The University of the State of New York

The State Education Department
State Review Officer
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No. 21-235

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

Appearances:
Law Offices of Martin Marks, attorneys for petitioners, by Martin Marks, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 determined that respondent (the district) offered the student appropriate special education programming and denied their request to be reimbursed for their daughter's tuition costs at the Imagine Academy for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 hearing record does not include detailed evidence regarding the student's educational history. According to the student's mother, the student attended a district public school for one school year, after which the student attended a nonpublic school at district expense for "six or seven years" util the student "aged out" of the school (Tr. pp. 202-03). Beginning in the 2014-15 school year, the district recommended that the student attend a public school setting, which the parents found inappropriate after visiting the school, and the parents unilaterally placed the student at Imagine Academy, which she attended through and including the 2019-20 school year (Tr. pp. 203-04).

An April 2019 Imagine Academy annual review document stated that the student was 14 years old, had received a diagnosis of autism, and presented with comprehensive developmental delays in the areas of expressive and receptive language, social/emotional development, cognitive skills, working memory, and adaptive daily living skills (Parent Ex. H at p. 1).[1] At the time of the April 2019 review, the student was attending Imagine Academy where the dual methodologies of applied behavior analysis (ABA) and the Developmental Individual Differences Relationship-based (DIR) / Floortime model were implemented throughout the school day and the student received related services of speech-language therapy, occupational therapy (OT), and music therapy (id.). The April 2019 review noted the student's difficulties in the areas of avoidant behaviors, dysregulation, adaptive functional communication, visual perceptual skills, initiating and maintaining appropriate social interactions, independence in functional living skills, and completion of daily living tasks as well as her need for visual schedules, redirection, visual and verbal prompts, work on typing readiness, and a sensory diet (id. at pp. 1-2, 5-6).

A CSE convened on April 12, 2019 to conduct an annual review and develop the student's IEP for the 2019-20 school year (Dist. Exs. 1 at pp. 1-24; 2; 3 at pp. 1-2). Finding the student eligible for special education and related services as a student with autism, the CSE recommended a 6:1+1 special class placement in a specialized school; adapted physical education; related services of two 45-minute sessions per week of individual OT, one 45-minute sessions per week of OT in a group of three, three 45-minute sessions per week of individual speech-language therapy, one 45-minute session per week of speech-language therapy in a group of three, and one 60-minute session per month of parent counseling and training; and the support of a fulltime individual behavior support paraprofessional and a dynamic display speech generating device (SGD) all provided for the 12-month school year (Dist. Ex. 1 at pp. 1, 17-18, 21-23).[2]

In May 2019 the district provided the parent with prior written notice (PWN) of the April 2019 CSE's proposed programming recommendations detailed above and a school location letter identifying the specific school site where the student's programming was to be provided (Dist. Exs. 5; 6).

On June 17, 2019 the parents provided the district with a ten-day notice stating that they believed the April 2019 CSE failed to recommend an appropriate program for the student for the 2019-20 school year, develop appropriate annual goals, and address the student's unique educational needs and that the recommended placement could not meet the student's needs and implement the IEP in an appropriate manner (Parent Ex. E). The parents stated their intention to enroll the student at Imagine Academy and seek tuition reimbursement and/or direct payment (id.).[3]

[1] The hearing record contains two copies of the April 2019 Imagine Academy annual review document that were entered into evidence (compare Parent Ex. H, with Dist. Ex. 4). For purposes of this decision, only the parent exhibit is cited.

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

[3] Imagine Academy has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On July 25, 2019 the parents executed an enrollment contract with Imagine Academy for the 2019-20 school year (Parent Ex. K). The student attended Imagine Academy during the 2019-20 school year (Parent Exs. F; G; J; L; N).

The student was the subject of another impartial hearing involving the 2018-19 school year (2018-19 proceeding) (Parent Ex. B at pp. 1-7). In a decision dated November 9, 2019, the IHO in that matter found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2018-19 school year because the district did not present any evidence regarding the provision of a FAPE, the district conceded that the parent cooperate with the CSE and, therefore, that the only issue to be determined regarding the 2018-19 school year was whether Imagine Academy was appropriate for the student (id. at pp. 1-2). The IHO determined that Imagine Academy was appropriate and ordered the district to fund the costs of the student's attendance at Imagine Academy for the 2018-19 school year (id. at pp. 1-2, 4).

A. Due Process Complaint Notice

In a due process complaint notice dated June 16, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A).[4] The parents asserted that the CSE that convened to develop the student's IEP was not properly constituted and that the district denied the parents the opportunity to participate in the development of the student's IEP in a meaningful way in that the parents were "not permitted to add [to] or review the draft IEP" (id. at p. 3). In addition, the parents alleged that the CSE failed to consider information provided by the student's providers about an appropriate program and class size for the student (id.). Next, the parents alleged that the district failed to appropriately evaluate the student in all areas of suspected disability and that the present levels of performance included in the April 2019 IEP lacked "specific, measurable information" regarding the student's academic achievement, functional performance, and related service needs (id. at pp. 3-4). In addition, the parents asserted that the annual goals were not specific, measurable, individualized to the student, or sufficiently challenging (id. at p. 4). Regarding the student's behavioral needs, the parents argued that the IEP lacked annual goals designed to address the student's maladaptive behaviors that impacted her academic and social/emotional progress and that the district did not rely on behavior data collected via a formal functional behavioral assessment (FBA) when developing the goals (id.). The parents contended that the CSE's programming recommendations would not be able to meet the student's needs and were not reasonably calculated to enable the student to receive educational benefits (id. at pp. 3, 4). Finally, the parents asserted that the student's IEP could not be "appropriately implemented" at the assigned public school site (id. at p. 4).

The parents contended that Imagine Academy was an appropriate unilateral placement for the student for the 2019-20 school year and that the parents cooperated with the CSE (Parent Ex. A at pp. 4-5). For relief, the parents requested district funding of the costs of the student's tuition

[4] The parent sought a determination that the student's pendency placement was based on the unappealed IHO decision resulting from a proceeding related to the 2017-18 school year, which ordered district funding of the costs of the student's attendance at Imagine Academy (Parent Ex. A at p. 1). The hearing record does not include an IHO decision arising from a proceeding related to the 2017-18 school year; however, as the case number noted in the parents' due process complaint notice is the same as the case number identified on the November 2019 IHO decision arising from the 2018-19 proceeding, it is presumed that the parents meant to request pendency based on the November 2019 IHO decision (compare Parent Ex. A at p. 1, with Parent Ex. B at p. 1).

at Imagine Academy for the 2019-20 school year (id. at p. 4). In addition, the parents asserted that the district should develop "behavior goals" for the student and provide the student with related services as set forth in the "last agreed upon IEP" or fund the costs of such services (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 13, 2020 and concluded on September 30, 2021, after 10 days of proceedings (see Tr. pp. 1-246). In a decision dated October 27, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year (see IHO Decision at pp. 12, 14). Initially, the IHO noted a lack of specificity in the parent's allegations set forth in the due process complaint notice (id. at pp. 7, 8). Regarding the composition of the CSE, the IHO found that the committee "was not lacking any of the required participants" (id. at p. 8). She noted that the CSE included a special education teacher who was also the district representative, a school psychologist, the principal and teacher from Imagine, the parent, and the student (id.). She further noted that no regular education teacher was required because the student could not participate in a general education program (id.). Next, the IHO found no basis for a finding that the parents were denied the opportunity to participate in the CSE process, citing the parents' contributions during the CSE meeting as noted in the meeting minutes and in the IEP (id.). The IHO determined that the district did not offer any evaluations into evidence and therefore there was no evidence that it adequately evaluated the student (id. at p. 9). However, she found that the CSE "had abundant information" from Imagine and the parents and thus the failure to include evidence of an evaluation did not render the IEP inappropriate (id.).

Turning to the IEP, the IHO found that the present levels of performance included specifics about the student's developmental delays and her functioning in the classroom, as well as her cognitive functioning, communication, behaviors, social functioning, physical development, and management needs (IHO Decision at p. 8). The IHO noted that additional management needs were "embedded in the goals" (id.). She concluded that the present levels of performance adequately described the student's then-current functioning (id. at p. 9). Regarding the student's behavioral needs, the IHO noted that the IEP indicated the student was working on decreasing avoidant behaviors of crying and closing her eyes through the use of embedded reinforcing activities/items and the use of first/then statements (id. at p. 11). The IHO observed that the IEP also indicated that the student engaged in elopement and self-stimulatory behaviors and that, to help the student regulate, a variety of approaches were implemented including the use of a weighted vest and a sensory diet (id.). The IHO found that, while the IEP did not specifically list these approaches in the management needs section of the IEP, the teachers and providers could "glean from the present levels of performance" that such approaches would be helpful and noted that the IEP included a sensory processing goal (id.). The IHO further noted that modeling, redirection, and prompting, strategies set forth in the positive behavior support plan, were incorporated in the present levels of performance and annual goals (id. at pp. 11-12). Acknowledging that there was no annual goal specifically targeting the student's behaviors, the IHO found that the maladaptive behaviors exhibited "were largely based upon the student's regulation and sensory needs," which the IEP addressed, along with addressing her communication needs (id. at p. 12). The IHO also indicated that the recommended 1:1 paraprofessional would have assisted in addressing the student's behavioral needs (id.). As for the program recommendations, the IHO noted that the special class ratio and related services recommendations were appropriate and that these recommendations,

along with the recommendations for a 12-month school year and assistive technology, "d[id] not appear to be an area of concern" (id. at p. 10).

Turning to the assigned public school, the IHO found that the school had the capacity to implement the IEP (IHO Decision at p. 12).

Although the IHO found that the district offered the student a FAPE, she went on to find that Imagine was an appropriate unilateral placement for the student for the 2019-20 school year (IHO Decision at pp. 13-14). In addition, the IHO found no equitable considerations that would have impacted an award of tuition reimbursement had the district been found to have denied the student a FAPE (id. at p. 14). However, for the reasons set forth above, the IHO denied the parent's request for district funding of the costs of the student's attendance at Imagine for the 2019-20 school year (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year. The parents assert that the IHO erred in disregarding the parent's assertions and finding that they were not specific. In particular, the parents allege that the IHO erred in finding that the parents were given an opportunity to meaningfully participate in the development of the April 2019 IEP.

The parents also allege that the IHO improperly relied upon retrospective evidence to cure defects in the IEP. Regarding management needs, the parents argue that the IHO erred in finding that teachers and providers could glean that supports such as use of a weighted vest and sensory diet would be beneficial for the student despite that they were not included in the IEP. The parents also argue that the IHO improperly justified the lack of annual goals in the IEP tailored to address the student's behaviors by referring to more general goals. The parents further assert that the IHO erred in finding that the district had abundant information from Imagine Academy from which to develop the IEP and in failing to find that the lack of an FBA was a fatal defect that resulted in a denial of a FAPE. Next, the parents allege that the April 2019 CSE incorporated goals and objectives developed by Imagine Academy but changed references to "trained professionals," to "paraprofessionals," which the parents argue resulted in a placement recommendation that was not specifically designed to benefit the student.

Turning to the assigned public school site, the parents allege that the IHO erred in finding that the school could implement the IEP. The parents argue that the assistant principal of the assigned public school site did not offer any testimony regarding use of a weighted vest, sensory diet, or related goals, or the provision of a trained professional.

Finally, the parents argue that the IHO correctly found that Imagine Academy was an appropriate unilateral placement and that equitable considerations would have supported an award of relief had the district been found to have denied the student a FAPE. The parents seek an order requiring the district to directly fund the costs of the student's attendance at Imagine Academy for the 2019-20 school year.

In an answer, the district denies the parents' material allegations.

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]).[5]

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

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).

[5] 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).

VI. Discussion

A. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In the request for review, under the bolded heading "Statement of the Issues," the parents set forth six "points" with the first point including four lettered subheadings. The numbered "points" identify aspects of the IHO's decision with which the parents disagree, and include allegations that: (1) the IHO improperly relied upon retrospective evidence to cure defects within the IEP (with subheadings identifying management needs, missing goals addressing maladaptive behaviors, and the recommendation for a paraprofessional instead of trained professionals as defects within the IEP); (2) the IHO erred in finding that the assigned public site could implement the IEP; (3) the lack of an FBA was a fatal defect to the BIP; (4) the parent was not allowed to meaningfully participate in the CSE meeting; (5) the IHO correctly determined that Imagine Academy was an appropriate unilateral placement; and (6) that the IHO correctly found that equitable considerations would not have warranted a reduction or denial of a tuition award (Req. for Rev. at pp. 2-9). Under each "point," the parents elaborate on their positions and point to evidence in the hearing record to support their view that the determinations of the IHO should be modified (or affirmed) (id.). Then, under the bolded heading "Specific Relief Sought," the parent set forth a list of 10 determinations of the IHO from which they purportedly "seek[] review" but do not further elaborate on the allegations in the list (id. at pp. 9-10).

To the extent the list identified under the heading "Specific Relief Sought" includes issues that were not otherwise identified under the heading "Statement of Issues" in the request for review (including whether "the present levels of performance adequately described the student's functioning, the IEP could be deemed appropriate without evidence of district evaluations, the recommended class size and related services were appropriate, and "the program was, overall, reasonably calculated to provide educational benefits"), I find that such issues are insufficiently raised as issues for review on appeal as the parents do number and set these issues forth separately or articulate grounds for reversing or modifying the IHO's decision on these points (8 NYCRR 279.8[c][2]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; 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]). It is not the responsibility of an SRO to research and construct the appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [holding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). In addition, as the parents are not aggrieved by the IHO's findings relating to the appropriateness of the unilateral placement and the weighing of equitable considerations, and the district has not interposed a cross-appeal of these determinations of the IHO, which were adverse to the district, I find that these issues are not properly before me on appeal.

Based on the foregoing, the IHO's determinations concerning CSE composition, the sufficiency of the evaluations before the CSE (with the exception of the FBA which will be discussed below), the adequacy of the present levels of educational performance included in the April 2019 IEP, the appropriateness of the April 2019 CSE's class size and related services recommendations, the appropriateness of Imagine Academy, and the weighing of equitable considerations have not been sufficiently or properly raised as issues for review on appeal (IHO Decision at pp. 8, 9, 10, 14). Therefore, the IHO's findings on these issues are final and binding upon the parties and will not be further discussed (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]).

B. April 2019 CSE—Parent Participation

Turning to the disputed matters, first, the parents allege that the IHO erred in finding that the parents were given an opportunity to meaningfully participate in the development of the April 2019 IEP. The parents argue that they were not permitted to add to or review the draft IEP resulting in their being denied any input into the IEP development.

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 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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; 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"]; 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] ["Meaningful 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 their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Here the hearing record shows that the student's mother attended the April 2019 CSE meeting by telephone (Dist. Ex. 2; see Tr. p. 56). The special education teacher assigned to the CSE testified that any concerns raised by the parent or the school regarding the services and recommendations proposed for the student would have been noted on the IEP's present levels of performance and that anything the parent had a concern with would have "definitely been written there" (Tr. p. 60). The present levels of performance of the April 2019 IEP and the CSE meeting minutes both noted the parent's agreement with the district's recommendation that the student required "a 1:1" to help regulate her behavior and for learning support (Dist. Exs. 1 at p. 3; 3 at p. 2). The present levels of performance also noted that the parent indicated the student had a slightly more varied diet at home than in school, the student was in good health and that the parent did not state any specific social development concerns during the CSE meeting (Dist. Exs. 1 at pp. 3-4; 3). In addition, the April 2019 CSE meeting minutes suggest that during the meeting the parent indicated that she was willing to visit the public school to which the student was assigned for the 2019-20 school year (Dist. Ex. 3 at p. 1). With regard to her participation in the April 2019 CSE meeting, the parent testified that she "listened" to the provider recommendations and "took the information" but did not have a conversation with the provider about the recommendations at that time (Tr. pp. 210-11). She noted that the provider advised her that if she did not feel the CSE recommendations were appropriate "there [we]re other avenues" (id.). The parent also confirmed that the district explained its recommendations and reason for the recommendations to her (id.).

The special education teacher testified that Imagine Academy provided written progress reports which included annual goals for the student and that they were discussed at the April 2019 CSE meeting (Tr. pp. 64-65, 66-67). She also stated that the parents had a copy of the progress reports with the goals and that the CSE made a practice to discuss the program, recommendations, and the goals for the student and that "everything [wa]s based on what was said during the meeting and what was written in the progress reports" (Tr. p. 83).

Further, as noted by the IHO, the parents provided no specifics as to what they wanted to add to the IEP or what input they wanted to share. Therefore, there is no reason to disturb the IHO's finding that the parents were provided adequate opportunity to participate in the development of the student's IEP.

C. April 2019 IEP

Next, the parents argue that the IHO improperly relied upon retrospective testimony and evidence found in other parts of the IEP and descriptions of other services offered by the district placement to cure defects with the April 2019 IEP. The district argues that the parents improperly conflate retrospective evidence with the IHO's ability to consider the appropriateness of the IEP as a whole

The Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP"; however, testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (see R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). The prohibition against retrospective testimony is intended to reflect the fact that "[a]t the time the parents . . . choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on" (R.E., 694 F.3d at 186). Therefore, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and . . . reasonably known to the parties at the time of the placement decision" (id. at 187).

The parents' arguments about the IHO's findings represent a misunderstanding of the nature of retrospective evidence. In detailing the IHO's purported reliance on retrospective evidence, the parents point to the IHO's findings that, although the management needs did not reference a weighted vest or sensory diet, a teacher or provider could glean from the present levels of performance that the student would benefit from such supports, and, although the IEP did not include goals specific to address the student's maladaptive behaviors, other goals included in the IEP could have an impact on the student's behaviors and were targeted to address needs underlying the student's behaviors (see IHO Decision at pp. 10-12). To the extent the IHO relied upon information included within the April 2019 IEP, such evidence was not retrospective as it was before the CSE and included by the CSE in the IEP document. The IDEA explicitly states that it is unnecessary "to include information under [one] component of a child's IEP that is already contained under another component of such IEP" (20 U.S.C. § 1414[d][1][A][ii][II]). Simply because it was included in a different part of the IEP than that being examined would not make it retrospective or inappropriate for the IHO to consider (cf. S.B. v New York City Dep't of Educ., 2017 WL 4326502, at *14 n.13 [E.D.N.Y. Sept. 28, 2017] [finding that "[i]t would exalt form over substance to invalidate [an] IEP solely because it fail[ed] to list . . . management techniques under the subsection of the IEP"]; D.S. v. Parsippany Troy Hills Bd. of Educ., 2018 WL 6617959, at *16 [D.N.J. Dec. 18, 2018]). As for the issue of training of the 1:1 paraprofessional, the IHO made no findings related to the adequacy of this support and, accordingly, did not rely on retrospective evidence. In any event, the IHO's underlying findings relating to the management needs and degree to which the IEP address the student's interfering behaviors, as well the appropriateness of the CSE's recommendation for 1:1 paraprofessional support for the student, are addressed below.

Overall, beyond arguing that the IHO relied on impermissible evidence, the portions of the parents' appeal directed at the alleged IEP defects do not offer a great deal of elaboration with respect to arguing that the permissible evidence in the hearing record does not support the IHO's finding that the April 2019 IEP was appropriate. In any event, I have considered the parents' claims and a review of the evidence in the hearing record presents no basis for disturbing the IHO's decision.

1. Special Factors—Interfering Behaviors

The parents further assert that the IHO erred in failing to find that the lack of an FBA was a fatal defect that resulted in a denial of a FAPE. Relevant to the student's interfering behaviors—and as alluded to above—the parents also take issue with the IHO's analysis of the IEP to the extent that he relied on the document as a whole to find that the CSE recommended sufficient supports for the student's management needs and annual goals targeted to address interfering behaviors.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113

[2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

As an initial matter, the parents' argument on appeal—that the district's failure to conduct an FBA is "a fatal defect" is belied by the foregoing authority which reflects that the lack of an FBA may not always rise to the level of a denial of a FAPE (R.E., 694 F.3d at 190). It is undisputed that the district did not conduct an FBA of the student. However, as noted by the IHO, the April 2019 CSE took detailed information on the student's needs and functioning in all areas from the Imagine Academy annual review document, as well as information from the student's teacher and principal from Imagine, and based the IEP on that information (Tr. pp. 57-58, 64-65, 67, 83-84, 99; IHO Decision at p. 9; compare Parent Ex. H, with Dist. Ex. 1). Moreover, the CSE had available an April 2019 Imagine Academy positive behavior support plan which included components of an FBA and BIP including target behaviors, behavior definitions, baseline data, a functional hypothesis, triggers, replacement behaviors, interventions, and an evaluation plan (Parent Ex. I at pp. 1-3). The April 2019 behavior plan described the student's behaviors as engaging in inactivity, hyperactivity, or outright refusal that could escalate quickly into crying/screaming, flinging her arms/legs outward, throwing materials/items, pushing into people seeking sensory input, and "bolting" from areas (id. at p. 1).

The April 2019 IEP indicated that, [w]hen dysregulated, [the student] display[ed] loud vocalizations, jumping out of her seat, running and spinning around the classroom, as well as trying to elope from the area" and that she "exhibit[ed] these behaviors when something [wa]s bothering her, or when she [wa]s expected to complete an undesirable activity" (Dist. Ex. 1 at p. 1). The IEP further described that the student "engage[d] in self-stimulatory behaviors which include[d] head/body rocking, stimming, and spinning" (id.). The April 2019 IEP's present levels of performance stated that, to help the student regulate, a variety of approaches had been implemented including the use of a weighed vest on an alternate schedule of 45 minutes on/off throughout the day and the use of a sensory diet (id.). The IEP stated that the student was provided with a sensory diet throughout her day which involved "deep pressure, tactile, and vestibular designed to target her deficiencies and increase mobility" (id. at p. 2). Additionally, the student reportedly required redirection when completing tasks and was working on decreasing work avoidant behaviors of crying and closing her eyes (id. at p. 3). The IEP stated that the student was working on decreasing her avoidant behaviors through the use of "embedding reinforcing activities/items" into her tasks and through the use of "First/Then" statements (id. at p. 3).

Although the April 2019 IEP indicated that the student did not need strategies, including positive behavioral interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others, it also reflected that the student required a BIP and referred to such a document available on "SESIS" (Dist. Ex. 1 at p. 5). In addition, the April 2019 IEP and the CSE meeting minutes both reflect that the parents and staff from Imagine Academy believed that the student "require[d]" 1:1 support to help her regulate her behavior (Dist. Exs. 1 at p. 3; 3 at p. 2). The April 2019 IEP did include the support of a fulltime 1:1 paraprofessional for behavioral support for the student (Dist. Exs. 1 at pp. 4, 18; 3 at p. 1; 5 at p. 1). In the management needs section, the IEP indicated that the student required a special class and related services, a 1:1 behavior support paraprofessional, and assistive technology (Dist. Ex. 1 at p. 4).

The foregoing reflects that, although the district did not conduct an FBA of the student, the CSE had sufficient information about the student's behaviors and included appropriate supports in the IEP to address the student's behavioral needs in conjunction with a BIP (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]; J.P. v. City of New York Dep't of Educ., 717 Fed. App'x 30, 32 [2d Cir. Dec. 19, 2017] [finding that, despite the lack of an FBA and BIP, the IEP adequately addressed the student's "problem behaviors, including his inattention and impulsivity" with the provision of a 1:1 paraprofessional and related services]; M.Z., 2013 WL 1314992, at *5, *8 [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]).

As to the parents' specific concerns about the supports to address the student's dysregulation, although not stated in the management needs section, the IEP as a whole sufficiently described the types of supports that would help the student, and, while the written reports from Imagine Academy discussed the use of a weighted vest and the other interventions in addressing the student's regulation needs, the record does not indicate that these were the only methods used nor that they were required (see Parent Exs. H at pp. 1-12; I at pp. 1-2; see also E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 [S.D.N.Y. Sept. 26, 2018] [finding that "absent a showing that a specific sensory diet is critical to the [s]tudent's development, a particular diet need not be prescribed by the IEP"]).

To the extent the IEP lacked annual goals specifically targeted to address the student's behaviors, the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20-*21 [S.D.N.Y. Feb. 14, 2017]). Here, the April 2019 IEP included 13 annual goals with accompanying short-term objectives that were targeted to address the student's needs in the areas of social/emotional development, attending, fine and gross motor skills, visual perceptual skills, language, communication and problem-solving, sensory processing, activities of daily living, and vocational and functional living skills, as well as her ability to follow directions and use her voice output device (Dist. Ex. 1 at pp. 6-17). While the IEP did not include an annual goal that specifically targeted the student's interfering behaviors, the IHO did not err in finding a relationship between the student's areas of deficit and her interfering behaviors and observing that the student's annual goals targeted the student's underlying areas of need (see IHO Decision at p. 12).

Overall, the evidence in the hearing record supports a finding that the IEP sufficiently addressed the student's behavioral needs, and the IHO's consideration of the degree to which certain management strategies were described in the present levels of performance and that the student's behaviors "were largely based upon the student's regulation and sensory needs," which the IEP addressed with annual goals, along with addressing her communication needs (IHO Decision at pp. 11-12) were not error, and in any event, are not determinative of the issue.

2. Paraprofessional Support

Next, the parents allege that the April 2019 CSE incorporated goals and objectives developed by Imagine Academy into the student's IEP but changed references to "trained professionals" to "paraprofessionals," which the parents argue resulted in a placement recommendation that was not specifically designed to benefit the student. The parents made no allegation relating to the CSE's recommendation that the student receive support from a 1:1 paraprofessional in their due process complaint notice (see Parent Ex. A), and the IHO made no specific finding relating thereto (see IHO Decision). On appeal, the parents seem to argue that, because the CSE considered information provided by the student's then current private school, Imagine Academy, the district was also obligated to adopt the private school's phrasing of the 1:1 support included in the review document relied on by the CSE. Even if properly raised, for the reasons discussed below, the parents' arguments on appeal are without merit.

The parents correctly note that the April 2019 Imagine Academy annual review document included the language that their goals had been developed for implementation in a 1:1 setting with a "trained professional" (Parent Ex. H at p. 2). The April 2019 IEP did not include this language (Dist. Ex. 1 at pp. 6-16);[6] however, as noted earlier, the April 2019 CSE recommended a 1:1 paraprofessional to help the student to regulate her behavior and for learning support (Dist. Exs. 1 at p. 3; 3 at p. 2). On cross examination regarding the Imagine Academy annual review document's language, which included "a 1:1 setting with a trained professional," the special education teacher stated that the 1:1 paraprofessional could have given support to the student (Tr. p. 80).

The parents now take issue with the CSE's recommendation for a paraprofessional apparently because there was no indication in the IEP that the paraprofessional would be "trained." I note that the term "paraprofessional" is an older term that was replaced in State regulation with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). Teaching assistants must meet certain licensure and certification requirements (8 NYCRR 80-5.6[c][2]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]).

[6] To the extent the parents' argument could be read to allege that the annual goals should have stated which teacher or provider would be responsible for implementing each goal, State guidance regarding IEP development indicates that "[g]oals are developed for the student, not the services provider," and that, if there is a question as to which teacher or provider is responsible for implementing a student's goal, such inquiry can be brought to the committee chairperson ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at pp. 22-23, Office of Special Ed. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

Generally, there is no basis for an assumption that a paraprofessional assigned to work with the student would not have training in his or her duties, and it is unnecessary for an IEP to state this explicitly. Any allegation to the contrary is speculative similar to those claims discussed below with respect to the assigned public school site. Moreover, in addition to the recommendation for a 1:1 paraprofessional, the IEP also recommended that the student attend a special class, which would be staffed with a certified special education teacher, and receive related services, which the district would be required to deliver via staff with appropriate certifications and licensures (Dist. Ex. 1 at pp. 17-18; see Tr. pp. 99-100). The assistant principal from the assigned school site testified that the teachers in the 6:1+1 special classes were certified in special education, that their related services providers were certified/licensed in their discipline, and that all of their paraprofessionals and teachers completed therapeutic crisis intervention training which involved de-escalating a situation before it became a crisis (Tr. pp. 131, 133, 138).

Overall, the parents claim that the April 2019 IEP was inappropriate because it did not state that the paraprofessional would be trained is wholly without merit. This is particularly so absent a challenge on appeal to the adequacy of the level of support recommended on the IEP. That is, the parent has not appealed the IHO's determination that the CSE's recommendation for a 6:1+1 special class, along with 1:1 paraprofessional support and related services was specially designed to meet the student's needs. Thus, even if there was some evidence that supported a finding that the CSE should have adopted the parents' preferred phrasing, the lack of such notation on the IEP would not rise to the level of a denial of a FAPE.

D. Assigned Public School Site

Turning to the parents' challenges to the assigned public school site, the parents allege that the IHO erred in finding that the school could implement the April 2019 IEP as the assistant principal from the assigned public site who testified at the impartial hearing had not reviewed the student's IEP and did not offer testimony regarding whether the assigned public school could provide the student with a weighted vest, sensory diet, goals, or a trained professional.

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., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). 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. Dec. 30, 2015]). Such 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 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., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. 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]).

Here, within the due process complaint notice, the parents alleged generally that the student's IEP could not be "appropriately implemented" at the assigned public school site (Parent Ex. A at p. 4). The student's mother testified that she was "very familiar" with the assigned school because she had lived in the area "for many years," had "gone to the school on many occasions," and "had family members that [had] attended" the school (Tr. p. 206). She testified she did not feel the assigned school was appropriate for the student because the special education program offered at the school was "a general program" that was "not really tailored specifically to [the student's] needs" (Tr. p. 206). During cross-examination, the student's mother clarified that the CSE's recommendation that the student attend a "District 75 program" was inappropriate because it was "not specific enough for [the student's] growth and development" and because "they" did not know the student and would not "cater[] their teaching methodology to" the student (Tr. pp. 211-12).

To the extent the school would be tasked with implementing the student's IEP, it is the IEP that must be tailored to the student, and the parents' testimony during the impartial hearing about the school location amounted to an impermissible "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O., 793 F.3d at 245).

Further, given the parents' broad allegation in the due process complaint notice, the testimony of the assistant principal sufficiently established that the assigned school was capable of fulfilling the CSE's proposed programming outlined in the student's IEP. The assistant principal stated that the assigned school had a number of special education classes (including 6:1+1 classes), provided related services of OT, PT, speech-language therapy, and counseling with duly certified providers (Tr. pp. 131, 133). In addition, the assistant principal stated that the assigned school site would have been able to provide the student with a paraprofessional for behavioral support and

assistive technology in the form of a dynamic display speech generating device, as well as providing the parents with parent counseling and training (Tr. pp. 133-35). While the parents argue on appeal that the assistant principal of the assigned public school site did not review the student's IEP or offer any testimony regarding use of a weighted vest, sensory diet, or related goals, or the provision of a "trained professional," the parents made no allegations in their due process complaint notice that the school was factually incapable of implementing these supports, and, therefore, the district was not required to offer evidence of the same.

Thus, there is no basis to modify the IHO's determination that the assigned public school site had the capacity to implement the CSE's proposed IEP for the 2019-20 school year (IHO Decision at p. 12).

VII. Conclusion

Based on the foregoing, there is no reason to disturb the IHO's determination that the district offered the student a FAPE for the 2019-20 school year.

Dated: **Albany, New York**
January 26, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER