 592-93).

[14] On April 27, 2017, a member of the district's assistive technology team observed the student (see Parent Ex. 33 at p. 2). According to the evaluation report, the assistive technology team was "awaiting parent consent" and further noted that, at that time, the parents "would like to hold off" (id.).

[15] The April 2017 meeting minutes reflected that the student's mother attended the CSE meeting with the same special education advocate who also attended the October 2016 CSE meeting (compare Dist. Ex. 32 at p. 1, with Dist. Ex. 50 at p. 1). The meeting minutes further reflected that the "program for next year would not be determined at this meeting and that the CSE would reconvene due the parent's previous request to have her attorney present" (Dist. Ex. 33 at p. 1). It was noted in the meeting minutes that a CSE would "reconvene before the end of June to discuss [summer services] and [the] fall program and services" (id. at p. 2; see Dist. Ex. 33 at pp. 10-11; see also Dist. Ex. 32 at p. 1).

remained eligible for special education and related services as a student with autism, the April 2017 CSE recommended an 8:1+1 special class placement with related services consisting of individual and small group speech-language therapy, individual and small group OT, and individual and small group PT for the remainder of the 2016-17 school year (see Dist. Ex. 32 at pp. 1, 10).[16] Near the conclusion of the meeting, the CSE asked the student's mother if she wanted to proceed with an FBA of the student and "sign [the] consent (sent 4/4/17)"—but the student's mother "requested that no action be taken at this time with an FBA" (Dist. Ex. 33 at p. 2).[17]

On June 21, 2017, a CSE convened for a "[r]equested [r]eview" (Dist. Exs. 27 at p. 1; 28 at p. 1; 29 at p. 1; see Parent Exs. 9 [audio recording on CD of June 2017 CSE meeting]; 11 at p. 2 [written transcript of June 2017 CSE meeting]). At the outset of the meeting, the district coordinator of special education programs (district coordinator) (who also fulfilled the role of CSE chairperson) emphasized that the "focus of this meeting [was] to look at summer services" and only summer services (Parent Ex. 11 at p. 2; see Dist. Ex. 28 at p. 1). In response, the special education advocate attending the meeting with the student's mother stated that they "want[ed] to look at next year" even though she understood that the coordinator "had considered it just [for] summer services" (Parent Ex. 11 at p. 2; see Dist. Ex. 28 at p. 1).[18] In addition, the special education advocate stated that "we did plan on looking at next year," that the district was "depriving the family of participating in the decision making by not taking a look at this point in next year," and that they wanted the district to "propose the recommendation" (Parent Ex. 11 at pp. 2-3).

In response, the district coordinator stated that the CSE was "not prepared" to address the next school year, noting that the "purpose of the meeting with the notification" was to address summer services "only" (Parent Ex. 11 at p. 3). The coordinator also remarked that the CSE was "not . . . ready to move forward" with planning for next year in light of the "impartial hearing request and the pieces that [were] in place" (id.). The coordinator then specifically addressed the student's mother by telling her that she could "express some thoughts and feelings, concerns, [and] questions that [she] may have" and "obviously [the CSE] c[ould] take that information in and consider it" (id.). The coordinator further indicated that the CSE was "not ready to make that

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[16] The evidence in the hearing record reveals that the parents filed a due process complaint notice "challenging the program and placement" recommended in the April 2017 IEP (Dist. Ex. 3 at p. 4). At the impartial hearing, the student's mother testified that the previous due process complaint notice had been filed with the district on or about May 2, 2017 (see Tr. pp. 593-95). The hearing record does not include a copy of the parents' due process complaint notice filed with the district in or around May 2017 (see generally Tr. pp. 1-1352; Parent Exs. 1-31; 33-61; 64-80; 85-93; 95; 97-98; 100; 102-103; Dist. Exs. 1-101; 103-109; IHO Exs. I-X). However, the parties proceeded to an impartial hearing, and the parents then filed an amended due process complaint notice dated September 18, 2017; in addition, the IHO assigned to the matter (who would be the same IHO subsequently assigned to, and who presided over, the parents' due process complaint notices in the matter underlying the instant appeal) issued an interim order on pendency, dated October 21, 2017 (see Dist. Exs. 3 at p. 4; 13; 16 at pp. 1, 3, 8). At some point thereafter, the parents withdrew the due process complaint notices filed in 2017 (see Tr. p. 595).

[17] According to the April 2017 IEP, the student could "consistently and independently read approximately 150 sight words" (Dist. Ex. 32 at p. 3).

[18] The special education advocate was the same individual who previously attended meetings with the student's mother in October 2016 and April 2017 (compare Parent Ex. 11 at p. 1, with Dist. Ex. 32 at p. 1, and Dist. Ex. 50 at p. 1).

recommendation" and she understood that "we would meet in the summer to determine what would happen" and to involve the parent in the decision-making process (id. at pp. 3-4).

At that point, the CSE resumed its focus on making recommendations for the student's summer 2017 services (Parent Ex. 11 at pp. 4-17). As part of this process, the special education advocate expressed "some . . . ideas" that they thought would be "more successful and better choices" for the student for summer 2017, which included three suggestions for out-of-district programs and services (id. at pp. 13-14). The coordinator explained why the CSE could not recommend the out-of-district programs suggested, and made the final recommendation for an 8:1+1 special class placement and related services for summer 2017 (id. at pp. 14-15). The special education advocate voiced the opinion that the summer 2017 services were "not appropriate," that the student's mother "reserve[d] her right to challenge if the district ma[de] the recommendation," and that they were "not going to respond at th[at] moment" (id. at p. 16). The student's mother stated that she would "think about it" (id.). At the conclusion of the meeting, the coordinator asked if anyone had any further questions or thoughts, and hearing none, the meeting ended (id. at pp. 16-17).

The June 2017 IEP developed at the meeting—which reflected implementation dates from July 4, 2017 through August 15, 2017—documented the CSE's recommendation that the student attend an 8:1+1 special class placement (5.5 hours per day) with the following related services: individual and small group speech-language therapy, individual and small group OT, and individual and small group PT (see Dist. Ex. 27 at pp. 1, 10-11; see also Dist. Ex. 26 at p. 1).[19]

On August 25, 2017, a CSE convened for a "[r]equested [r]eview" and developed an IEP to be implemented from September 5, 2017 through May 1, 2018 (Dist. Exs. 23 at p. 1; 24 at p. 1; 25 at p. 1).[20] Finding that the student remained eligible for special education and related services as a student with autism, the August 2017 CSE recommended an 8:1+1 special class placement (five hours per day) with the following related services: individual and small group speech-language therapy, individual and small group OT, and individual and small group PT (see Dist. Ex. 23 at pp. 1, 10). In addition, the August 2017 CSE recommended the use of refocusing and redirection, a positive reinforcement plan, and a calculator as supplementary aids and services, program modifications, and accommodations (id. at pp. 10-11). The August 2017 IEP also reflected a recommendation for one 60-minute team meeting per month and testing accommodations (id. at pp. 11-12). The August 2017 CSE created annual goals targeting the student's needs in the areas of reading, writing, mathematics, speech-language, and motor skills (id. at pp. 8-9). Finally, the August 2017 CSE recommended that the student receive the special

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[19] The June 2017 IEP included a recommendation that the student attend a district middle school (middle school 3) as the location within which to receive the summer services recommended for July and August 2017 (compare Dist. Ex. 27 at p. 11, with Dist. Ex. 55 at p. 11, and Parent Ex. 5 at pp. 11-12).

[20] The August 2017 IEP also reflected April 20, 2018 as the student's anticipated annual review date, and May 12, 2018 as the anticipated date for the student's reevaluation (see Dist. Ex. 23 at p. 1). The student's mother attended this meeting with the special education advocate and her attorney (see Dist. Exs. 23 at p. 1; 24 at p. 1). The district's then-current attorney was also present at the meeting (see Dist. Exs. 23 at p. 1; 24 at p. 1). According to the meeting minutes, the August 2017 CSE meeting began at 1:08 p.m. and ended at 3:28 p.m. (see Dist. Ex. 24 at p. 5).

education program for the 2017-18 school year at middle school 1 (id. at p. 1; see Dist. Exs. 22 at p. 1 [comprising an August 25, 2017 prior written notice to parents]; 24 at p. 5).[21]

At the impartial hearing, the student's mother testified that after the August 2017 CSE made its recommendation, she was "not in agreement, and [she] went home and discussed this with [her] husband and the [special education advocate]" (Tr. pp. 664-65). She further testified that at some point thereafter, she contacted Mandala to set up a visit to the program, and on September 1, 2017—or what she characterized as the "Friday before Labor Day"—she went to Mandala and met with the director/founder of the school (see Tr. pp. 665-69). After her visit, the student "started shadowing" at Mandala, as part of its admissions process, during the "second week of September" (Tr. pp. 666-67, 678).

In a letter dated September 7, 2017, the parents—through their attorney—wrote to confirm the "telephone conference" held on August 31, 2017, wherein the parents notified the district that they were "investigating alternate placements instead of the recommended [sic] by the CSE" (Dist. Ex. 20). According to the letter, the parents informed the district that they were "fundamentally opposed to the proposed IEP" generated by the August 2017 CSE and had "decided to obtain educational services" at Mandala while awaiting the "pendency hearing and a pendency determination" related to the impartial hearing proceeding at that time (id.). The parents noted that they "reserve[d] the right to seek reimbursement for [the] costs associated with [the student's] placement including tuition, transportation and related services" (id.).

In a letter to the district dated September 19, 2017, the parents advised that they had "not yet received a copy of the IEP" from the August 2017 CSE meeting, and thus, the district had violated State regulation (Parent Ex. 21 [internal citations omitted]). The parents also noted, however, that they "ha[d] declined placing their child in the program recommended by the district's CSE" but had not "decline[d] related services and request[ed] [the] same be implemented at once" (id.). The district's then-current attorney responded in a letter dated September 27, 2017, which indicated that the district had "finalized the student's IEP and sent it to the parent[s] on September 20, 2017" (Dist. Ex. 18; see Parent Ex. 98).

By letter dated October 31, 2017, the parents notified the district of their intentions to unilaterally place the student at Mandala for the 2017-18 school year at district expense (see Parent Ex. 53). In addition, the parents indicated that they rejected the "placement proposed" by the August 2017 CSE (id.). As concerns, the parents noted that the district failed to "provide [a free appropriate public education (FAPE)] in a Least Restrictive Environment [LRE]" and "the appropriate level of related services and specialized instruction" (id.).[22]

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[21] In a prior written notice dated September 1, 2017, the district sought the parents' consent to conduct an assistive technology evaluation of the student (see Dist. Ex. 21). The student's mother testified at the impartial hearing that she did not provide the district with consent to conduct the evaluation (see Tr. pp. 962-63).

[22] According to the October 2017 letter, the parents "attached the previously [sic] notice for [the district's] convenience" (Parent Ex. 53). The hearing record does not clarify what previous notice had been attached to the letter (see generally Tr. pp. 1-1352; Parent Exs. 1-31; 33-61; 64-80; 85-93; 95; 97-98; 100; 102-103; Dist. Exs. 1-101; 103-109; IHO Exs. I-X).

A. Due Process Complaint Notice

By due process complaint notice dated April 16, 2018 (April 2018 due process complaint notice), and as relevant to this appeal, the parents alleged that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years (see Dist. Ex. 3 at pp. 1-2, 7). As a basis for these allegations, the parents generally pointed to the "recommendations" in the student's April 2016 IEP (fourth grade, 2016-17 school year), and the student's April 2017, June 2017, and August 2017 IEPs (fifth grade, 2017-18 school year) (id. at pp. 1-2). With regard to the April 2016 IEP, the parents more specifically asserted that the IEP reflected "concerns" expressed at the CSE meeting about the student's "reading progress," and relatedly, that the parents were "seeking a consultation with the reading specialist" (id. at pp. 2-3). In addition, the parents indicated that the "CSE failed to address the [s]tudent's lack of progress" during the latter half of the 2015-16 school year and during the 2016-17 school year, and the CSE failed to "make any recommendations towards providing additional services resulting in a lack of challenging curriculum" (id. at p. 5). As relief for the district's alleged failure to offer the student a FAPE for the 2016-17 school year, the parents sought an order directing the district to provide the student with compensatory educational services in reading (id. at p. 7).

With respect to the 2017-18 school year, the parents contended that the April 2017 IEP—which recommended a special education program to be implemented from May 1, 2017 through June 23, 2017—did not include a "recommendation for the extended school year services and programming for the upcoming summer for the 2017-2018 school year" (Dist. Ex. 3 at p. 4). The parents noted, however, that the "extended school year determination was deferred" and that a CSE subsequently convened "prior to the commencement of the extended school year session" (id.).

With respect to the June 2017 IEP, the parents alleged that, although the CSE made recommendations for "extended school year services" (i.e., summer 2017), the CSE failed to "make any recommendations for the 2017-2018 school year" (Dist. Ex. 3 at p. 4). As noted in the April 2018 due process complaint notice, the parents indicated that the "CSE determined that it did not have enough information to make a recommendation" for the 2017-18 school year (id.). In addition, the parents contended that the June 2017 CSE "committed multiple procedural violations" including the failure to "consider the educational placement for the 2017-2018 school year [and] by failing to recommend[] a specialized reading program" (id. at p. 7).

Turning to the August 2017 IEP, the parents alleged that, "[a]fter a lengthy discussion concerning the student's goals, the CSE recommended a program for the upcoming school year without the benefit of the evaluations or assessments such as an FBA, assistive technology evaluation, reading evaluation, OT, PT, or [s]peech[-][l]anguage evaluation" (Dist. Ex. 3 at p. 5). The parents further alleged that the CSE failed to discuss "alternative programs" despite the "grave concerns" the parents had "that the student cohort of the recommended 8:1+1 was inappropriate with students spanning four grade levels and possessing disparate skills and needs and deficits" (id.). The parents also alleged that the 8:1+1 special class placement was not appropriate because the August 2017 CSE—as acknowledged by the June 2017 CSE—"lacked data to make an appropriate recommendation" (id.). In addition, the parents asserted that the timing of the August 2017 CSE meeting "eliminated various options" for programs and placements the parents could consider (id.). Finally, the parents alleged that the August 2017 CSE "committed multiple procedural violations," which included "making a recommendation for the 2017-2018 school year

without co[nducting] reevaluations that it had deemed necessary, by failing to consider alternate placements, and by being predetermined to make a recommendation, [and] making an inappropriate recommendation for . . . the 8:1+1 [middle school 1] alternatively assessed program" (id. at p. 7). With regard to the 8:1+1 special class placement, the parents asserted that it was not appropriate because it "contained students creating an inappropriate cohort making it difficult to have proper differential learning . . . with a lack of opportunity to be exposed and interact with typically developing peers thereby slowing the [s]tudent's speech language growth" (id.; see Dist. Ex. 3 at p. 6).

As relief for the district's alleged failure to offer the student a FAPE for the 2017-18 school year, the parents requested reimbursement for the costs of the student's tuition at Mandala for the 2017-18 school year, as well as reimbursement for the costs of the student's round-trip transportation to Mandala (see Dist. Ex. 3 at p. 8).

B. Events Post-Dating the April 2018 Due Process Complaint Notice

Shortly after his appointment to this matter, the IHO held prehearing conferences with the parties on May 24, 2018; June 18, 2018; June 21, 2018; and July 16, 2018 (see IHO Decision at p. 3).[23] The IHO and the parties scheduled two impartial hearing dates for September 2018, which were cancelled when the parents filed an amended due process complaint notice, dated September 20, 2018 (September 2018 due process complaint notice) (id.; see Dist. Ex. 1 at p. 1). As relevant to this appeal, the parents' September 2018 due process complaint notice repeated all of the same information, allegations, and requested relief with respect to the 2016-17 and 2017-18 school years as set forth in the April 2018 due process complaint notice (compare Dist. Ex. 1 at pp. 1-6, 9-11, with Dist. Ex. 3 at pp. 1-8).

After the parents filed the September 2018 due process complaint notice, the IHO held another prehearing conference in October 2018 (see IHO Decision at p. 3).[24] The IHO and the parties scheduled four impartial hearing dates to take place in January and February 2019; however, given the IHO's winter driving concerns, all four impartial hearing dates were cancelled "with the consent of both attorneys" and rescheduled to occur over four dates in April and May 2019 (id.). In or around that same time, the district's legal representation changed and the impartial hearing dates had to be "scrubbed and reset" to accommodate the schedule of the new attorney to four different impartial hearing dates, namely, April 29, 2019; April 30, 2019; May 30, 2019; and May 31, 2019 (id. at pp. 3-4; see also Tr. pp. 1, 206, 418, 642).

[23] The hearing record does not include any summaries or transcripts of the four prehearing conferences held throughout May, June, and July 2018 (see generally Tr. pp. 1-1352; Parent Exs. 1-31; 33-61; 64-80; 85-93; 95; 97-98; 100; 102-103; Dist. Exs. 1-101; 103-109; IHO Exs. I-X). The IHO and the parties are reminded that State regulation requires that a "transcript or a written summary of the prehearing conference[s] shall be entered into the record by the [IHO]" (8 NYCRR 200.5[j][3][xi]).

[24] The hearing record does not include any summaries or transcripts of the October 2018 prehearing conference (see generally Tr. pp. 1-1352; Parent Exs. 1-31; 33-61; 64-80; 85-93; 95; 97-98; 100; 102-103; Dist. Exs. 1-101; 103-109; IHO Exs. I-X).

C. Impartial Hearing

On April 29, 2019, the parties proceeded to the impartial hearing (see Tr. p. 1). After completing the second impartial hearing date on April 30, 2019, the IHO held a prehearing conference to "specify the issues raised" in the parents' September 2018 due process complaint notice (IHO Ex. I at p. 1; see Tr. pp. 1, 206, 413-14). The need for the prehearing conference arose in part because the IHO, upon reading the parents' September 2018 due process complaint notice at the impartial hearing held on April 30, 2019, sought clarification from the parents' attorney about whether certain language was intended to raise an issue regarding the 2016-17 school year or was included in the due process complaint notice as background information (see Tr. pp. 206, 209-15; Dist. Ex. 1 at pp. 3-5). In response, the parents' attorney stated that he "believe[d] that was for historical purposes" and that the parents' "claim [was] strictly reimbursement" (Tr. pp. 209-10). The IHO also expressed some confusion regarding the parents' request for compensatory educational services for the 2016-17 and 2018-19 school years in the September 2018 due process complaint notice (see Tr. pp. 210, 212-14; Dist. Ex. 1 at p. 10 [pointing explicitly to paragraph 6]). Having considered the IHO's concerns, the parents' attorney later clarified that the parents withdrew the request for compensatory educational services in paragraph "6" of the September 2018 due process complaint notice (Tr. pp. 319-20; Dist. Ex. 1 at p. 10).

At the conclusion of April 30, 2019 impartial hearing date, the district's attorney remained undecided as to whether he would rest the district's case-in-chief because he was "still not 100 percent clear" about the "issues in this proceeding" (Tr. p. 411). The IHO responded, "[w]ell, you have the [p]arents' due process complaint, and those are the issues that are raised" (Tr. pp. 411-12). The district's attorney stated that he did not "understand the issues" and that he was not "clear" about the issues, and moreover, issues were typically clarified at a prehearing conference, but noted that "[w]e didn't do that in our pre-hearing conference" (Tr. p. 412). Given that the district's decision to either call another witness or rest its case ultimately turned on further clarification of the issues, the IHO suggested holding a prehearing or "inter-hearing" conference to "get a definite position on that" and the parties agreed (Tr. pp. 410-14).

In a letter dated May 17, 2019, the IHO summarized the prehearing conference, and as relevant to this appeal, listed the following as the issues for the impartial hearing: compensatory educational services in reading for the 2016-17 school year, reimbursement for the costs of the parents' unilateral placement of the student at Mandala for the 2017-18 school year, and reimbursement for the costs of the student's round-trip transportation to Mandala during the 2017-18 school year (IHO Ex. I at pp. 1-2). The IHO further reflected in the letter that he took note of the district's assertion with respect the statute of limitations pertaining to the 2016-17 school year (id. at p. 2). The impartial hearing resumed on May 30, 2019, and on that date, the district's attorney decided to present one additional witness for its case-in-chief and then rested (see Tr. pp.

418-21, 481).[25] The impartial hearing continued on May 31, 2019, and concluded on July after seven total days of proceedings (see Tr. pp. 643-1352).[26]

D. Impartial Hearing Officer Decision

In a decision dated October 4, 2019, the IHO initially addressed whether the student was entitled to compensatory educational services in reading for the 2016-17 school year (see IHO Decision at pp. 10-14).[27] As part of this analysis, the IHO considered the district's argument that the statute of limitations confined the parents' claims regarding the 2015-16 school year to the period between "April 16, 2016"—as the date two years prior to the date of the parents' due process complaint notice—and the conclusion of the 2015-16 school year, which the IHO quantified as a 10-week period of time (IHO Decision at p. 13). The IHO agreed with the district's argument and limited the parents' contentions to this 10-week period (id.).

Turning to the merits of the parents' arguments for an award of compensatory educational services, the IHO surmised that the parents' "challenge appear[ed] to be based on the fact that the [district s]pecial [e]ducation [t]eacher . . . stated [at the April 2016 CSE meeting] that she was working on Orton-Gillingham with [the s]tudent and that [the s]tudent was making limited progress" (IHO Decision at p. 13). The IHO further surmised that the parents' "challenge appear[ed] to be based on the fact that [the district s]pecial [e]ducation [t]eacher . . . was not certified by the Orton-Gillingham Academy" (id.). Finding that "Orton-Gillingham" referred to a "method," the IHO indicated that the district special education teacher had "become familiar" with this method at a previous nonpublic school and by "attending training sessions" that included the Orton-Gillingham method (id. at pp. 13-14). The IHO further indicated, however, that "[t]here was no requirement that [the district special education teacher] be certified in such methodology" (id. at p. 14). The IHO addressed the parents' allegation that they had been "misled" with respect to "what methodology" the district special education teacher used with the student in the classroom, noting that "such d[id] not establish that [the s]tudent was not receiving [a] FAPE"

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[25] Since the hearing record lacks any other summary or transcription of the May 2019 prehearing conference, it is altogether unclear how the IHO identified compensatory educational services for the 2016-17 school year as either an "issue" to be resolved, or as relief being sought in this case when, at the April 30, 2019 impartial hearing date, the parents' attorney specifically withdrew this "issue" or claim for relief (compare IHO Ex. I at p. 1, with Tr. pp. 319-20, and Dist. Ex. 1 at p. 10).

[26] While bearing in mind that the district's legal representation changed in 2019, the impartial hearing in this matter far exceeded the timelines prescribed in State regulations and without any written documentation of extensions either requested, granted, or denied by the IHO throughout the entirety of this matter (see 8 NYCRR 200.5[j][5]; see also IHO Decision at p. 3; Tr. pp. 1, 1124). The IHO and the parties are reminded that, consistent with State regulations, an IHO "may grant specific extensions of time" but "only after fully considering the cumulative impact" of several factors, and the IHO is required to "promptly respond in writing to each request for an extension" and the written responses "shall become part of the record" (8 NYCRR 200.5[j][5][i]-[iv]).

[27] For clarity, the IHO premised his findings and conclusions based upon the "issues" agreed upon by the parties at the May 2019 prehearing conference and set forth in the IHO's letter summarizing the conference, which had all been based upon the parents' September 2018 due process complaint notice (compare IHO Decision at pp. 4, 9-10, with IHO Ex. 1 at pp. 1-2, and Dist. Ex. 1). In addition, the IHO made clear that the parents' September 2018 due process complaint notice "superseded" the parents' April 2018 due process complaint notice (IHO Decision at p. 4).

(id.). In addition, the IHO indicated that an IEP "should not specify a particular methodology, but should leave such to the determination of the [s]pecial [e]ducation [t]eacher" (id.).

Based upon the foregoing, the IHO found that the hearing record was "bereft of any testimony or exhibit" to establish that the student was "not afforded FAPE" during the "last [10] weeks of the 2015-2016 school year" by the special education program recommended in the April 2016 IEP (IHO Decision at pp. 10-14). In addition, the IHO found that the April 2016 IEP, which was to be implemented from May 2016 through May 2017, was "sufficient to meet [the s]tudent's need and insure some progress" (id. at p. 14). As a result, the IHO denied the parents' request for compensatory educational services (id. at pp. 14, 28).

The IHO, as relevant to this appeal, next addressed whether the district offered the student a FAPE for the 2017-18 school year (see IHO Decision at pp. 15-20). Here, the IHO found that the student's IEP had been created at the August 2017 CSE meeting, which "continued [the s]tudent's program [from the 2016-17 school year], consisting of an 8:1+1 [s]pecial [c]lass and the [r]elated [s]ervices" (id. at p. 15). In addition, the IHO noted that the IEP reflected that the student's IEP would be implemented at middle school 1 (id.).

Next, the IHO recited the legal framework for analyzing whether the district offered the student a FAPE for the 2017-18 school year, and included in this framework that, based upon federal regulations, the district was mandated to have an IEP "in effect" for a student with a disability "at the beginning of each school year" (IHO Decision at pp. 16-18). The IHO also noted that pursuant to the district's policy, a student's IEP remained in effect for "one year from its [a]nnual [r]eview date" (id. at p. 18). With this as backdrop, the IHO opined that, because the student was expected to transition into middle school for the 2017-18 school year, the annual review "was of particular importance" (id.). As such, the IHO found that, while the student's annual review in this case occurred at the April 2017 CSE meeting, the CSE "made no determination of the nature or placement of [the s]tudent's program at such [a]nnual [r]eview," but instead, "decided that [the s]tudent's program for the next (2017-2018) year would not be determined and that the [CSE] would reconvene due to [the p]arents' previous request to have her attorney present" (id.). According to the IHO, the April 2017 CSE meeting minutes reflected this information by noting that the "'CSE w[ould] reconvene before the end of June to discuss [summer 2017 services] and [the] fall program and services'" (id.). The IHO also pointed to the testimony offered by the district coordinator, who testified that the parents' advocate at that time had "'stipulated that the parent[s] did not want to talk about September's programming'" (id.). According to the IHO, however, the parents' advocate "pointedly denied having made such statement," and the IHO found the advocate's testimony "to be credible" (id. at p. 19).

As a result of the foregoing, the IHO concluded that the district "committed a serious procedural violation by failing to determine the student's program and placement" for the 2017-18 school year at the April 2017 CSE meeting (IHO Decision at p. 19).

The IHO then turned to the CSE meeting held in June 2017, wherein the parents had been accompanied by their advocate, and which had been convened for the purpose of discussing the student's summer 2017 and "fall program and services" (see IHO Decision at p. 19). Relying upon the CSE meeting minutes, the IHO found, however, that the purpose of the June 2017 CSE meeting was to discuss the student's summer 2017 services because the CSE was "'not prepared at th[at]

time to discuss next year's program and plan[ned] on meeting in the summer to determine this'" (id.). According to the IHO, "what should have been determined in April, at [the s]tudent's [a]nnual [r]eview, was again being denied to the parent[s]" (id.).

Next, the IHO addressed the CSE meeting reconvened in August 2017, which, as reflected in the CSE meeting minutes, "confirmed its recommendation that [the s]tudent's program remain unchanged" and that he would attend an 8:1+1 special class placement with related services within middle school 1 (IHO Decision at pp. 19-20).

Thereafter, the IHO concluded and summarized that the district "committed numerous procedural violations in the preparation" of the student's IEP for the 2017-18 school year, as outlined above, and that such violations had the cumulative effect of impeding the student's right to a [FAPE] and significantly impeding the parent[s'] opportunity to participate in the decision-making process" (IHO Decision at p. 20). In addition, the IHO found that the district failed to "submit credible evidence that the 8:1+1 class at the [assigned public middle school site] was appropriate to meet [the s]tudent's needs" (id.). According to the IHO, the August 2017 CSE had "discussions" concerning "how [the assigned middle school classroom teacher] could teach students spanning four levels and how [the assigned classroom teacher] would communicate with parents" (id.). The IHO noted, however, that the district did not present the assigned classroom teacher or the district school psychologist at middle school 1 as witnesses at the impartial hearing (id.). Overall, the IHO concluded that the district failed to offer the student a FAPE for the 2017-18 school year (id.).

Having found that the district did not offer the student a FAPE, the IHO turned to the question of whether the parents sustained their burden to establish that the student's unilateral placement at Mandala for the 2017-18 school year was appropriate to meet his needs (see IHO Decision at pp. 20-25). The IHO described Mandala as a "non-traditional facility" housed within a "residence with many rooms" with 20 to 21 students who ranged from first grade to eighth grade (id. at p. 21). In addition, Mandala was "staffed by three full-time teachers and part-time instructors in the areas of Art, Language and Music" (id.). The IHO indicated that, "with staff and so few students, teaching c[ould] be accomplished by individually meeting whatever need a student might display without delay" and, due to the small number of students, those students could be "educated together without segregation by age or ability and c[ould] benefit from each other—with or without adult instruction" (id.). The IHO also noted that Mandala acted as a "family, with older students looking after younger ones" and students "graduating from the Mandala School easily me[t] or exceed[ed] State-mandated performance levels" (id.).

The student began at Mandala in the "second week of September 2017 in order to 'shadow' the program," which, based upon testimonial evidence, was described as a "method used to determine if [the student] would be a good fit" for Mandala and "its philosophy" (IHO Decision at p. 22). Mandala's founder testified that, during the shadow period, "he had concerns about [the s]tudent being a part of the [s]chool due to [his] display of some aberrant behaviors" (id. at p. 23). Both the founder and the parents testified that "at the beginning of the school year, the student was instructed solely" by the student's mother, who drove him to Mandala and then "remained at the school for the entire [s]chool day" (id.).

According to the IHO, although the parents were "unable to state" when the student was "enrolled" at Mandala, other than noting that they were awaiting an interim order on pendency (issued October 21, 2017), the IHO "presumed that it was sometime in mid-November of 2017"—to wit, "November 10, 2017"—based upon the timing of the parents' 10-day notice (dated October 31, 2017) informing the district of their intention to unilaterally place the student at Mandala at public expense (IHO Decision at p. 22). However, the IHO indicated that the date of the student's individual education services plan (IESP)—"October 18, 2017"—was at odds with his own presumed date of the student's enrollment at Mandala on November 10, 2017, and "clearly contravene[d] the requirement" mandated under federal regulation for providing a 10-day notice (id. at pp. 22-23).

In order for the parents to sustain their burden of proof, the IHO indicated that Mandala must provide the student with an educational program that was "specifically designed to meet the [student's] unique needs" (IHO Decision at p. 23). Here, the IHO found that, "[c]learly, such was not the case" because the student had "many needs which required services" in speech-language therapy and OT, "as well as deficits in Reading and Math" (id.). The IHO also found that the parents were "fully aware" of the student's needs, "as well as the fact that the Mandala School could not meet such needs"—evidenced further by the parents "immediate efforts in mid-October of 2017" to secure services via an IESP from the district of location (id.). The student's IESP initially provided him with speech-language therapy and OT and later was amended in March 2018 to add specialized reading instruction services for the student (id. at pp. 23-24). To the extent that Mandala's founder testified that he and the student's mother instructed the student in reading, the IHO found that this assertion was "contradicted" by the addition of the specialized reading instruction to the IESP (id. at p. 24).

In conclusion, the IHO found that the parents failed to sustain their burden to establish the appropriateness of Mandala for the 2017-18 school year, "without regard to the supplementary services" provided to the student via an IESP, because Mandala did not provide an "educational program . . . that was specifically designed to meet the [student's] unique needs" (IHO Decision at p. 24). Consequently, the IHO denied the parents' request to be reimbursed for the costs of the student's tuition and relatedly the corresponding round-trip transportation costs expended for the 2017-18 school year (id. at pp. 24, 27-28). Having determined that Mandala was not an appropriate unilateral placement, the IHO did not address whether equitable considerations weighed in favor of the parents' requested relief (id. at p. 25).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying their request for compensatory educational services in reading for the 2016-17 school year, in finding that Mandala was not an appropriate unilateral placement for the student for the 2017-18 school year, and by denying their request for tuition reimbursement. In addition, the parents contend that they are entitled to reimbursement for the costs of the student's round-trip transportation because they are entitled to tuition reimbursement. As relief, the parents seek a determination that the district failed to offer the student a FAPE for the 2016-17 school year and that the student is entitled to compensatory educational services in the form of specialized reading instruction. In addition, the parents assert

that, contrary to the IHO's finding, they sustained their burden to establish the appropriateness of the student's unilateral placement at Mandala and equitable considerations weighed in their favor.[28]

In its answer, the district responds to the parents' allegations and seeks to uphold the IHO's findings that the student was not entitled to compensatory educational services for the 2016-17 school year and that Mandala was not an appropriate unilateral placement for the student. In addition, the district asserts that the parents' request for review should be dismissed for failing to comply with practice regulations. As a cross-appeal, the district argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2017-18 school year as a result of the cumulative impact of procedural violations and in finding that the district failed to submit sufficient evidence to establish that the 8:1+1 special class placement was appropriate to meet the student's needs. As relief, the district seeks an order dismissing the parents' appeal and overturning the IHO's decision to the extent that the IHO found that the district did not offer the student a FAPE for the 2017-18 school year.

In its answer to the district's cross-appeal, the parents respond to the district's allegations and generally argue to uphold the IHO's finding that the district failed to offer the student a FAPE for the 2017-18 school year.

Finally, in a reply, the district responds to the parents' contentions in the answer to the cross-appeal. Additionally, the district alleges that the parents' memorandum of law in support of the amended answer to the district's cross-appeal fails to comply with practice regulations and impermissibly raises issues not set forth in the parents' request for review or that are otherwise beyond the scope of the district's cross-appeal.[29] As a result, the district argues that the parents' memorandum of law should not be considered.

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[28] To be clear, the parents affirmatively assert in the request for review that they do not appeal the IHO's findings that the district was not obligated to offer the student a FAPE for the 2018-19 school year and that Mandala was not an appropriate unilateral placement for the student for the 2018-19 school year (see Req. for Rev. at p. 1). The parents also affirmatively assert that they "abandoned and did not proceed" at the impartial hearing with respect to any "reimbursement of monies paid" for privately obtained speech-language services for the student, "nor dispute the ruling from the IHO" (id.). As such, the IHO's 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]).

[29] To the extent that the parents elaborate or expand upon arguments in support of the issues in the request for review within the memorandum of law submitted in support of the amended answer to the district's cross-appeal, or argue additional grounds upon which to conclude that the district failed to offer the student a FAPE or that equitable considerations weighed in favor of the requested relief for the 2017-18 or 2018-19 school years solely within the memorandum of law, the parents' attorney is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-060). State regulation directs that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by [an SRO], except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any issues included solely within the parents' memorandum of law—and as identified by the district in its reply—have not been properly raised and will not be considered or addressed in this decision.

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]).[30]

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. Compliance with Practice Regulations

The district contends that the request for review must be dismissed and that the parents' memorandum of law should not be considered for failure to comply with State regulations governing the form requirements for pleadings (see 8 NYCRR 279.8[a][3]; [b]; [c][1]; [c][3]).[31] More specifically, the district alleges that the request for review fails to include "consecutively numbered pages, fails to state the specific relief sought, fails to include citations to the record on

[30] 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).

[31] The district cites to the wrong State regulation—8 NYCRR 279.3, rather than 8 NYCRR 279.8—in support of its arguments pertaining to the request for review (see Answer & Cr. App. at ¶¶ 20-21).

appeal, and fails to identify relevant page number(s) in the hearing decision, hearing transcript and exhibits" (Answer & Cr. App. at ¶ 20).[32] In its reply, the district contends that the parents' memorandum of law submitted in support of the amended answer should not be considered because it violates State regulation by exceeding the 10-page limit (see Reply at ¶¶ 1-4).

State regulation provides that the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Generally, section 279.8 of the State regulations describes both the form and content requirements for pleadings and memoranda of law submitted to the Office of State Review in connection with the administrative review process (see generally 8 NYCRR 279.8). With respect to form requirements, section 279.8 requires, in part, that all pleadings and memoranda of law must be assembled with "pages consecutively numbered and fastened together" (8 NYCRR 279.8[a][3]). Another subparagraph of the same regulation requires that a "memorandum of law in support of an answer to a cross-appeal or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).

Consistent with the district's contention, the parents' request for review violates the form requirements because it was not assembled with consecutively numbered pages (see generally Req. for Rev.). Additionally, the parents' request for review fails to specify the relief requested—other than noting unspecified "compensatory specialized reading instruction"—in the conclusion and a strong inference that the parents seek an award of tuition reimbursement for the district's failure to offer the student a FAPE for the 2017-18 school year (id. at pp. 2-6, 9). In addition, the request for review includes sparse citations to the hearing record (transcript or exhibits) and fails to identify the relevant page numbers in the IHO's decision, as per State regulation (id. at pp. 1-9). As for the

[32] The parents, without explanation, did not submit a reply to the district's answer and therefore, did not respond to the district's allegations that the request for review failed to comply with the practice regulations (see 8 NYCRR 279.6[a]-[b]; Answer & Cr. App. at ¶¶ 20-21).

parents' memorandum of law, the district correctly asserts that, as a 14-page document, it violates the 10-page limit (see generally Parent Mem. of Law).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; 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]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).[33] However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).[34]

Additionally, in weighing whether to dismiss the parents' appeal outright for the failure to comply with both the form and content requirements set forth in the practice regulations described above, another consideration is the parents or the parents' attorney's history of compliance. An examination of decisions issued in previous State-level administrative appeals reveals that the instant appeal is the first time the parents' attorney has appeared in this role, and thus, yields no previous admonitions with respect to the pleading requirements of Part 279. However, the parents' attorney is specifically cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Consequently, at this juncture, taking into account that the parents and their attorney have not

[33] For example, the parents' original answer to the district's cross-appeal was rejected by the undersigned SRO because it failed to comply with the form requirements (it was not double-spaced text), and the SRO provided the parents with the opportunity to submit an amended answer to the district's cross-appeal. While the parents were not further directed to review whether the corresponding memorandum of law met the form requirements in State regulation, the parents did not take the opportunity to adjust the memorandum of law submitted in support of the amended answer to the district's cross-appeal and instead, resubmitted the same document sent with the original answer to the cross-appeal (see Reply at ¶¶ 1-4).

[34] Ultimately, while the merits of the more easily discernable issues in the request for review will be addressed with respect to the 2016-17 school year, the parents' attorney is strongly cautioned that the failure to comply with the practice regulations in the future may result in dismissal of an appeal, in its entirety, and with prejudice, and without the opportunity to amend the pleading as offered, here, with regard to the amended answer to the district's cross-appeal. If the parents, or the parents' attorney for that matter, require additional guidance on how to prepare pleadings in compliance with practice regulations, assistance, including samples forms for what is expected in a request for review and memorandum of law, is available on the Office of State Review's website (see https://www.sro.nysed.gov/book/prepare-appeal).

engaged in a pattern of noncompliance in proceedings before this Office, the lack of compliance in the instant appeal will not result in a dismissal of the parents' appeal in its entirety but will severely circumscribe the issues to be addressed on the merits as further discussed below.[35]

2. Scope of Impartial Hearing and Review

Before proceeding to a review of the merits, a further determination—beyond disposing of issues the parents impermissibly raised in the memorandum of law that were not identified as issues in the request for review or that were otherwise beyond the scope of the district's cross-appeal—must be made regarding which claims are properly before me on appeal, and more specifically, with respect to the 2016-17 school year. While this analysis should not generally be required when an IHO conducts a prehearing conference to identify and clarify the issues to be resolved at the impartial hearing, it becomes necessary when, as in this case, the prehearing conference only produced a list of the relief sought by the parents, as opposed to identifying the alleged violations of the IDEA, federal regulations, State law, or State regulations that could potentially form the basis to find that the district failed to offer the student a FAPE (compare IHO Ex. I, with Dist. Ex. 1).

It is also required, in part, because the parents frame the IHO's error as failing to address their request for compensatory educational services for the 2016-17 school year. If the IHO failed to address the 2016-17 school year, it then becomes necessary to determine whether the unaddressed issue must be remanded to the IHO. If, however, the IHO did address the parents' request for compensatory educational services, it must then be determined whether the IHO exceeded his jurisdiction by sua sponte raising, addressing, and relying upon issues concerning the district special education teacher's qualifications to provide instruction using the Orton-Gillingham methodology—which the parents did not raise as issues in the September 2018 due process complaint notice—in order to conclude, in part, that the district offered the student a FAPE for the 2016-17 school year and which the parents now argue on appeal as the basis for overturning the IHO's finding.

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. 13-151; Application of a Student with a Disability, Appeal No. 09-141). 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 300.508[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. §

[35] In a similar vein, on the case information statement required by State regulation (8 NYCRR 279.2[e]), the parents also failed to accurately check the correct boxes pertaining to issues that they intended to raise in the request for review. Notably, the parents checked 13 of 20 possible issues available on the form case information statement, including issues that were not even peripherally related to or raised at the impartial hearing, such as required notices and child find. While the case information statement does not bind the parents to those issues checked, in this instance, the lack of care with which the case information statement was prepared further mirrors the parents' attorney's approach to achieving a clear articulation of issues for which the parents seek review on appeal in the request for review.

1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][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]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parents—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, it is undisputed that, when the parties and the IHO held the impartial hearing on April 29, 2019, the allegations and issues raised in the September 2018 due process complaint notice formed the basis for the issues to be resolved at the impartial hearing, which the IHO correctly noted within the decision (see IHO Decision at p. 4; IHO Ex. I at p. 1; see also Tr. pp. 593-95; see generally Dist. Ex. 1).

Turning then to the first point to be determined, a review of the IHO's decision does not support the parents' contention that the IHO failed to address their request for compensatory educational services for the 2016-17 school year. With respect to the 2016-17 school year, the hearing record contains at least five IEPs that include recommendations for that school year, beginning with the April 2016 IEP developed at the student's annual review (to be implemented May 2016 through May 2017) and continuing thereafter with the October 2016 IEP, the December 2016 IEP, the March 2017 IEP, and the April 2017 IEP (to be implemented May 1, 2017 through June 23, 2017) (see Dist. Exs. 36; 38-47; 50 at p. 1; 55 at p. 1). However, of these five IEPs, the parents' September 2018 due process complaint notice only made reference to the April 2016 IEP and the April 2017 IEP (see Dist. Ex. 1 at pp. 1, 3-4, 9-11).

With respect to the April 2016 IEP, the parents' September 2018 due process complaint notice set forth all of the recommendations contained therein, but did not assert any challenges to those recommendations aside from noting that the IEP reflected "concerns" expressed at the CSE meeting about the student's "reading progress" and that the parents were "seeking a consultation with the reading specialist" (Dist. Ex. 1 at p. 2). The September 2018 due process complaint notice more generally indicated in a separate paragraph that the "CSE failed to address the [s]tudent's lack of progress" during the latter half of the 2015-16 school year and during the 2016-17 school year, and the CSE failed to "make any recommendations towards providing additional services resulting in a lack of challenging curriculum"—but failed to identify the specific CSE(s) that committed these alleged failures (id. at pp. 5, 9-11).[36]

[36] The final lines of that same paragraph within the September 2018 due process complaint notice turn to recommendations for the student's fifth grade, 2017-18 school year, and, on its face, have nothing to do with the recommendations in the April 2016 IEP for the 2016-17 school year and fourth grade (see Dist. Exs. 1 at p. 3; 55 at p. 1).

With respect to the April 2017 IEP, the parents' September 2018 due process complaint notice similarly set forth all of the recommendations contained therein, but did not assert any challenges to these recommendations other than noting that the April 2017 CSE did not make a recommendation for summer 2017 services but subsequently reconvened in June 2017—prior to the start of the summer 2017 "session"—to make those recommendations (Dist. Ex. 1 at pp. 1-2, 4, 9-11).[37] Therefore, to the extent that the April 2017 IEP included recommendations to be implemented from May 1, 2017 through June 23, 2017 (i.e., the final weeks of the 2016-17 school year) the IHO could not find that the district failed to offer the student a FAPE for that small portion of the school year because the parents did not assert any challenges to either the April 2017 CSE process or the April 2017 IEP (see generally Dist. Ex. 1).

In analyzing what the IHO and the parties identified as the "issue" for the 2016-17 school year—the parents' request for compensatory educational services—the IHO turned to the April 2016 IEP, which included recommendations for what the IHO defined, per the statute of limitations, as the final 10-week period at the close of the 2015-16 school year (see IHO Decision at pp. 10-13). Finding that the hearing record failed to contain evidence that the student was "not afforded FAPE " during that 10-week period under the April 2016 IEP, the IHO then noted, however briefly, that the April 2016 IEP recommending an 8:1+1 special class placement and related services was "sufficient to meet [the s]tudent's needs and insure some progress" and that "[n]othing more [was] required" (id. at pp. 13-14). Therefore, the IHO found that the April 2016 IEP offered the student a FAPE for the remaining 10-week period of the 2015-16 school year, as well as for that portion of the 2016-17 school year from July 2016 through May 2017 (id.).

Consequently, the IHO's decision did address the parents' request for compensatory educational services for the 2016-17 school year based upon the only IEP in the hearing record that the parents effectively asserted any challenges to—namely, the April 2016 IEP—in the September 2018 due process complaint notice (compare IHO Decision at pp. 13-14, with Dist. Ex. 1 at pp. 1-4, 9-11). Therefore, the parents' contention on appeal that the IHO failed to address their request for compensatory educational services must be dismissed.

Next, it is necessary to examine whether the IHO exceeded his jurisdiction in reaching his decision. As a matter of basic fairness and due process of law, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [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 the 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]).

Here, even a cursory review and comparison of the IHO's decision with the parents' September 2018 due process complaint notice reveals that the IHO relied on an issue that the

[37] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

parents did not raise in the due process complaint notice to conclude that the April 2016 IEP offered the student a FAPE for the 2016-17 school year: namely, whether the district special education teacher was qualified to instruct the student using the Orton-Gillingham methodology for reading (compare IHO Decision at pp. 10-14, with Dist. Ex. 1).

Moreover, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d 217, 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]), I note that the issues ultimately relied upon by the IHO and the contentions now argued by the parents in the request for review were first raised—if at all during the impartial hearing—by the parents or by counsel for the parents collaterally through cross-examination of a district witness, and the testimony from the student's mother and the parents' "expert" witness (see, e.g., Tr. pp. 380-82, 386, 537-42, 545-47; see generally Tr. pp. 1127-1235). Here, the district did not initially elicit testimony regarding the district special education teacher's qualifications to use Orton-Gillingham with the student, other than asking routine questions to elicit her educational background (see Tr. pp. 296-99), and therefore, the district did not "open the door" to these issues under the holding of M.H. Instead, it appears that the IHO gleaned this issue from the parents' closing brief submitted after the conclusion of the impartial hearing (see IHO Ex. II at pp. 1-2, 14-15, 17-18).

Generally, where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues and otherwise failed to raise these issues in the September 2018 due process complaint notice, the issues are not properly subject to review. 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]; see also 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]). "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. of the City of New York, 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 SRO because it was not raised in the party's due process complaint notice]). Consequently, the IHO's finding that the district special education teacher was not required to be "certified" in the Orton-Gillingham "methodology" in order to use that methodology with the student must be vacated.

B. 2016-17 School Year

Other than continuing to press the argument that the IHO erred in his determination concerning the district special education teacher's qualifications to use Orton-Gillingham, the parents also argue that in denying their request for compensatory educational services for the 2016-17 school year the IHO failed to consider specific documentary evidence and failed to "examine the reasons why [the s]tudent had deficiencies in reading," such as the "failure to utilize Orton Gillingham specialized reading instruction notwithstanding a determination that was what was determined to be the best methodology" (Req. for Rev. at pp. 6-8).

The district denies these allegations, and argues that the April 2016 IEP did not require the district to use Orton-Gillingham or any other specific reading methodology or program with the student. In addition, the district contends that the evidence in the hearing record demonstrates that the student made progress in reading during the 2016-17 school year.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including in a special class or as a related service ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html). In addition, the guidance specifies that the CSE should "consider what prior instructional methods and strategies have been utilized with the student to avoid reinstituting programs that have not proven effective in the past" and further indicates that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" (id.). As a final point, the guidance also reflects that a "certified reading teacher or a special education teacher is authorized to provide specially designed reading instruction," which may be provided "in the classroom or in another educational setting structured to meet the needs of the individual student" (id.).[38]

Further, in general a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g, 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]). As long

[38] Assuming for the sake of argument that the IHO properly reached this as an issue, I would find no basis to disturb the IHO's determination that the district special education teacher was not required to be "certified" in Orton-Gillingham in order to use that methodology or approach with the student or to provide specially designed reading instruction to the student, regardless of whether the IEP included a recommendation for such service.

as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs" (34 CFR 300.39[a][3]), the omission of a particular methodology is not necessarily a procedural violation (see R.B., 589 Fed. App'x at 576; R.E., 694 F.3d at 192-94 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

Initially, it is undisputed that neither the April 2016 IEP (recommending special education services for May 2016 through May 2017) nor the April 2017 IEP (recommending special education services for May 2017 through June 2017) included a recommendation that the student receive specially designed reading instruction as a separate service or otherwise specified the use of a particular program (i.e., Orton-Gillingham) as a method of instruction teachers would be required to use with the student for reading (see generally Dist. Exs. 32; 55). Nor do the parents, now on appeal, contend that the student required Orton-Gillingham in order to receive a FAPE for the 2016-17 school year (see Req. for Rev. at pp. 6-8). Consequently, the district was not required, under an IEP, to use the Orton-Gillingham methodology or approach to instruct the student in reading and any alleged failure to implement Orton-Gillingham with the student cannot form the basis upon which to conclude that the district failed to offer the student a FAPE.

In this instance, the evidence in the hearing record demonstrates that, regardless of the specific program(s) used to provide the student with reading instruction during the 2016-17 school year, the district did provide the student with reading instruction designed to meet his individual needs and enabled the student to make progress commensurate with his ability.

Starting with the April 2016 IEP, the present levels of performance described the student's needs in the area of reading, noting that the student "enjoy[ed] looking at books and often show[ed] interest in the author, illustrator and characters within books of his choosing" (Dist. Ex. 55 at p. 4). However, the student had "difficulty attending [to the] text" when "asked to read books not of his choosing" and was "often distracted when other students and teachers [were] in the classroom" (id.).

At the time of the April 2016 CSE meeting and as reported in the IEP, the student could "consistently and independently read approximately 100 sight words," including "schedule words, color words, days of the week, months of the year, and words from the Edmark Reading Series" (Dist. Ex. 55 at p. 4). The IEP noted that "these words were learned through matching a word to a picture" and that, thereafter, the "picture prompt[s]" were "systematically remov[ed]" (id.).[39] In addition, the April 2016 CSE indicated that "[o]nce" the student learned a "set of words, they need[ed] to be reviewed on a consistent basis to ensure [that the student] d[id] not lose the skill"

[39] In contrast, the student's June 2015 IEP reflected that, at that time, he had "difficulty looking at and memorizing sight words" but could "demonstrate receptively identifying 24 sight words within [] a group of 5" (compare Parent Ex. 5 at p. 4, with Dist. Ex. 55 at p. 4).

(id.). The April 2016 IEP further reflected that the student had been "observed to rely on the beginning letter to identify the word and often ma[de] mistakes because of this," and "[w]hen prompted to stretch the word and sound out the letters, [the student] often resort[ed] to saying the letters and not the sounds" (id.).

Next, the April 2016 IEP reflected that the student could "listen to a short paragraph and answer a 'who,' 'what,' 'when,' or 'where' question from the story"; the student could also "ask[] and answer[] story element question[s] such as author and illustrator" (Dist. Ex. 55 at p. 4). However, the student had difficulty with "higher level questions that look[ed] for answers beyond the text (predicting and inferencing)" (id.). At that time, the student demonstrated the ability to "memorize a book (word for word) with good inflection and expression" when provided with "several teacher models of a story" (id.). In addition, while the student did not "always attend to the print while he [was] 'reading,' he c[ould] point to certain words when asked to find them" (id.). The April 2016 IEP also noted that sending "reading materials . . . home nightly as part of his homework" had been a "benefit" to the student, "as repeated practice help[ed] him learn sight words quicker" (id.).

In addition to describing the student's needs in the area of reading, the April 2016 IEP included an annual goal for reading that targeted the student's ability to use "known phonological skills . . . [to] sound out [three to four] letter words" and an annual goal for speech-language that focused on improving his ability to "answer content related questions [by] targeting his ability to recall facts, make inferences, and make predictions" (Dist. Ex. 55 at p. 9). The student's annual goal in writing targeted the student's ability to use "known phonological skills . . . [to] spell novel [three to four] letter words" (id.). In addition, the April 2016 IEP included several strategies to address the student's management needs that provided additional support for the student's reading, such as: "monitoring attention to task and quietly provid[ing] verbal prompting to redirect attention when needed," "simplify[ing] language and/or repeat[ing] information to aid in his comprehension of new concepts and vocabulary," "monitoring organization/work habits—provid[ing] prompting for [the student] to complete all work as he gets easily distracted," "preferential seating to minimize distractions," the use of "visual supports to aide in reading comprehension," and a "highly structured classroom setting" (id. at p. 8). The April 2016 IEP also include testing accommodations, which included the use of revised directions; flexibility in the setting where tests were administered and in the scheduling and timing of test administration; and the use of a revised format (id. at p. 12). Finally, the April 2016 CSE noted in the IEP that the student's mother "expressed concerns for [the student's] reading progress and would like to incorporate consultation with the reading specialist to address potential program[m]ing ideas" (id. at p. 4; see Dist. Ex. 56 at p. 2; see also Dist. Ex. 54 at p. 1).

The evidence in the hearing record reflects that, at the April 2016 CSE meeting, the student's special education classroom teacher stated that she was "working on Orton-Gillingham" with the student and that he was "making some progress" (Dist. Ex. 56 at p. 1). The meeting minutes further reflect that the CSE, in discussing the student's progress, noted that the student "los[t] his ability to recall the words" if the "information" was "not reviewed every day" and that he had "difficulty predicting" (id.). In addition, the CSE meeting minutes reported that the student "like[d] to read and use[d] various different means, books on tape, picture books, and other genres" (id.).

In response to the concerns expressed about the student's progress in reading, the April 2016 CSE "decided that the teacher would talk with the reading specialist about [the parents'] concerns, and they would set up a time for the reading specialist, teacher, and [the student's mother] to all meet to figure out the best way to meet his reading needs" (Dist. Ex. 56 at p. 2; see Dist. Ex. 54 at p. 1). Consistent with this decision, the evidence in the hearing record reflects, as detailed previously, that following the April 2016 CSE meeting and throughout summer 2016, the district principal enlisted the support of a reading specialist, researched reading programs, communicated with the parents about the efforts being made, and met with the parents to further address the student's reading needs (see Tr. pp. 516-25; Parent Ex. 58 at pp. 1-2, 5; see generally Parent Ex. 95; Dist. Exs. 67-97).

In addition, as part of the ongoing efforts to address the student's needs in reading during the 2016-17 school year, the evidence reflects that, in September 2016, the district reading specialist administered a "FastBridge" reading assessment to the student and another reading specialist conducted an "Observation Survey" of the student in reading (Parent Exs. 26 at p. 1; 31 at pp. 1-2; see Parent Ex. 58 at p. 5). The September 2016 FastBridge results found the student to be "[s]lightly above 5 [percent]" for letter sound, "[s]lightly above 20 [percent]" for sight words, and "[b]elow 5 [percent]" for nonsense words when compared to the "National Percentile for Grade 1" (Parent Ex. 26 at p. 1; compare Parent Ex. 26 at p. 1, with Parent Ex. 31 at p. 3). Based upon the results and as noted within the September 2016 FastBridge assessment report, the student "w[ould] be progress monitored bi-weekly" on both nonsense words and sight words, and, in addition, the district "[w]ould be providing some practice forms between now and the next progress monitor to help [the student] to understand the task better" (Parent Ex. 26 at p. 1).

In the "Observation Survey" of the student in September 2016, the summary report noted that the student could "identify all the letters fluently by name" without any "confusions, errors or hesitations" (Parent Ex. 26 at p. 2). In addition, the student demonstrated an understanding of the concepts of print, and after being read a book, he could "'read' the pictures from memory and did not look at the text" (id.). The summary report also noted that, when "presented with a list of 20 first grade words, [the student] was able to read one of them: yes" (id.). In addition, the student "named the first letter of the word" for "several other words" and made errors such as reading the word "and for at, house for here, out for over, yes for where, [and] how for has" (id.).

Overall, the summary report reflected that the student demonstrated "very little focus on the reading and writing tasks" and a "strong interest in manipulative and stuffed animals" in the evaluation setting (Parent Ex. 26 at p. 3). In light of his strengths and weaknesses, the reading specialist suggested—"based on this very limited interaction with him"—turning "books into 'games' and to use magnetic letters to make words" (id.). She also suggested cutting books apart so the student could "match the text to pictures," for the student to "write 'speech bubbles' over characters' heads," continue to practice "letter formation," and to have the student "[c]ut books apart and have him read and reconstruct the books so that pages [were] sequential" (id.).

After meeting with the district principal, the student's special education classroom teacher, and the district reading specialist on September 20, 2016, the student's mother sent an email of the same date to request copies of the student's "reading assessment" results mentioned at the meeting (Parent Ex. 58 at p. 5; see Tr. pp. 523-25). In the same email, the parents asked the district's

reading specialist for "documentation of how [the district] arrived at Orton-Gillingham as the program of choice" for the student (id.).

Notwithstanding this email, however, the hearing record does not include any evidence, other than testimony from the student's mother about the meeting held on September 20, 2016 (see Tr. pp. 545-46), to establish that the district specifically selected the Orton-Gillingham methodology—or any other particular program or approach—as the "program of choice" that was to be used exclusively with the student (see generally Tr. pp. 1-1352; Parent Exs. 1-31; 33-61; 64-80; 85-93; 95; 97-98; 100; 102-103; Dist. Exs. 1-101; 103-109; IHO Exs. I-X).

Nonetheless, the evidence reveals that the district remained responsive to the parents' concerns about the student's reading needs and, in October 2016, convened a CSE meeting to review and discuss whether the student's "present program [was] meeting his needs" (see Dist. Exs. 50 at p. 1; 51 at p. 1). As previously detailed, the October 2016 CSE "discussed reading support" for the student, reviewed his annual goals for reading as well as the present levels of performance related to the annual goals, and reviewed his progress in reading (Dist. Ex. 51 at p. 1). The district special education teacher specifically reported that the student knew "all of the letters and sounds of the alphabet in isolation but ha[d] difficulty blending sounds," he used "sight words rather than decoding when reading, and that he "trie[d] hard and d[id] not appear to get frustrated" (id.). By that time, and as reflected in the IEP, the student had increased the number of sight words he could consistently and independently read from approximately 100 words in April 2016 to approximately 115 words in October 2016 (compare Dist. Ex. 50 at p. 3, with Dist. Ex. 55 at p. 4).

The October 2016 CSE also updated the student's present levels of performance from April 2016 to reflect the most recent reading assessments administered to the student in September 2016, noting that he knew "all letters and letter sounds" and he could "identify these sounds in isolation, but struggle[d] to blend th[ese] sounds together" (see Parent Ex. 26 at p. 2; compare Dist. Ex. 50 at p. 3, with Dist. Ex. 55 at p. 4). In addition, the student's IEP was updated to reflect that, "[i]n the classroom, [he was] working on sounding out [three to four] letter words" using "letter sounds, picture prompts, and background knowledge to determine if the word [was] correct" as well as working on using "1:1 correspondence when pointing to and reading words" (compare Dist. Ex. 50 at p. 3, with Dist. Ex. 55 at p. 4). The October 2016 IEP further reflected that the student's mother "explained her history of request for a reading specialist to work directly with [the student]" and that a "reading specialist currently consult[ed] with the classroom teacher, [had] evaluated [the student]," and provided "support with progress monitoring of [the student's] skills" (compare Dist. Ex. 50 at p. 3, with Dist. Ex. 55 at p. 4).

At the impartial hearing, the student's mother testified that when she "asked for a reading specialist once again" at the October 2016 CSE meeting and stated that the district special education teacher was "not Orton-Gillingham trained," the October 2016 CSE "understood what [she] was saying" and the district principal left the meeting to sign the district special education teacher up for an upcoming training in "Phonics First"; the student's mother further testified that this was the first time the district brought up "Phonics First" with her (Tr. pp. 547-50).

According to the evidence, the district special education teacher attended five training sessions (all scheduled from 8:00 a.m. to 3:00 p.m.) held on October 18, October 19, and October

20, 2016, and thereafter on January 5 and January 6, 2017 (Dist. Ex. 109 at pp. 1-5). At the impartial hearing, she described Phonics First as a "phonics-based instruction" program that systematically led from "one step to another step" (Tr. pp. 380-81). The district special education teacher also testified that, in third grade (2015-16 school year), she used a reading program with the student that was similar but not as specific (see Tr. p. 381). Although she was unsure of a specific date, the district special education teacher testified that she began using the program with the student "[r]ight after [she] was trained" (Tr. p. 382).

Turning more specifically to the reading instruction she provided to the student during the 2016-17 school year, the district special education teacher testified that she worked with the district reading specialist to develop a "reading program" for the student prior to attending the Phonics First training (Tr. pp. 384-85).[40] The district reading specialist monitored the student's progress "twice a month" and she would "discuss it" with the district special education teacher (Tr. pp. 385-86). When working with the student on reading, the district special education teacher—while not "necessarily" providing "one-to-one reading" instruction—provided instruction in a "smaller group" with "maybe two kids that both had similar needs" so that she could "really target their IEP goals as opposed to whole group instruction where students had varying needs and abilities" (Tr. p. 390). The small group instruction allowed the special education teacher to "really focus on just what they needed" and was referred to as "independent or individualized work time" (Tr. pp. 390-91). During small group instruction, the district special education teacher worked with the student on "individual sounds," "decoding," and "encoding" (Tr. p. 391). In addition to this testimony, the weekly updates prepared by the district special education teacher during the 2016-17 school year further reflected the reading instruction provided to the student and documented more specifically what she worked on with the student (see generally Dist. Exs. 67-97).

At the impartial hearing, the district coordinator testified that, during the five hours per day in the 8:1+1 special class placement during the 2016-17 school year, the student received—as part of English Language arts (ELA)—"specialized instruction for his reading, . . . [and] writing, [and] all within the content of the Common Core curriculum"; she further testified that the student received a "highly-specialized program" for mathematics in the 8:1+1 special class placement and was "exposed to grade level content concepts" (Tr. pp. 16-17, 19, 21, 23-24, 26-28; see Dist. Ex. 55 at pp. 1, 10; see also Tr. pp. 126-27, 250-51 [discussing delivery of specialized reading instruction to the student in the 8:1+1 special class]). The coordinator also testified that, during the five hours per day in the 8:1+1 special class, social studies was delivered to the student in a "highly-specialized fashion, so that he could have the concepts presented" (Tr. pp. 28-29). However, given the student's "significantly delayed" skills in reading, writing, mathematics, and science, the coordinator testified that the information was presented to the student so that he "could access . . . the content . . . at his functional level versus the grade level content" (id.; see also Tr. pp. 29-30 [describing how the student's special education classroom teacher could differentiate instruction for the student within the 8:1+1 special class]).

Based upon the student's final progress report, the student made progress in reading during the 2016-17 school year. For example, by March 2017, the student had "[a]chieved" his annual

[40] The district coordinator testified that, while the reading specialist did not provide services pursuant to an IEP, her role with the district special education teacher was "[s]upporting [her]" and "[o]ffering additional insights and information on possible use[s] of the various programs that the [d]istrict ha[d] for reading" (Tr. pp. 250-51).

goal in reading that targeted his use of known phonological skills to sound out three and four letter words (see Dist. Ex. 107 at p. 1). In addition, the student could "blend directly taught sounds in a structured environment," but continued to demonstrate "difficulty generalizing these skills to various settings" (id.). The student had also "[a]chieved" his annual goal in writing to use known phonological skills to spell novel three to four letter words (id. at p. 2). The student was "[p]rogressing [s]atisfactorily" on the annual goal in speech-language that focused on improving his ability to "answer content related question that target[ed] his ability to recall fact, make inferences, and make predictions" (id. at p. 4).

At the annual review held in April 2017, the CSE discussed the student's continued progress in reading (see Dist. Ex. 33 at p. 1). The April 2017 CSE reflected the student's progress in the present levels of performance by noting that he could now "consistently and independently read approximately 150 sight words" from the "Edmark Reading Series"—an increase of approximately 35 words since October 2016 and a total of 50 words since April 2016 (compare Dist. Ex. 32 at p. 3, with Dist. Ex. 50 at p. 3, and Dist. Ex. 55 at p. 4). The April 2017 CSE also noted in the present levels of performance that, since April and October 2016, the student could now "sound out 'CVC' words consistently" when using "specific cards"; he could also now "sound out words with the 'ch' and 'sh' blends," but demonstrated "difficulty generalizing these learned sounds to a text, such as a book or written sentence" (compare Dist. Ex. 32 at p. 3, with Dist. Ex. 50 at p. 3, and Dist. Ex. 55 at p. 4). The student had also shown improvement in his ability to "make predictions and basic inferences related to the text" since April and October 2016 (compare Dist. Ex. 32 at p. 3, with Dist. Ex. 50 at p. 3, and Dist. Ex. 55 at p. 4). In light of achieving his annual goal in reading from the April 2016 IEP, and the overall progress the student had made in reading, the April 2017 CSE created a new annual goal in reading that targeted the student's ability to use "learned phonemic reading skills . . . to independently read a passage [or] book at his instructional level with three or less errors" (Dist. Ex. 32 at pp. 3, 9; see Dist. Ex. 107 at p. 1).

Based on the foregoing, and taking into account the limited scope of the issues raised by the parents in their due process complaint notice and on appeal, the IHO did not err in denying the parents' request for compensatory educational services for the 2016-17 school year. Even if the IHO failed to describe his reliance on specific documentary evidence, as the parents allege, an independent review of the evidence in the hearing record supports the IHO's ultimate conclusion that the district provided the student a FAPE for the 2016-17 school year; specifically, the evidence support a finding that the district described the student's reading skills and deficits, monitored the student's progress in reading, and delivered specialized reading instruction aligned with the IEPs in effect for the 2016-17 school year that enabled the student to make progress commensurate with his abilities. Based on the foregoing, the parents' appeal of the IHO's denial of compensatory educational services for the 2016-17 school year is dismissed.

C. 2017-18 School Year

1. CSE Process and Cumulative Procedural Violations

In its cross-appeal, the district contends that the IHO erred in finding that it committed procedural violations by failing to determine the student's special education program for the 2017-18 school year at the student's annual review conducted at the April 2017 CSE meeting and at the June 2017 CSE meeting, and by concluding, overall, that these procedural violations had the

cumulative effect of impeding the student's right to a FAPE and significantly impeding the parents' opportunity to participate in the decision-making process. The district also asserts that, contrary to the IHO's decision, the district met its statutory obligation to have an IEP in place at the start of the 2017-18 school year for the student and that the parents had the opportunity to participate in the development of the 2017-18 IEP.

In response, the parents' arguments in support of upholding this portion of the IHO's decision reflect the IHO's rationale that an IEP should be "reviewed, discussed, and in place at the [a]nnual [r]eview CSE" and that the failure to complete this process at the April 2017 CSE meeting significantly impeded their opportunity to participate in the decision-making process (Amended Answer to Cr. App. at ¶ 10; see Amended Answer to Cr. App. at ¶¶ 8-9, 11-19).

The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Additionally, the IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]); 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81; B.P., 841 F. Supp. 2d at 614). In addition, there is no legal authority requiring districts to produce an IEP at the time that the parents demand; districts must only ensure that the parents are provided with a copy of the IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]; N.K., 961 F. Supp. 2d at 586 [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]). Simply put, the IHO's findings—and the parents' arguments in support of those findings—erroneously conflate these principles.

First, the IHO's finding that the district "committed a serious procedural violation by failing to determine the student's program and placement" for the 2017-18 school year at the April 2017 CSE meeting must be vacated because the IHO exceeded his jurisdiction (IHO Decision at p. 19). The parents failed to raise any procedural or substantive violations as issues with respect to the April 2017 CSE meeting, either by way of CSE process or the IEP generated, in the September 2018 due process complaint notice as a basis upon which the IHO could conclude that the district failed to offer the student a FAPE for the 2017-18 school year (see generally Dist. Ex. 1). Moreover, the evidence in the hearing record supports the parents' acknowledgments in the September 2018 due process complaint notice that the April 2017 CSE "deferred" the student's summer "services and programming" for the upcoming school year, that the June 2017 CSE meeting was subsequently convened, and that the June 2017 CSE made recommendations for summer 2017 services "prior to the commencement of the [summer] school year session" (id. at pp. 3-4, 6-8). The IHO, therefore, exceeded his jurisdiction by sua sponte reaching an issue pertaining to the April 2017 CSE process or April 2017 IEP that the parents did not raise in the September 2018 due process complaint notice (compare IHO Decision at p. 19, with Dist. Ex. 1 at pp. 3-4, 6-8). Even assuming for the sake of argument that the IHO did not exceed his jurisdiction, the IHO misapplied the evidence and the applicable law in finding that the district's actions at the April 2017 CSE meeting constituted a serious procedural violation, as explained more fully below.

Here, it is undisputed that the district held an annual review for the student at the April 2017 CSE meeting consistent with its own internal policy to hold an annual review on or around the student's yearly "anniversary date[]" (Dist. Exs. 32 at pp. 1-2; 33 at p. 1; 35 at p. 1; see Tr. p. 54; compare Dist. Ex. 32 at p. 1, with Dist. Ex. 55 at p. 1). According to the meeting minutes, the April 2017 CSE "discussed that [the] program for next year would not be determined at th[at] meeting and that the CSE would reconvene due to the parent's previous request to have her attorney present" (Dist. Ex. 33 at p. 1). The same meeting minutes do not reflect any concerns or objections to the CSE's decision to postpone making recommendations for the 2017-18 school year made by either the student's mother or the special education advocate attending the meeting (see generally Dist. Ex. 33). In addition, the April 2017 IEP clearly reflected that the recommended program would be implemented for the remainder of the 2016-17 school year, from May 1, 2017 through June 23, 2017, and that programming for summer 2017 had been "[d]eferred pending review" with no concerns or objections by either the student's mother or the special education advocate noted within the IEP (Dist. Ex. 32 at pp. 1, 11; see generally Dist. Ex. 32). The April 2017 prior written notice to the parents also reflected the same information concerning the development of the student's program for summer 2017 and the upcoming 2017-18 school year (see Dist. Ex. 31 at p. 1).

The district's decision to conduct a student's annual review around an "anniversary date" on a yearly basis meets the statutory and regulatory mandates requiring that a CSE must review and revise, if necessary, the student's IEP, at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f] [emphasis added]). Consistent with this requirement, the evidence reflects that the April 2017 CSE focused the meeting on updating the present levels of performance, "supplemental supports, accommodations and goals"; the same evidence reflects CSE participants reporting on the student's progress and present levels of performance in the areas of academics (reading, writing, and mathematics), social development, behaviors, participation with nondisabled peers, speech-language therapy, PT, and OT (Dist. Ex. 33 at pp. 1-2). According to the meeting minutes, the "[g]oals, supplemental supports, testing accommodations and transportation were reviewed, discussed and agreed to" and further noted that the "CSE w[ould] reconvene before the end of June to discuss [summer services] and [the] fall program and services" (id. at p. 2).

Notably, while the statutory and regulatory requirements cited above require, at a minimum, that a CSE must review and revise, if necessary, a student's IEP at least once per year, those same requirements do not preclude a CSE from conducting multiple meetings to review and revise, if necessary, a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In addition, neither the IDEA or its implementing regulations, nor State law or regulations, requires that a district must hold an annual review for the express and sole purpose of developing a student's IEP or entire program for the upcoming school year, as held by the IHO and as now argued, without legal authority, by the parents on appeal (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Thus, contrary to the IHO's finding, the district did not violate any legal authority or commit any procedural violations by deciding to hold more than one CSE meeting to develop the student's 2017-18 IEP after the annual review or by failing to complete the decision-making process solely within the confines of the annual review held in April 2017.

As noted, however, a district must have an IEP in effect at the start of the school year regardless of whether it holds one CSE meeting or multiple CSE meetings to develop a student's IEP (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]); 8 NYCRR 200.4[e][1][ii]). In this case, the evidence in the hearing record reflects that, contrary to the IHO's findings, the district met this requirement by having an IEP in effect for summer 2017 services, as developed by the June 2017 CSE, and then later reconvening in August 2017 to develop an IEP that was in effect for the remainder of the student's 12-month school year program (see Dist. Exs. 27 at p. 1; 28 at p. 1; 29 at p. 1; see generally Parent Exs. 9; 11).

In reaching this determination, it must first be noted that in contrast to the parents' failure to raise any procedural or substantive violations with regard to the April 2017 CSE meeting or April 2017 IEP, the parents asserted in the September 2018 due process complaint notice that the June 2017 CSE's failure to "consider the educational placement for the 2017-2018 school year" was but one of the "multiple procedural violations" the district committed, which resulted in the district's failure to offer the student a FAPE for that school year (Dist. Ex. 1 at pp. 4-5, 9-11; see generally Dist Ex. 1). Therefore, while the IHO properly reached this as an issue, the IHO's findings are not supported by the evidence in the hearing record or the applicable law for the same reasons cited above with regard to the April 2017 CSE meeting.

In his decision, the IHO found that, notwithstanding the April 2017 CSE's assurance that the student's program for the 2017-18 school year would be determined at a CSE reconvened before the end of June, the parent "was again being denied" that opportunity when the June 2017 CSE only determined the student's summer 2017 services (IHO Decision at p. 19). At the impartial hearing, the district coordinator testified that, based upon conversations with other district staff in contact with the parents and based upon her own conversation with the parents' special education advocate, the parents had "actually stipulated that prior" to the June 2017 CSE meeting that they "did not want to talk about September's programming" (Tr. p. 194; see Tr pp. 195-201). However, at the impartial hearing the special education advocate testified that she did not agree with the district coordinator's statement and did not think it was accurate (see Tr. p. 1081).[41]

[41] In the decision, the IHO appeared to rely on this testimonial exchange in support of finding that the April 2017 CSE committed a serious procedural violation by failing to determine the student's program for the 2017-18 school year (see IHO Decision at pp. 18-19). The hearing record establishes that the testimony concerned the purpose of the June 2017 CSE meeting (see Tr. pp. 194-201, 1081). In addition, to the extent that the IHO found the special education advocate's testimony in this exchange with the district coordinator "to be credible" and the parents now attempt to fortify their arguments in support of upholding the IHO's finding with respect to the 2017-18 school year by characterizing the IHO's language as an unassailable credibility finding, I am not persuaded. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In reviewing the contradictory testimony in this instance, while the IHO indicated that the special education advocate's testimony was "credible"—which presumably equates to finding that the special education advocate did not directly inform the district coordinator that the parents did not wish to discuss the student's program for the 2017-18 school year at the June 2017 CSE meeting—as discussed herein, resolution of the particular factual discrepancy is not determinative with respect to whether the district failed to offer the student a FAPE at the June 2017 CSE meeting or whether the parents were afforded an opportunity to participate in the

When the June 2017 CSE convened, both parties recorded the meeting and the parents transcribed the recording (see Parent Ex. 11 at p.1; Dist. Ex. 28 at p. 1). The district coordinator started the meeting by asking the CSE members to introduce themselves, and then noted that "after that, really the focus of this meeting is to look at the summer services, and that's all we're doing is the summer services" (Parent Ex. 11 at p. 2). The special education advocate immediately responded by stating that "[w]e do want to look at next year, and I know that you had considered it just summer services—but we did plan on looking at next year" (id.). The special education advocate also stated that the district was "depriving the family of participation in the decision making by not taking a look at this point in next year" and they wanted the "district to propose the recommendation" (id. at pp. 2-3). The district coordinator responded that the CSE was not prepared to make a recommendation for various reasons, but "another meeting" would be held in the summer for that purpose; she also asked the student's mother to "express some thoughts and feelings, concerns, [or] questions" she had and the CSE would "take that information in and consider it" (id. at pp. 3-4).

As the June 2017 CSE meeting proceeded, neither the student's mother nor the special education advocate raised any thoughts, feelings, concerns, or questions about either the decision to focus on summer 2017 services only, or the decision to delay the decision-making until later in the summer (see generally Parent Ex. 11). The June 2017 CSE turned to discussing the recommendations for summer 2017 and the meeting concluded with the special education advocate stating that the recommendations were not appropriate, but that the student's mother agreed to "think about it" and reserved her right to challenge the program recommendations (id. at p. 16; see Dist. Ex. 27 at p. 1; see also Dist. Ex. 26 at p. 1).

According to the IHO's decision, the June 2017 CSE committed the same "serious procedural violation" as the annual review conducted by the April 2017 CSE: namely, the failure to determine the student's program for the entire 2017-18 school year (IHO Decision at pp. 19-20). The IHO also found that the parents had been "denied," yet again, what the district "should have" determined at the student's annual review in April 2017 (id. at p. 19). However, as described above, even if the parents demanded that the district produce the student's IEP for the 2017-18 school year in its entirety at the June 2017 CSE meeting as opposed to the bifurcated process used in this case, and the district did not do so, there is no legal authority requiring districts to produce an IEP at the time that the parents demand (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]; N.K., 961 F. Supp. 2d at 586; J.G., 682 F. Supp. 2d at 396). Moreover, the district met its obligation to have an IEP in effect by July 1 for the start of the student's 12-month school year program for the 2017-18 school year (see Dist. Ex. 27 at p. 1; 20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]); 8 NYCRR 200.4[e][1][ii]).

In addition, the evidence in the hearing record reveals that the parents had the opportunity to participate in the decision-making process pertaining to the student's IEP for the 2017-18 school year at both the June and August 2017 CSE meetings. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity

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decision-making process with regard to the 2017-18 school year.

to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see J.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *11 [S.D.N.Y. June 28, 2016]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [indicating that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [noting that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of the student's IEP (Cerra, 427 F.3d at 192).

In this instance, although the special education advocate indicated that she and the parent wanted the district to propose recommendations for the 2017-18 school year and the June 2017 CSE only addressed the summer 2017 services, the evidence reflects that the student's mother participated in the discussions about those recommendations and services and even suggested alternative, nonpublic school placement options for those services (see generally Parent Ex. 11). Moreover, the evidence reflects that, at the August 2017 CSE meeting—which the student's mother attended with the special education advocate and her attorney and which lasted approximately two hours—all three individuals participated in the discussions about the recommendations and services for the remainder of the 2017-18 school year (see generally Dist. Ex. 24). For example, the student's mother suggested annual goals and specific language with regard to some of the annual goals, as well as criteria to measure them; she also participated in the discussion of the frequency of speech-language therapy services, the student's interaction with nondisabled peers, the recommended supplemental services (such as team meetings), and the student's eligibility for alternate assessment (id. at pp. 2-4).[42] In addition, the evidence reveals that the district had the August 2017 IEP in effect prior to the start of the 10-month portion of the school year in September 2017 (see Dist. Ex. 27 at p. 1). As such, the district did not commit any procedural violations or any serious procedural violations with regard to the development of the student's June 2017 IEP or August 2017 IEP, and the parents had the opportunity to participate in the decision-making process regarding a FAPE, and the IHO's findings must be vacated.[43]

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[42] Given this evidence demonstrating the parents' participation in the decision-making process at both the June 2017 and August 2017 CSE meetings, any alleged delay in providing the parents with a copy of the student's IEP for the 2017-18 school year—even if it constituted a procedural violation—would not result in a finding that the district failed to offer the student a FAPE solely on that basis (see N.K., 961 F. Supp. 2d at 586 [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]).

[43] As another facet of parent participation, the district asserts that the parents' inability to tour middle school 1 did not impede their opportunity to participate in the decision-making process regarding the 2017-18 school year.

Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M., 845 F.3d at 541 [noting that it will be a "rare case where the violations, when taken together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]). As noted above, none of the alleged violations constituted a procedural violation and, as such, there was no basis on which to find that they cumulatively rose to the level of a denial of a FAPE for the 2017-18 school year (see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *18 [S.D.N.Y. Feb. 14, 2017]).

2. 8:1+1 Special Class Placement at Middle School 1

Here, the district argues that the IHO erred in finding that it failed to present sufficient credible evidence to demonstrate that the 8:1+1 special class placement at middle school 1 was appropriate to meet the student's needs. The district contends that the IHO improperly relied on

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However, a review of the parents' September 2018 due process complaint notice reveals that the parents did not assert any challenge relating to the inability to visit or tour the 8:1+1 special class placement at middle school 1 or the district's capacity to implement the August 2017 IEP at middle school 1, let alone one that was based on something more than mere speculation (see Dist. Ex. 1; see also 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; 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"]). In addition, the IHO did not address this as an issue in finding that the district failed to offer the student a FAPE for the 2017-18 school year (see IHO Decision at pp. 18-20). The United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]); see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]). However, OSEP also acknowledged that "there may be circumstances in which access may need to be provided," such as "if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement" (Letter to Mamas, 42 IDELR 10). Further, there is some district court authority indicating that a parent has a right to obtain information about an assigned public school site (F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding "implicit" in the reasoning of the Second Circuit's decision in M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015], the proposition that parents have the right to obtain information on which to form a judgment about an assigned school]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered, rather than, the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

the absence of testimony from the district special education teacher assigned to the 8:1+1 special class placement at middle school 1 or the district school psychologist at middle school 1 as a basis to find that the district did not present sufficient evidence regarding its ability to implement the August 2017 IEP. In addition, the district argues that the IHO's finding was error because the introduction of such evidence was impermissible as retrospective evidence, and the IHO ignored evidence establishing that the student was appropriately grouped within the 8:1+1 special class placement at middle school 1.

In response, the parents contend that evidence about the "student cohort" was not retrospective, and continue to assert that the student cohort in the 8:1+1 special class placement at middle school 1 was not appropriate.

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., 589 Fed. App'x at 576).[44] 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 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

[44] 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., 746 F.3d at 79 [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]).

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]).

At the August 2017 CSE meeting, the CSE included the district school psychologist from middle school 1 (see Dist. Exs. 23 at p. 1; 24 at p. 1; 25 at p. 1). According to the April 2017 CSE meeting minutes, after a lengthy discussion about the student's progress and present levels of performance, annual goals, supplemental aids and support, and the available programs and services, the parents' attorney asked the CSE about the 8:1+1 "program and what the program/curriculum consist[ed] of" (Dist. Ex. 24 at pp. 1-4). The CSE chairperson explained the program, noting that it was an "extension of the program at [the district elementary school]," with an "emphasis on building comprehension questions" (id. at p. 4). The meeting minutes documented that the parents' attorney then "spoke [to the student's] weaknesses and transition and asked about integration with general education," and the CSE—including, more specifically, the district school psychologist from middle school 1—explained a "typical day at [middle school 1]" and the types of opportunities that would be available for the student to access to his nondisabled peers (id.). The CSE continued the discussion after a short break and at least three CSE members expressed disagreement with integrating the student in academic classes and, instead, supported the student's full-time attendance in the 8:1+1 special class placement for academics (id. at pp. 4-5).

At that point in the August 2017 CSE meeting, the CSE returned to a discussion about a "monthly meeting" and raised the suggestion of using a "communication notebook" as additional communication strategies with the parents (Dist. Ex. 24 at pp. 3-5). The district school psychologist from middle school 1 indicated that the special education teacher assigned to the 8:1+1 special class at middle school 1 "communicate[d] at least weekly with parents" (id. at p. 5). The student's mother then asked the district school psychologist from middle school 1 "how [the special education teacher assigned to the 8:1+1 special class at middle school 1] c[ould] teach students spanning grades 5, 6, 7 & 8," but as the district school psychologist began to answer that question, the parents' attorney "ended that topic of discussion" (id. at p. 5). The August 2017 CSE meeting concluded shortly thereafter (id.).

As argued by the district, the IHO essentially concluded—without citing to any legal authority—that the district failed to present sufficient evidence to establish that the district had the capacity to implement the student's August 2017 IEP because the district failed to present evidence from either the special education teacher assigned to the 8:1+1 special class at middle school 1 or, alternatively, the district school psychologist from middle school 1 on this point (see IHO Decision at p. 20). However, in order for the IHO to reach this conclusion, the IHO first needed to determine whether the special education teacher's ability to "teach students spanning four levels" and "communicate with parents" constituted permissible prospective challenges to the IEP as

contemplated by the Second Circuit cases allowing such challenges in the first instance (see, e.g., Y.F., 659 Fed. App'x at 5).

As noted above, permissible prospective challenges must be "'tethered' to actual mandates in the student's IEP" (Y.F., 659 Fed. App'x at 5); the parents "must allege that the school is 'factually incapable' of implementing the IEP" to be considered "more than speculation" (see, e.g., M.E., 2018 WL 582601, at *12); and such challenges "must be based on something more than the parents' speculative 'personal belief' that the assigned public school site was not appropriate" (see, e.g., K.F., 2016 WL 3981370, at *13). Given these parameters, the special education teacher's ability to "teach students spanning four levels" and his ability "communicate with parents" do not fall within the permissible prospective challenges to a district's capacity to implement the August 2017 IEP, as these issues are neither tethered to actual mandates in the IEP, nor do such issues rise to "more than speculation" that the district was factually incapable of implementing the August 2017 IEP. The IHO's finding, therefore, must be vacated.

Next, the IHO did not address the issue actually raised by the parents in the September 2018 due process complaint notice pertaining to the "student cohort"—or functional grouping—of the students in the 8:1+1 special class placement at middle school 1, about which there was evidence in the hearing record (compare IHO Decision at pp. 18-21, with Dist. Ex. 1 at pp. 5, 9-10). The evidence in the hearing record reveals that the August 2017 CSE discussed not only the student's program recommendations, but also the particular 8:1+1 special class placement at middle school 1, and moreover, the evidence demonstrates that the functional grouping within the special class placement was appropriate.

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than sixteen years old shall not exceed 36 months (8 NYCRR 200.6[h][5]).[45]

In addition, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed

[45] Nevertheless, even if there were students in the class who were outside of the 36-month age range requirement set forth in State regulations, such a violation would not amount to a denial of FAPE (E.A.M., 2012 WL 4571794, at *11, citing M.P.G. v. N.Y.C. Dep't of Educ., 2010 WL 3398256, at *10 [S.D.N.Y. Aug. 27, 2010] [finding that the "'failure to adhere to the age-related guidelines is not always fatal . . . if the students are grouped appropriately in terms of functional needs'"]). The Commissioner also allows school districts to seek variances from the age requirements, which the district sought and received in this case (see Parent Ex. 93 at p. 3). Specifically, on or about August 18, 2017, the district sought a variance from the State Education Department to exceed the class size for the 8:1+1 special class placement at middle school 1 (see id. at pp. 1-2). By letter dated August 24, 2017, the State notified the district that it had approved the variance request (id. at p. 1).

a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[46] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

According to the evidence in the hearing record, the district sought and received a variance to exceed the class size for the 8:1+1 special class placement at middle school 1 (see generally Parent Ex. 93). As part of this process, the district was required to provide a general narrative description of the students expected to attend the special class with regard to their collective abilities in the areas of learning rate and academic performance, social development, physical development, and management needs (id. at p. 3). In addition, the district also submitted more individualized descriptions of each student expected to attend the special class at middle school 1 (id. at pp. 5-8).

At the impartial hearing, the student's mother testified that she did not believe that the student would be a "good fit" for the 8:1+1 special class at middle school 1 (Tr. p. 613). As a basis for this belief, the student's mother testified that she knew the students who would attend the fifth grade 8:1+1 special class that year, as well as some of the students that were in the class currently (see Tr. pp. 609-13, 615-17, 661-65). However, at the impartial hearing when presented with the class profile of the students expected to attend the 8:1+1 special class—which the district coordinator created—the student's mother could not identify the students (except for possibly two students, but without certainty) within the class profile notwithstanding her previous testimony (see Tr. pp. 95-96, 98-99, 609-13, 840-47; Dist. Ex. 65).[47]

In developing the class profile, the district coordinator testified that she gleaned the information from the students' IEPs and multidisciplinary reports about their disability categories, chronological grade levels, cognitive abilities, reading levels, and mathematics levels (see Tr. pp. 96-110; Dist. Ex. 65). Upon review, the class profile of the 8:1+1 special class at middle school 1 demonstrates that, consistent with State regulation, all of the students assigned to attend the particular special class were eligible as students with autism, all the students functioned cognitively in the low to extremely low range (with this student falling in the very low range), and all the students reading and mathematics levels ranged from prekindergarten to the second grade

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[46] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

[47] If a district operates a special class wherein the range of achievement in reading and mathematics exceeds three years, the district shall provide the CSE, parents, and teacher of the students in the class with "a description of the range of achievement in reading and mathematics, and the general levels of social development, physical development and management needs in the class, by November 1st of each year"—which is typically referred to as a class profile (8 NYCRR 200.6[h][7]).

level (with this student falling at the kindergarten to first grade level in both reading and mathematics) (see Dist. Ex. 65).

In light of the foregoing, the evidence in the hearing record establishes that the functional grouping of the 8:1+1 special class at middle school 1 for the 2017-18 school year was consistent with the requirements of State regulations and was appropriate for the student.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2016-17 school year, and contrary to the IHO's finding, that the district offered the student a FAPE for the 2017-18 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Mandala was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated October 4, 2019, is modified by reversing that portion of the IHO's decision, which found that the district failed to offer the student a FAPE for the 2017-18 school year.

Dated: **Albany, New York**
January 10, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER